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THE
ENCYCLOPÆDIA
OF
PLEADING AND PRACTICE

UNDER THE CODES AND PRACTICE ACTS,
AT COMMON LAW, IN EQUITY
AND IN CRIMINAL CASES.

COMPILED UNDER THE EDITORIAL SUPERVISION OF
WILLIAM M. MCKINNEY.

VOL. XII.

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THE ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

JUDICIAL NOTICE.

As to Pleading Matters of Which the Court Takes Judicial Notice. — Matters of which, from their nature, the court will take judicial notice should not be stated in pleading. This is the rule both at common law¹ and under the code.² In equity, also, it is not proper for the plaintiff to state such matters in the bill.³ Should there be an averment in the bill in opposition to facts which the court is bound to notice judicially, it will, upon demurrer, be treated as a nullity.⁴

As to What Matters Will Be Judicially Noticed by the court, see the American and English Encyclopædia of Law, title *Judicial Notice*.

1. *Fitch v. Rawling*, 2 H. Bl. 398; *Deybel's Case*, 4 B. & Ald. 243, 6 E. C. L. 468; *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159; *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401; *Ferguson v. State*, 4 Greene (Iowa) 302; 1 Chitty Pl. 236.

2. See *Goelet v. Cowdrey*, 1 Duer (N. Y.) 132.

By Statute, in some states, the pleading of such matters is expressly made unnecessary and improper. *Sand. & H. Dig. Ark. Stat.* (1894), § 5751; *Horner's Anno. Ind. Stat.* (1896), § 374; *Iowa Code* (1897), § 3632; *Bullitt's Ky. Code* (1895), § 119; *Gen. Stat. Kan.* (1897), c. 95, § 130; *Comp. Stat. Neb.* (1897), § 5727; *Rev. Stat. Mo.* (1889), § 207; *Bates's Anno. Ohio Stat.* (1897), § 5083.

Reference to Statutes Redundant. — In *Goelet v. Cowdrey*, 1 Duer (N. Y.) 139, it was stated in the opinion of the court that "in pleadings under the code, in which facts alone, as distinguished from conclusions of law, are proper to be stated, it may be doubted whether an express reference to a statute of which the court is bound to take notice might not be struck out as redundant." See also article STATUTES.

3. *Secrist v. Petty*, 109 Ill. 188. See article BILLS IN EQUITY, vol. 3, p. 356.

Proof Is Never Required of a fact of which the court is bound to take judicial notice. *Secrist v. Petty*, 109 Ill. 188.

4. 1 Daniell Ch. Pr. (1st Am. ed.) 23.

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BY CARL E. HERRING, LL.M.

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Sales on Foreclosure, see article *FORECLOSURE OF MORTGAGES*, vol. 9, p. 84.

Sales of Infants' Property, see article *INFANTS*, vol. 10, p. 581.

Sales of Property of Insane Persons, see article *INSANE PERSONS*, vol. 10, p. 1169.

Sales by Executors and Administrators, see article *PROBATE AND ADMINISTRATION*.

I. DEFINITION.—A judicial sale is a sale¹ made as a result of a judicial proceeding,² by a person legally appointed by a court³ of competent jurisdiction,⁴ and which becomes absolute only upon confirmation by the court.⁵

II. NATURE.—A judicial sale is therefore a sale made *pendente lite*,⁶ wherein the court is the vendor⁷ and the person appointed

1. *Williamson v. Berry*, 8 How. (U. S.) 495; *Lawson v. DeBolt*, 78 Ind. 563.

2. *Lawson v. DeBolt*, 78 Ind. 563; *Forman v. Hunt*, 3 Dana (Ky.) 614; *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *Chew v. Hyman*, 7 Fed. Rep. 7.

3. *Williamson v. Berry*, 8 How. (U. S.) 495; *Blossom v. Milwaukee, etc.*, R. Co., 3 Wall. (U. S.) 196; *Lawson v. DeBolt*, 78 Ind. 563; *Forman v. Hunt*, 3 Dana (Ky.) 614; *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *Mason v. Osgood*, 64 N. Car. 467.

4. *Indiana*.—*Lawson v. DeBolt*, 78 Ind. 563.

Maryland.—*Bolgiano v. Cooke*, 19 Md. 375.

North Carolina.—*Thompson v. Cox*, 8 Jones L. (N. Car.) 311.

United States.—*Williamson v. Berry*, 8 How. (U. S.) 495.

5. *California*.—*Halleck v. Guy*, 9 Cal. 182.

Illinois.—*Southern Bank v. Humphreys*, 47 Ill. 227; *Bozza v. Rowe*, 30 Ill. 198; *Ayers v. Baumgarten*, 15 Ill. 444; *Rawlings v. Bailey*, 15 Ill. 178; *Young v. Keogh*, 11 Ill. 642.

Indiana.—*Lawson v. DeBolt*, 78 Ind. 563.

Kentucky.—*Forman v. Hunt*, 3 Dana (Ky.) 614; *Watson v. Violett*, 2 Duv. (Ky.) 332.

Maryland.—*Andrews v. Scotton*, 2 Bland (Md.) 629; *Schindel v. Keedy*, 43 Md. 413; *Harrison v. Harrison*, 1 Md. Ch. 331; *Bolgiano v. Cooke*, 19 Md. 375; *Wagner v. Cohen*, 6 Gill (Md.) 97.

Missouri.—*Noland v. Barrett*, 122 Mo. 181.

North Carolina.—*McKee v. Lineberger*, 69 N. Car. 217; *Ashbee v. Cowell*, Busb. Eq. (N. Car.) 158.

Tennessee.—*Lasell v. Powell*, 7 Coldw. (Tenn.) 277.

Texas.—*Yerby v. Hill*, 16 Tex. 377.

United States.—*Williamson v. Berry*, 8 How. (U. S.) 495; *Blossom v. Milwaukee, etc.*, R. Co., 3 Wall. (U. S.) 196.

England.—*Atty.-Gen. v. Day*, 1 Ves. 218; *Ex p. Minor*, 11 Ves. Jr. 559.

6. *Medhurst v. Waite*, 3 Burr. 1260.

7. *Maryland*.—*Schindel v. Keedy*, 43 Md. 413; *Harrison v. Harrison*, 1 Md. Ch. 331; *Hurt v. Stull*, 4 Md. Ch. 391; *Andrews v. Scotton*, 2 Bland

to conduct the sale is a mere agent of the court.¹ It thus follows that a court may ratify a sale although the instructions in the decree may not have been strictly followed,² but it would seem that a confirmation does not validate an issue not presented to the court.³

III. WHAT ARE JUDICIAL SALES—Under Decree of Foreclosure.—A sale made under a decree of foreclosure of a mortgage, or a vendor's lien,⁴ or an order of sale based upon such decree, is a judicial sale.⁵

By Executors or Administrators.—Sales made by executors or administrators, requiring confirmation by the court, are held to be judicial sales.⁶

(Md.) 629; *Wagner v. Cohen*, 6 Gill (Md.) 97.

North Carolina.—*McKee v. Lineberger*, 69 N. Car. 217; *Williams v. Council*, 8 Jones L. (N. Car.) 229.

Wisconsin.—*Hill v. Hoover*, 5 Wis. 354.

1. *Illinois.*—*Bozza v. Rowe*, 30 Ill. 198.

Kentucky.—*Forman v. Hunt*, 3 Dana (Ky.) 614.

Maryland.—*Bolgiano v. Cooke*, 19 Md. 375; *Schindel v. Keedy*, 43 Md. 413; *Harrison v. Harrison*, 1 Md. Ch. 331; *Hurt v. Stull*, 4 Md. Ch. 391.

Missouri.—*Noland v. Barrett*, 122 Mo. 181.

United States.—*Williamson v. Berry*, 8 How. (U. S.) 495.

2. *Harrison v. Harrison*, 1 Md. Ch. 331; *Thorn v. Ingram*, 25 Ark. 52; *Brown v. Christie*, 27 Tex. 73.

3. *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609, where the court said: "It is too clear for argument that a sale by the marshal unauthorized by the decree is without any validity. Does the order of the court confirming the sale make it valid? Upon principle, the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nullity, and we doubt if a court can make it valid by a mere general order of confirmation. If, however, an issue had been made by exceptions or other proper pleading as to the question whether any particular piece of property had been included in the decree or order of sale, and the court had decided that it was so included, it might be an adjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. There is every reason, on the contrary, to believe that the court had

no suspicion that the marshal had sold more than the decree authorized."

4. *Hurt v. Stull*, 4 Md. Ch. 391; *Sewall v. Costigan*, 1 Md. Ch. 208; *Iglehart v. Armiger*, 1 Bland (Md.) 519.

5. See article FORECLOSURE OF MORTGAGES, vol. 9, p. 501.

6. *Arkansas.*—*Thorn v. Ingram*, 25 Ark. 52.

California.—*Horton v. Jack*, 115 Cal. 29; *Halleck v. Guy*, 9 Cal. 182; Cal. Code Civ. Pro., § 1517.

Florida.—*Myers v. Nourse*, 5 Fla. 516.

Illinois.—*Bozza v. Rowe*, 30 Ill. 198.

Michigan.—*Averill v. Jackson City Bank*, (Mich. 1897) 72 N. W. Rep. 15.

Minnesota.—*Culver v. Hardenbergh*, 37 Minn. 225.

Missouri.—*Noland v. Barrett*, 122 Mo. 181. But see *Agan v. Shannon*, 103 Mo. 661, wherein it is held that a formal order of approval is not necessary.

Nebraska.—*Maul v. Hellman*, 39 Neb. 322; *Motley v. Motley*, (Neb. 1898) 73 N. W. Rep. 738.

North Carolina.—*Mason v. Osgood*, 64 N. Car. 467; *Thompson v. Cox*, 8 Jones L. (N. Car.) 311.

Pennsylvania.—*Armstrong's Appeal*, 68 Pa. St. 409.

Texas.—*Dowling v. Duke*, 20 Tex. 181; *Wells v. Mills*, 22 Tex. 302; *Yerby v. Hill*, 16 Tex. 377; *Williams v. McDonald*, 13 Tex. 322; *Poor v. Boyce*, 12 Tex. 440; *Lynch v. Baxter*, 4 Tex. 432; *Pace v. Fishback*, 10 Tex. Civ. App. 450.

Utah.—*Matter of Walker*, 6 Utah 369.

United States.—*Chew v. Hyman*, 7 Fed. Rep. 7; *Grignon v. Astor*, 2 How. (U. S.) 319; *May v. Logan County*, 30 Fed. Rep. 250. See generally article PROBATE AND ADMINISTRATION.

What Are Judicial Sales. *JUDICIAL SALES.* What Are Judicial Sales.

Orphans' Court and Probate Sales. — Where commissioners or other persons are authorized by an Orphans' Court to sell land, a sale made in pursuance thereof is a judicial sale;¹ and likewise a sale under order of a Probate Court.²

By Guardians. — A guardian's sale under order of court is held to be a judicial sale, and therefore subject to all the incidents of such sale.³

In Attachment Proceedings. — A sale in attachment proceedings is subject to all the rules and limitations of a judicial sale.⁴ So, too, a sale under a creditor's bill.⁵

In Partition. — A sale in partition proceedings is also a judicial sale.⁶

In Admiralty. — A sale in admiralty proceedings is a judicial sale.⁷

By Receivers. — And likewise a sale by a receiver.⁸

Assignee. — In *Indiana* a conveyance by a register in bankruptcy, of the real estate of an adjudged bankrupt, to his assignee, is held

1. *Worthington v. McRoberts*, 9 Ala. 297; *Van Dyke v. Johns*, 1 Del. Ch. 93; *Sackett v. Twining*, 18 Pa. St. 199; *Greenough v. Small*, 137 Pa. St. 132; *Vandever v. Baker*, 13 Pa. St. 121; *Moore v. Shultz*, 13 Pa. St. 99.

2. *Lumpkins v. Johnson*, 61 Ark. 80; *Apel v. Kelsey*, 47 Ark. 413; *Sturdy v. Jacoway*, 19 Ark. 499; *Smith v. Denson*, 2 Smed. & M. (Miss.) 326; *Castleman v. Relfe*, 50 Mo. 583; *Swenson v. Seale*, (Tex. Civ. App. 1894) 28 S. W. Rep. 143; *Yerby v. Hill*, 16 Tex. 377.

3. See article INFANTS, vol. 10, p. 812. *California*. — *Halleck v. Guy*, 9 Cal. 182.

Florida. — *Leuders v. Thomas*, 35 Fla. 521, where the court said: "The general rule is that statutory proceedings to divest a minor of his real estate should be strictly pursued. They cannot be deprived of their property except by 'due process of law.' In this case there does not appear to have been any report to the court, or any confirmation of the sale, from which a ratification by the court might be inferred. Parties who purchase from a guardian the real estate of his ward should ascertain whether he has full legal authority to make a valid title before they deal with him. In such a case the doctrine of *caveat emptor* has peculiar application, and the purchaser at such sale buys at his peril. *Guynn v. McCauley*, 32 Ark. 112; *Black v. Walton*, 32 Ark. 324, and authorities cited."

Illinois. — *Penn v. Helsey*, 19 Ill. 295; *Young v. Keogh*, 11 Ill. 642; *Ayers*

v. Baumgarten, 15 Ill. 444; *Rawlings v. Bailey*, 15 Ill. 178.

Michigan. — *People v. Circuit Judge*, 19 Mich. 296.

Mississippi. — *Hoel v. Coursery*, 26 Miss. 511.

Missouri. — *McVey v. McVey*, 51 Mo. 406.

Nebraska. — *Myers v. McGavock*, 39 Neb. 843.

Texas. — *Berry v. Young*, 15 Tex. 369; *Poor v. Boyce*, 12 Tex. 440; *Brown v. Christie*, 27 Tex. 73.

4. *Graff v. Louis*, 71 Fed. Rep. 591; *Helmer v. Rehm*, 14 Neb. 219; *Hall v. Lowther*, 22 W. Va. 570; *Freeman v. Watkins*, 52 Ark. 446, *construing* section 350 Mansf. Dig.; but see *Webster v. Daniel*, 47 Ark. 131, wherein it is held that a sale of lands upon execution issued by the clerk of the Circuit Court upon a transcript from a justice of the peace in proceedings in attachment needs no confirmation by the court.

5. *Hudgin v. Hudgin*, 6 Gratt. (Va.) 320; *Utterbach v. Mehler*, 86 Va. 62.

6. *Hutton v. Williams*, 35 Ala. 503; *Sackett v. Twining*, 18 Pa. St. 199; *Girard L. Ins. Annuity, etc., Co. v. Farmers', etc., Nat. Bank*, 57 Pa. St. 388; *Cates v. Johnson*, 109 Ala. 126; *Hammond v. Cailleaud*, 111 Cal. 206; *Burden v. Taylor*, 124 Mo. 12; *Gulf Coast Canning Co. v. Foster*, (Miss. 1895) 17 So. Rep. 683.

7. *The Ruby*, 38 Fed. Rep. 622; *Griffith v. Fowler*, 18 Vt. 390.

8. *Rome, etc., R. Co. v. Sibert*, 97 Ala. 393.

to be a judicial sale.¹ In *Ohio* a sale by an assignee for the benefit of creditors under assignment laws is held to be a judicial sale.² So, too, in *Nebraska* by statute.³

By Commissioners in Insanity. — Under jurisdictions appointing commissioners in insanity for the sale of property of persons adjudged insane, sales made by such commissioners are judicial sales.⁴

Trustees' Sales. — Trustees' sales are subject to all the rules of equity regarding judicial sales.⁵

Execution or Sheriffs' Sales. — While an execution or sheriff's sale is not, strictly speaking, a judicial sale, it is subject to many of the same rules and principles, and in a number of jurisdictions the distinction is entirely abolished.⁶

IV. WHAT ARE NOT JUDICIAL SALES — Execution or Sheriffs' Sales — In General. — Strictly speaking, technical execution or sheriffs' sales are not judicial sales, as they lack the important distinguishing feature of requiring confirmation by the court in order to become absolute.⁷

Execution, etc., Distinguished from Judicial Sales. — A technical execution sale differs from a judicial sale in that an execution sale is made by a ministerial officer who derives his authority from the writ and sells in conformity with existing laws covering execution, and is not required to report his proceedings to the court for confirmation.⁸ Further, execution sales are held to be within the

1. *Ketchum v. Schicketanz*, 73 Ind. 137, and *McCracken v. Kuhn*, 73 Ind. 149, and *Roberts v. Shroyer*, 68 Ind. 64, construing the Act of March 11, 1875, Rev. Stat. 1876, p. 541.

2. *Dresbach v. Stein*, 41 Ohio St. 70.

3. Comp. Stat. Neb., § 20, c. 6, Assignments.

4. *Stone v. Cromie*, 87 Ky. 173. See also *McKenzie v. Bacon*, 40 La. Ann. 157; and article *INSANE PERSONS*, vol. 10, p. 1238.

5. *Bolgiano v. Cooke*, 19 Md. 375.

6. *Iowa*. — In *Jensen v. Woodbury*, 16 Iowa 515, it is held that the general execution laws of the state are applicable to all sales under execution, including sales under special executions in the foreclosure of mortgages.

Nebraska. — *Burkett v. Clark*, 46 Neb. 466; *Parrat v. Neligh*, 7 Neb. 456.

Ohio. — *Curtis v. Norton*, 1 Ohio 278.

Oregon. — *Leinenweber v. Brown*, 24 Oregon 548.

South Dakota. — *Baxter v. O'Leary*, (S. Dak. 1897) 72 N. W. Rep. 91.

United States. — *Griffith v. Bogert*, 18 How. (U. S.) 158; *Young v. De Putron*, 37 Fed. Rep. 46, construing the law as applicable to the state of

Nebraska; *Thompson v. Phillips*, 1 Baldw. (U. S.) 246.

7. *Hershy v. Latham*, 42 Ark. 305; *Noland v. Barrett*, 122 Mo. 181; *Bachle v. Webb*, 11 Neb. 423; *Griffith v. Fowler*, 18 Vt. 390.

8. **Sheriffs' Sales Not Judicial** — *Kentucky*. — *Dawson v. Litsey*, 10 Bush (Ky.) 408; *Forman v. Hunt*, 3 Dana (Ky.) 614.

Maryland. — *Andrews v. Scotton*, 2 Bland (Md.) 637.

Missouri. — *Noland v. Barrett*, 122 Mo. 190.

Nebraska. — In *Bachle v. Webb*, 11 Neb. 427, the court said: "It will thus be seen that while the statute provides that sheriff's sales shall pass under the scrutiny of the court, yet it falls far short of making them judicial sales in the well-understood sense of those terms. Had it been the intention of the legislature to abolish the distinction between sheriff's sales and judicial sales, I think it would have provided that the powers and duties heretofore exercised by courts of equity in confirming and setting aside sales of real estate by masters and commissioners should thereafter prevail in all cases of

provision of the statute of frauds requiring a memorandum or agreement in writing, while judicial sales are held not to be within

sales by sheriffs on execution. But clearly such was not the intention of the legislature, but only to make it the duty of the court in every case to see that it appeared *prima facie* that the process of the law had not been abused by the ministerial officer charged with its execution. It is true there are some cases and text writers which seem to hold, or at least intimate, that in those states where execution sales are required by statute to be reported to the court for confirmation, such sales thereby become judicial sales. And one eminent author, Mr. Rorer, in his work on Judicial Sales, p. 28, says that in such states 'such confirmation is a matter of discretion in the court,' etc. As applied to this state, I do not agree with the author; but, on the contrary, think that the statute making it the duty of the court to examine the report of the sheriff in cases of sales of real estate on execution or *fi. fa.* should be strictly construed. And this construction I think is necessary in order that the confidence of bidders and the public in such sales be upheld."

North Carolina. — In *McKee v. Lineberger*, 69 N. Car. 240, the court observed: "It will be seen that a bidder at a sheriff's sale occupies a relation altogether different from a bidder at a sale made by order of a court of equity, either by its clerk and master, or by a commissioner, for then the court takes the matter into its own hands and makes the sale for the parties, holding the cause for further directions, taking the bidder under its protection and control, so as to relieve him from his bid if there be ground for it, or to compel him to perform his contract specifically, and managing the whole proceeding until the sale is in all things carried into effect; whereas the sheriff makes the sale by himself, without any confirmation or other act of the court, and acts by force of a statutory power to sell, receive the price, and make title, so the court has no privity or control over the bidder, and the sheriff is left to his action."

South Carolina. — In *Bailey v. Bailey*, 9 Rich. Eq. (S. Car.) 392, the court said: "In a sheriff's sale the omission to advertise in the manner and for the time prescribed by law, or even the omission to advertise at all, is an irreg-

ularity that does not vitiate the sale. The object of a sale by a sheriff by virtue of an execution and a sale under a decree in equity are for purposes widely different, and it does not follow because the want of due notice does not invalidate a sale made by a sheriff that the same rule must prevail in sales made by a commissioner or master under a decree in equity. As to sales under the order of this court, the law does not prescribe the length of time notice shall be given. It ought to be a reasonable time, and what would be a reasonable time in one case might not be so in another. It is left to the discretion of the court. As a general rule, the court has adopted the rule as to notice prescribed by the statute law in cases of sheriff's sales. The object desired and intended to be secured is notoriety and competition. And it is obvious that where these objects can be obtained by a shorter notice, the court, being tied down by no positive requirement of the law, may, with propriety and without injury to any one, dispense with the notice of twenty-one days usually required."

Tennessee. — In *Lasell v. Powell*, 7 Coldw. (Tenn.) 282, the court said: "Sales made by a clerk and master, under the direction of a court of chancery, do not stand in all respects upon the footing of sales made by a sheriff, under execution. The latter are made under the naked authority of the writ — not under the direct supervision of the court. They are not reported to the court except by the return upon the writ, nor subject to be set aside, and require no confirmation by it. Hence they must be made in all respects in accordance with the rules which the law lays down for the protection of the owner of the property; and if not so made may be held irregular and void. But sales made under the decree of a court of chancery are, to a considerable extent, under the discretionary control of that court. It will often set them aside where no error or irregularity has been committed, merely for the sake of an advance in the price; and it may, if satisfied that no injustice has been done, disregard irregularities in the conduct of the sale and confirm the action of the master."

See generally article SHERIFFS' SALES.

such provision.¹ In this article execution sales cases are cited only as they confirm general rules applicable as well to judicial sales.

V. PUBLIC AND PRIVATE. — While, by statutory enactments and orders of court, judicial sales must generally be public, by provision of statute in special cases private sales are permitted.² The order of the court must be strictly followed, and an order for a private sale will not authorize a public sale.³ Nor will a private sale be permitted under an order directing a public sale.⁴

VI. ORDER OF SALE — 1. In General. — Under a decree of foreclosure it is held that no order of sale is necessary, the decree itself being sufficient authority.⁵ Where an order of sale is required, it is doubtful if a sale made in the absence of such

1. *Statute of Frauds—California.* — Halleck v. Guy, 9 Cal. 182.

Illinois. — Patterson v. Hubbard, 30 Ill. 201.

Kentucky. — Perry v. Seitz, 2 Duv. (Ky.) 123; Watson v. Violet, 2 Duv. (Ky.) 332.

Maryland. — Warfield v. Dorsey, 39 Md. 299.

England. — Atty.-Gen. v. Day, 1 Ves. 221.

See also *infra*, X. 9. *Bidding.*

2. *Private Sales Judicial.* — In Leuders v. Thomas, 35 Fla. 520, the court observed: "The order of sale * * * concluded as follows: 'It is ordered, adjudged, and decreed that the said Frederick Leuders be and he is hereby authorized and empowered as guardian as aforesaid to sell and convey the said real estate for the use and benefit of said minor.' * * * Without determining whether a public sale for a fair price after due notice would or would not be upheld under this order, we are clearly of the opinion that a private sale under it should not be sustained. The county judge has power to prescribe the conditions of the sale. If he failed to prescribe the conditions or to direct a private sale, the sale should have been made as judicial sales generally are — *i. e.*, publicly and after due advertisement. A private sale was not authorized by the order, and was wholly illegal." See also Mallard v. Dejan, 45 La. Ann. 1270, a guardian's sale under Act No. 25 of 1878; Barcello v. Hapgood, 118 N. Car. 712, wherein it is held that a sale of a ward's land by order of the court may be either public or private in the discretion of the court.

In Dresbach v. Stein, 41 Ohio St. 77, a case of an assignee's sale, the court

said: "To determine this question we must first ascertain the character of the sale. It was conducted under section 5 of the act regulating the mode of administering assignments for the benefit of creditors (58 Ohio Laws 105). The land had been surveyed, appraised, and offered at public sale, but had not been sold for want of bidders. All these things were done under the supervision of the Probate Court and in the manner provided by the statute. Then application was made to the Probate Court for an order to sell at private sale. The court, exercising a power conferred by section 5, above referred to, and being satisfied that it would be for the advantage of the creditors of the assignors, made the order. The assignees then sold the land to Stein and Dresbach upon the terms and under the limitations authorized by the court. The sale was reported to the court, confirmed by the court, deeds ordered by the court, and made and delivered to the purchasers in pursuance of such order. In short, the assignees acted as the agents of the court in selling the land, and simply obeyed its orders, made in accordance with powers conferred by the statute regulating assignments for the benefit of creditors. This was a judicial sale — a distinguishing feature of which is that it must be confirmed by the court before it will be complete."

3. Mallard v. Dejan, 45 La. Ann. 1270.

4. Schlicker v. Hemenway, 110 Cal. 579; Hutson v. Sadler, 31 W. Va. 358.

5. *Necessity of Order of Sale.* — Johnston v. Colby, (Neb. 1897) 72 N. W. Rep. 313; McKinley-Lanning L. & T. Co. v. Hamer, (Neb. 1897) 72 N. W. Rep. 1042, holding that errors in the

order can be sustained,¹ but in the absence of any showing to the contrary it will be presumed that such order was given.²

2. Jurisdiction. — A sale made under an order of court without jurisdiction is a nullity.³

3. Contents. — The statutes of the various states prescribing what shall be contained in an order of sale are generally regarded as directory and vesting a large discretion in the court,⁴ although the contrary has been held,⁵ but the directions given in the order of sale must be strictly followed.⁶

VII. LEVY. — In proceedings under a strict judicial sale no formal levy is necessary.⁷

VIII. APPRAISEMENT — **1. Presumptions.** — In considering questions under the appraisement laws the presumption is that an officer charged with the performance of a duty has performed it.⁸ Thus, in the absence of evidence to the contrary, it will be presumed that an appraisement has been made when such is required, and the burden of proof is on the party attacking the sale because of no appraisement.⁹

2. Necessity of Appraisement — **a. IN GENERAL.** — The necessity of an appraisement, under whatever kind of a judicial sale, rests solely upon statutory enactment. Such statutes have uniformly

order of sale will not affect the validity of the sale as the decree governs.

1. *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609.

2. *Clossen v. Whitney*, 39 Minn. 50.

3. Jurisdiction to Render Order. — *Williamson v. Berry*, 8 How. (U. S.) 495; *Shriver v. Lynn*, 2 How. (U. S.) 43; *Mulvey v. Carpenter*, 78 Ill. 580; *Morris v. Hogle*, 37 Ill. 150.

In *Bethel v. Bethel*, 6 Bush (Ky.) 65, two final judgments and orders of sale were rendered, and the sale complied in part with each judgment. The second judgment was held void. It was held that a sale of land can only be valid when made in pursuance of the judgment, and that no invalid sale can be validated by a mere confirmation of the commissioner's report.

In *Farmers', etc., Bank v. Luther*, 14 Wis. 96, a sale made before the order was certified to and filed and entered by the clerk of the court in which the action was pending was held irregular and liable to be set aside at the instance of any party interested.

4. Discretionary Direction. — In *Oppenheimer v. Reed*, 11 Tex. Civ. App. 367, it is held that the statute relating to sales of mortgage foreclosure, requiring lands in towns and cities to be sold by lots, is directory, and will not prevent the court from ordering a sale

in bulk if it appears to be for the best interest of the parties.

In *Gould v. Garrison*, 48 Ill. 258, it is held that the statutes in relation to the publishing of newspaper notices of sale on execution have no application to sales under a decree in chancery, and that the time and mode of advertising and making sales under decrees are discretionary with the court.

5. In *Bozeman v. Bozeman*, 82 Ala. 389, it is held that the place of sale must be specified in the order granting the petition of an administrator for a sale of lands for distribution (Code of Ala., § 2462), and the failure to do so is reversible error.

6. *Wheatley v. Tutt*, 4 Kan. 195; *Gould v. Garrison*, 48 Ill. 258; *Reynolds v. Wilson*, 15 Ill. 395.

7. *Ewing v. Hatfield*, 17 Ind. 513; *Burkett v. Clark*, 46 Neb. 466. See article EXECUTIONS, vol. 8, p. 486.

8. *Lytton v. Baird*, 141 Ind. 446; *Davis v. Hoover*, 112 Ind. 423; *Coan v. Elliott*, 101 Ind. 275; *Hale v. Talbott*, 86 Ind. 447; *Talbott v. Hale*, 72 Ind. 1; *Evans v. Ashby*, 22 Ind. 15; *Mercer v. Doe*, 6 Ind. 80; *Carpenter v. Doe*, 2 Ind. 465.

9. *Coan v. Elliott*, 101 Ind. 275; *Hale v. Talbott*, 86 Ind. 447; *Talbott v. Hale*, 72 Ind. 1; *Davis v. Hoover*, 112 Ind. 423.

been held constitutional, as not impairing the obligations of the contract,¹ and their requirements are imperative.² In *Indiana* it is held that no appraisement is necessary in a sale of property under a decree of foreclosure of a tax lien,³ nor, by statute, where property has been conveyed by a debtor with intent to hinder, delay, or defraud creditors.⁴ Where two or more executions are placed in the hands of the sheriff at the same time, some subject to appraisement and some not, a valid sale may be made without appraisement.⁵

An appraisement is not necessary if at the date of the contract upon which the judgment is founded there was no law requiring an appraisement, although such law may have been subsequently enacted.⁶ All judgments entered after an appraisement law has

1. *Bronson v. Kinzie*, 1 How. (U. S.) 311; *U. S. v. Conway*, Hempst. (U. S.) 313; *Jones v. Davis*, 6 Neb. 33; *Catlin v. Munger*, 1 Tex. 598.

2. *Arkansas*. — *Crow v. State*, 23 Ark. 684.

Indiana. — *Cox v. Bird*, 88 Ind. 142; *Davis v. Campbell*, 12 Ind. 192; *Babcock v. Doe*, 8 Ind. 111; *Mercer v. Doe*, 6 Ind. 80.

Kentucky. — *Brandenburgh v. Beach*, 17 Ky. L. Rep. 560, (Ky. 1895) 32 S. W. Rep. 168; *Meddis v. Fenley*, 98 Ky. 432; *Graves v. Long*, 87 Ky. 441.

Louisiana. — *Force v. McIntyre*, 14 La. Ann. 153; *Hiligsberg's Succession*, 1 La. Ann. 340.

Nebraska. — *Kearney Land, etc., Co. v. Aspinwall*, 45 Neb. 601.

Ohio. — *Stall v. Macalester*, 9 Ohio 19; *Wiles v. Baylor*, 1 Ohio 509.

United States. — *Collier v. Stanbrough*, 6 How. (U. S.) 15. This was a case, however, which discussed the appraisement law in so far only as it related to the law of the state of *Louisiana*.

In *Crow v. State*, 23 Ark. 684, it was held that the appraisement law applied generally to executions issued upon judgments *in personam* and *in rem*.

In *Cox v. Bird*, 88 Ind. 142, a sale of property upon a judgment for the enforcement of a ditch assessment was held to come under the provisions of the statute requiring appraisement.

In *Davis v. Campbell*, 12 Ind. 192, it was held that not only could the property not be sold without appraisement, but no valid offer of sale could be made.

In *Graves v. Long*, 87 Ky. 441, the court said: "Evidence that it in fact sold for a fair value, or more than the

two-thirds of any appraised value which could fairly have been placed upon it, cannot avail. If so, it could equally be urged that a judicial sale made without advertisement, or otherwise in violation of law, should be upheld because the property in fact brought a fair price. The law is imperative that the valuation shall be made before the sale. It is not merely directory. It goes to the right of the debtor and reaches to the interest of the creditors. It is the statutory test of the right of the one to redeem and of the other to still look to the property for the payment of their debts. No coercive sale for debt can be lawfully made in the absence of this valuation. The statute forbids it; and it was not intended that its place should be supplied by testimony given after the sale and heard upon the question of its confirmation."

3. *Hall v. Craig*, 125 Ind. 523, *construing* Act of March 5, 1883, *Elliott's Supp.*, § 2143.

4. Rev. Stat. 1881, § 743, cl. 2; *Mugge v. Helgemeier*, 81 Ind. 120. But to come within the provision of such statute the transfer must have been decreed fraudulent and an order of sale issued providing for a sale without appraisement. *Milburn v. Phillips*, 136 Ind. 680, *rehearing denied* in 36 N. E. Rep. 360; *Shirk v. Wilson*, 13 Ind. 129.

5. *Mugge v. Helgemeier*, 81 Ind. 120; *Robinson v. Bush*, 17 Ind. 517; *Shirk v. Wilson*, 13 Ind. 129; *Clark v. Watson*, 2 Ind. 400.

6. *Gantly v. Ewing*, 3 How. (U. S.) 707; *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Rawley v. Hooker*, 21 Ind. 144; *Law v. Smith*, 4 Ind. 56; *Tevis v. Doe*, 3 Ind. 129; *Rosier v. Hale*, 10 Iowa

taken effect will be presumed to be subject to such law,¹ but where the record is silent as to the date of the contract a decision of a lower court affirming a sale without appraisement will be sustained;² such provision, however, does not apply to contracts executed and to be performed outside of the state.³ An appraisement is necessary where the judgment is founded upon several counts, some of which relate to contracts entered into after the appraisement law was in force.⁴ No appraisement is necessary where lands are sold at a judicial sale for the purpose of division at the instance of the owners.⁵

b. WAIVER. — The appraisement may be waived by a stipulation to that effect in the contract upon which the judgment is founded,⁶ or by consent of the debtor,⁷ or by failing to make objection at the proper time.⁸ But it has been held that a debtor in failing circumstances has no right to waive the appraisement laws,⁹ and in *Minnesota* it is held that in the sale of personal property upon execution the appraisement cannot be waived.¹⁰

470; *Sprott v. Reid*, 3 *Greene* (Iowa) 489; *Allen v. Parish*, 3 *Ohio* 187; *Robinson v. Perry*, 4 *Tex.* 273; *Blakeney v. McCraw*, 8 *Ark.* 200, holding the converse to be equally true, viz., that the repeal of an appraisement law does not affect contracts then in force.

1. *Robinson v. Perry*, 4 *Tex.* 273.

2. *Small v. Eby*, 9 *Ind.* 177.

3. *Hefferlin v. Sinsinderfer*, 2 *Kan.* 401; *Hutchins v. Barnett*, 19 *Ind.* 15, wherein the court said: "Where, however, the contract involved in the judgment was executed and was to be performed without the state, our law on the subject of appraisement could not enter into and constitute a part of such contract; and the result is, the appraisement law in force at the date of the judgment will govern the sale on execution."

4. *Babcock v. Doe*, 8 *Ind.* 111, where a judgment was rendered on several notes, some of which were executed before the appraisement law went into effect, and some after. The property was sold without appraisement, and it was held that the sheriff's deed was no evidence of title.

5. *Southwick v. Greuzenbach*, 12 *Ky. L. Rep.* 263, (Ky. 1890) 14 *S. W. Rep.* 344.

6. *Indiana*. — *Vesey v. Reynolds*, 14 *Ind.* 444; *Smith v. Doggett*, 14 *Ind.* 442; *Baker v. Roberts*, 14 *Ind.* 552; *Harris v. Makepeace*, 13 *Ind.* 560; *Deam v. Morrison*, 10 *Ind.* 368.

Louisiana. — *New Orleans Mut. Ins.*

Co. v. Bagley, 19 *La. Ann.* 89; *Broadwell v. Rodrigues*, 18 *La. Ann.* 68.

In *Vesey v. Reynolds*, 14 *Ind.* 444, the words in the note upon which the judgment was obtained, "waiving appraisement laws," were held to be a promise to pay the money "without relief from valuation laws."

7. *Indiana*. — *Stockwell v. Byrne*, 22 *Ind.* 6.

Kansas. — *De Jarnette v. Verner*, 40 *Kan.* 224.

Louisiana. — *Weber v. Gorsuch*, 24 *La. Ann.* 615; *Desplate v. St. Martin*, 17 *La. Ann.* 91.

Pennsylvania. — *Wray v. Miller*, 20 *Pa. St.* 111; *McCleary v. Faber*, 6 *Pa. St.* 476; *Overton v. Tozer*, 7 *Watts* (Pa.) 331, wherein it was held that lands may be sold upon a *feri facias* without inquisition, with the written consent of the defendant, filed either before or after sale.

8. *Allen v. Parish*, 3 *Ohio* 187; *Crowell v. Meconkey*, 5 *Pa. St.* 168; *Sydnor v. Roberts*, 13 *Tex.* 598.

In *Allen v. Parish*, 3 *Ohio* 187, it was held that where the objection of "no appraisement" was not made at the return of the execution the purchaser, if a stranger, is not affected; *distinguishing* and practically *overruling* *Patrick v. Oosterout*, 1 *Ohio* 27.

9. *Hiligsberg's Succession*, 1 *La. Ann.* 340.

10. *Minneapolis Threshing Mach. Co. v. Beck*, 95 *Iowa* 725, *construing* *Minn. Code*, § 3100.

c. EFFECT OF FAILURE TO APPRAISE. — The great weight of authority is to the effect that where the law requires an appraisement, a sale without appraisement is absolutely void.¹ There are a few cases, however, which do not go so far as this.²

3. Appraisers — *a.* IN GENERAL — **Attacking Valuation.** — Appraisers of property for sale under an execution act judicially. Hence it is held that the value fixed by appraisers on property can be assailed only for fraud, and where the only objection is that the property is appraised too low, its actual value must so greatly exceed its appraised value as to raise a presumption of fraud.³

Appointment Ministerial. — It has been held that the appointment of an appraiser is not a judicial but a ministerial act.⁴

b. QUALIFICATIONS. — The statutes prescribe the qualifications of appraisers, and such statutes are mandatory whether they require that the appraisers shall be freeholders of the town⁵ in which the property is situated, or of the county,⁶ or that they

1. *Connecticut.* — *Scripture v. Johnson*, 3 Conn. 211.

Iowa. — *Maple v. Nelson*, 31 Iowa 322.

Kentucky. — *Meddis v. Fenley*, 98 Ky. 432.

Missouri. — *Strouse v. Drennan*, 41 Mo. 289.

Pennsylvania. — *Gardner v. Sisk*, 54 Pa. St. 506; *Wolf v. Payne*, 35 Pa. St. 97; *Baird v. Lent*, 8 Watts (Pa.) 422.

United States. — *Smith v. Cockrill*, 6 Wall. (U. S.) 756; *Collier v. Stanbrough*, 6 How. (U. S.) 14, considered only with reference to *Louisiana* laws.

In *Scripture v. Johnson*, 3 Conn. 211, it was held that in order to transfer an equity or redemption by execution the execution must be levied on such equity of redemption, which must be appraised, and that a levy upon the property mortgaged, the title being in the mortgagee, was ineffectual.

2. In *Indiana* the decisions are generally to the effect that a sale without appraisement is void. *Milburn v. Phillips*, 136 Ind. 680; *Tyler v. Wilkerson*, 27 Ind. 450; *Evans v. Ashby*, 22 Ind. 15; *Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23; *Doe v. Craft*, 2 Ind. 359; *Doe v. Collins*, 1 Ind. 24, wherein the sale was held void although the purchaser had no actual notice of the irregularity. But one of the later decisions holds such a sale voidable, if not void. *Stotsenburg v. Stotsenburg*, 75 Ind. 538.

In *Louisiana* such sales were held void. *Stockton v. Stanbrough*, 3 La. Ann. 390. But it was suggested that

possibly third persons cannot object. *Chapman v. New Orleans Gas Light, etc., Co.*, 4 La. Ann. 153.

In *Nebraska* a failure of appraisement is regarded as a mere irregularity which is cured by confirmation. *Neligh v. Keene*, 16 Neb. 407.

In *Ohio* an early case holding such sales absolutely void, *Patrick v. Oosterhout*, 1 Ohio 27, was practically overruled by a later decision. *Allen v. Parish*, 3 Ohio 187.

3. *Burkett v. Clark*, 46 Neb. 466; *Ecklund v. Willis*, 44 Neb. 129; *Kearney Land, etc., Co. v. Aspinwall*, 45 Neb. 601; *Vought v. Foxworthy*, 38 Neb. 790; *Sessions v. Irwin*, 8 Neb. 5.

4. *Fox v. Hills*, 1 Conn. 295.

5. *Mather v. Chapman*, 6 Conn. 54; *Chapman v. Griffin*, 1 Root (Conn.) 196, holding that the parties cannot waive such provisions; *Richmond v. Marston*, 15 Ind. 134.

Where distinct tracts of land not adjoining were situated in adjoining towns, the appointment of appraisers partly from both towns was held proper, under a statute providing that appraisers should be so appointed in case the real estate was situated in adjoining towns, especially in view of the fact that no objection was made for two years. *Perrin v. Reed*, 35 Vt. 2.

6. *Woodman v. Smith*, 37 Me. 21; *Nickerson v. Whittier*, 20 Me. 223.

In *State Bank v. Green*, 11 Neb. 303, it was held that where land is situated in two counties the appraisers must be called from the county in which the decree was obtained.

shall be householders,¹ or residents of the neighborhood,² or that they be discreet and disinterested,³ or simply disinterested.⁴ Thus relatives of parties in interest are disqualified,⁵ and an inhabitant of the town cannot act upon an execution in favor of the town,⁶ but where an interest or relationship is so far removed as to raise no presumption of bias or prejudice, the appointment is valid.⁷

In *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281, it was held that where the only land held by one of the appraisers was originally conveyed to him as security for a debt by a deed absolute in form, and subsequently and before he acted as appraiser he paid further money to the grantor under an agreement that the deed should thenceforth be treated as absolute, he was a freeholder. *Rix v. Johnson*, 5 N. H. 520; *Simpson v. Coe*, 3 N. H. 85; *Libbey v. Copp*, 3 N. H. 45.

1. *McNamara v. Ellis*, 14 Ind. 516; *Gapen v. Stephenson*, 17 Kan. 613; *Woods v. Cochrane*, 38 Iowa 484, *distinguishing* *Hill v. Baker*, 32 Iowa 302, which held that the want of a qualification of an appraiser in that he was not a householder did not vitiate the sale; *Kutler v. Buckhout*, 4 Kan. 120, holding that under the Code a householder need not be a man of family, but that it is sufficient if he is the owner of real property, and resides in the community.

2. *Woods v. Cochrane*, 38 Iowa 484, holding that a person residing in a town thirty-five miles distant might be "of the neighborhood;" but *prima facie* he is not, and if the vicinity of the land is so sparsely settled as to extend the neighborhood to thirty-five miles these facts should be shown, and the *prima facie* condition should be thus rebutted.

3. *Glidden v. Philbrick*, 56 Me. 222; *Rollins v. Mooers*, 25 Me. 192; *Russ v. Gilman*, 16 Me. 209; *Bradley v. Bassett*, 2 Cush. (Mass.) 417; *Williams v. Amory*, 14 Mass. 20.

4. *Fitch v. Smith*, 9 Conn. 42; *Booth v. Booth*, 7 Conn. 350; *Pierce v. Strickland*, 26 Me. 277; *Day v. Roberts*, 8 Vt. 414.

5. **Relatives Disqualified.**—Where the wife of an appraiser was the mother of the wife of the creditor, it was held that such an appraiser was not an indifferent freeholder. *Johnson v. Huntington*, 13 Conn. 47.

An appraiser who is nephew by mar-

riage to one of the parties is not "indifferent" within the meaning of the statute. *Fox v. Hills*, 1 Conn. 295.

An uncle to the creditor's wife was held disqualified to act as an appraiser. *McKeen v. Gammon*, 33 Me. 187.

A tenant in common with a judgment debtor cannot act. *Cowdrey v. Sheldon*, 122 Mass. 267.

A son-in-law of a judgment creditor has been held disqualified. *Wolcott v. Ely*, 2 Allen (Mass.) 338.

A brother of an attaching creditor is not disinterested so as to qualify him to act as an appraiser. *McGough v. Wellington*, 6 Allen (Mass.) 505.

6. *Boston v. Tileston*, 11 Mass. 469.

7. **Exceptions.**—Where, under a statute, a justice of the peace appointed some of the appraisers, it was no disqualification that the same justice acted as an appraiser. *Pendleton v. Button*, 3 Conn. 406.

A deputy sheriff may properly act as an appraiser where the property is sold by the sheriff or another deputy. *Sullenger v. Buck*, 22 Kan. 28; *Grover v. Howard*, 31 Me. 546.

Where a person having, as administrator, attached real estate, was appointed by the debtor to appraise the same real estate when set off on the execution to a previously attaching creditor, it was held that neither the debtor nor subsequent attaching creditors could object that he was interested. *Cutting v. Rockwood*, 2 Pick. (Mass.) 443.

A reversioner has been held not disqualified to act as appraiser. *Chamberlain v. Doty*, 18 Pick. (Mass.) 495.

An attorney who obtained the judgment may act as an appraiser on the theory that after the judgment the connection of client and attorney is not presumed to continue. *Porter v. Bean*, 1 N. H. 362.

Unfriendly feeling toward an execution debtor on the part of those appointed to appraise does not constitute legal disqualification. *Briggs v. Green*, 33 Vt. 565.

c. NUMBER. — Statutes in each instance fix the number of appraisers, which is generally three.¹

d. APPOINTMENT — *By Debtor.* — The appointment of appraisers is determined by statute in the several states, and is ordinarily left to the officer in charge of the execution. Under some jurisdictions the debtor has the right to appoint one appraiser, in which case notice must be served upon him to make such appointment,² if the debtor's residence is such as to make service of notice possible.³ The time within which the debtor must appoint an appraiser should be stated in the notice,⁴ and it should otherwise conform to the execution.⁵ If the debtor has appointed an appraiser no notice is required.⁶ An appraiser may be appointed by an agent or attorney,⁷ or by the wife of the debtor,⁸ or by the guardian of a spendthrift,⁹ or by a married woman.¹⁰

One of Two Judgment Debtors may appoint an appraiser if the land levied upon belongs to him or to both of them,¹¹ but otherwise if the land belongs solely to the other.¹²

Where the Debtor Is Disqualified from making an appointment it is provided in some instances that a justice of the peace residing in the town in which the estate levied on lies shall make the appointment,¹³ and in others that the officer holding the writ

It is no disqualification that the appraiser is a cousin to the plaintiff's mother. *Kinsman v. Warner*, 113 Mass. 347.

The brother-in-law of an officer may act as an appraiser. *Brown v. Washington*, 110 Mass. 529.

1. *U. S. v. Slade*, 2 Mason (U. S.) 71; *Evans v. Landon*, 6 Ill. 307; *Perrin v. Reed*, 35 Vt. 2; *Baird v. Kirtland*, 8 Ohio 21.

2. *Maine.* — *Boynton v. Grant*, 52 Me. 220; *Ware v. Barker*, 49 Me. 358; *Means v. Osgood*, 7 Me. 146; *Bugnon v. Howes*, 13 Me. 154; *Howe v. Wildes*, 34 Me. 566; *Dodge v. Farnsworth*, 19 Me. 278.

Massachusetts. — *Wolcott v. Ely*, 2 Allen (Mass.) 338; *Randall v. Wyman*, 16 Gray (Mass.) 334; *Shields v. Hastings*, 10 Cush. (Mass.) 247; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Whitman v. Tyler*, 8 Mass. 284; *Eddy v. Knap*, 2 Mass. 154.

New Hampshire. — *Whittier v. Varney*, 10 N. H. 291; *Daniels v. Ellison*, 3 N. H. 279.

3. Notice Held Not Necessary when the debtor is out of the county, *Nickerson v. Whittier*, 20 Me. 223; *Dodge v. Farnsworth*, 19 Me. 278; *Howe v. Reed*, 12 Me. 515; *Buck v. Hardy*, 6

Me. 162; or in parts unknown, *Galusha v. Sinclear*, 3 Vt. 394; or out of the state and has no attorney, *Gilman v. Thompson*, 11 Vt. 643; or in the penitentiary, *Grant v. Dalliber*, 11 Conn. 234.

4. *Fitch v. Tyler*, 34 Me. 463, holding that the time must be reasonable, but that it is in the discretion of the officer.

5. *Davis v. Hubbs*, 8 Blackf. (Ind.) 184, wherein a notice of sale under execution without appraisement which stated the judgment to be two hundred and twenty-five dollars and three cents, when in fact it was two hundred and fifty-five dollars and three cents, was held invalid.

6. *Foster v. Roussel*, 3 La. Ann. 546.

7. *Dooley v. Wolcott*, 4 Allen (Mass.) 406; *Roop v. Johnson*, 23 Me. 335; *Odiorne v. Mason*, 9 N. H. 24.

8. The judgment debtor being out of the state at the time. *Russell v. Hook*, 4 Me. 372.

9. *Bond v. Bond*, 2 Pick. (Mass.) 382.

10. *Mun v. Carrington*, 2 Root (Conn.)

15.

11. *Herring v. Polley*, 8 Mass. 113.

12. *Harriman v. Cummings*, 45 Me. 351; *Herring v. Polley*, 8 Mass. 113.

13. *Pendleton v. Button*, 3 Conn. 406;

Mather v. Chapman, 6 Conn. 54.

shall appoint for the debtor,¹ or that a *curator ad hoc* be appointed to represent the defendant.²

e. OATH — Generally. — The statutes uniformly require that the appraisers shall be sworn,³ and provide before whom the oath shall be taken,⁴ and the form.⁵

By Whom Administered. — The oath should be administered in the manner which will best bind the conscience,⁶ and an affirmation is sufficient.⁷ A deputy sheriff may administer the oath,⁸ but not in his capacity as a justice of the peace.⁹ A special master commissioner who has not qualified cannot administer the oath.¹⁰ The creditor, as a justice of the peace, may swear the appraisers.¹¹

A Technical Error in administering the oath will not avoid the sale.¹²

f. DUTIES — View of Premises. — Appraisers are usually required

1. *Cooper v. Bisbee*, 4 N. H. 329; *Parish v. Harriman*, 3 N. H. 317; *Galusha v. Sinclear*, 3 Vt. 394; *Nickerson v. Whittier*, 20 Me. 223. Debtor refusing, officer may appoint, *Leonard v. Bryant* 2 Cush. (Mass.) 32; *Wadsworth v. Williams*, 100 Mass. 126; but not for a creditor, *Richardson v. Payne*, 114 Mass. 429.

2. *Farrell v. Klumpp*, 13 La. Ann. 311, holding that the plaintiff in execution has no right to procure the appointment of a *curator ad hoc* to represent the defendant in the appointment of an appraiser, the absence of the defendant or other sufficient cause not being shown.

3. *U. S. v. Slade*, 2 Mason (U. S.) 71; *Tweedy v. Pickett*, 1 Day (Conn.) 109; *Stumph v. Reger*, 92 Ind. 286; *Phelps v. Jones*, 91 Ky. 250; *Munroe v. Reding*, 15 Me. 153; *Sturdivant v. Sweetsir*, 12 Me. 520; *Phillips v. Williams*, 14 Me. 411; *Chamberlain v. Doty*, 18 Pick. (Mass.) 495; *State Bank v. Green*, 11 Neb. 303; *Cooper v. Bisbee*, 4 N. H. 329; *Patrick v. Oosterout*, 1 Ohio 27.

4. *Stumph v. Reger*, 92 Ind. 286; *Chamberlain v. Doty*, 18 Pick. (Mass.) 495; *Howard v. Turner*, 6 Me. 106.

5. Faithfully and impartially to appraise the lands of the debtor. *Porter v. Bean*, 1 N. H. 362. That the same is the fair cash value thereof at the time, exclusive of liens and incumbrances. *Stumph v. Reger*, 92 Ind. 286. Impartially to appraise the interests of defendants in said lands and tenements upon actual view thereof. *State Bank v. Green*, 11 Neb. 303.

6. *Cooper v. Bisbee*, 4 N. H. 329.

7. *Hall v. Hoxie*, 3 Met. (Mass.) 251, holding that it need not be shown that

the person thus affirming had conscientious scruples against taking an oath. See generally article AFFIRMATION, vol. 1, p. 377.

8. *Copeland v. Labatut*, 6 La. Ann. 61; *Lambert v. De Santos*, 10 La. Ann. 725, holding that where the law provides that the appraisers shall be sworn by the sheriff, and further that the deputy sheriff may represent the sheriff in all the duties confided by law to the latter, the oath may be administered by the deputy.

9. *Bamford v. Melvin*, 7 Me. 14. So held under a constitutional provision which says that "no person or persons belonging to one of those departments [legislative, executive, and judicial] shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed or permitted."

10. *Phelps v. Jones*, 91 Ky. 244, construing a special statute. But see *Northwestern Mut. L. Ins. Co. v. Mulvihill*, (Neb. 1898) 74 N. W. Rep. 78, wherein it is held that a master commissioner may qualify the appraisers without himself having taken an oath; *per Harrison, C. J.*

11. *Atherton v. Jones*, 1 N. H. 343, note, the statute not requiring him to be disinterested.

12. In *La Flume v. Jones*, 5 Neb. 236, it was held that an oath "impartially to appraise the property to be sold," instead of the "interest" of the defendants therein, as required by the laws governing appraisements in Nebraska, was not an error for which the sale should be set aside, inasmuch as there could be no interest greater than the entire value of the land.

by statute to make the appraisement upon actual view of the property.¹ This does not require that they should go upon the land,² and even a personal inspection is not necessary if they are acquainted with the property.³

Rents and Profits. — In *Indiana* the rents and profits are required to be appraised prior to the execution upon the land.⁴

Liens and Incumbrances. — The statutes of the various states differ with respect to deducting liens and incumbrances from the appraised value.⁵ The provision for deducting incumbrances being for the sole benefit of the plaintiff, the defendant cannot be heard to object that such deductions were not made.⁶ Where the law requires incumbrances to be deducted, a sale is invalid where the appraisers, after finding the value of the property, provide: "If there are any liens they are to be deducted from the above value;"⁷ or where the appraisers deduct a balance omitted from the decree,⁸ and where an adverse claim of title is considered and deducted.⁹

Joint Debtors. — Where an execution is levied upon lands owned

1. *Pendleton v. Button*, 3 Conn. 406; *Johnson v. Carson*, 3 Greene (Iowa) 499; *Hanly v. Sidelinger*, 52 Me. 138; *Hammatt v. Bassett*, 2 Pick. (Mass.) 564; *Bond v. Bond*, 2 Pick. (Mass.) 382.

In *Johnson v. Carson*, 3 Greene (Iowa) 499, the court said: "The valuation law directs the appraisement 'upon actual view of the premises forthwith after such view.' Rev. Stat. 630, § 3. It is claimed that this 'actual view' was essential to the validity of the sale. This would be true if such actual view could be considered an element of power, or one of those essential objects to which the law directs the execution purchaser, as authority upon which he might rest his title. The purchaser is only required to look at the judgment, the execution, and the levy for evidence of the sheriff's power to sell. If these are in conformity to law *prima facie* he is justified in paying the price required by law for the property, and should be protected in his title."

2. *Bond v. Bond*, 2 Pick. (Mass.) 382.

3. *Fourcher v. Day*, 6 La. Ann. 60.

4. *Lytton v. Baird*, 141 Ind. 446; *Ragsdale v. Mathes*, 52 Ind. 495.

5. In *Indiana* it is provided that either party may furnish the sheriff with a list of the incumbrances. *Stumph v. Reger*, 92 Ind. 286.

In *Iowa* the law provides for deducting the incumbrances, but the decisions are conflicting as to whose duty it is to

make such deduction. *Barber v. Tryon*, 41 Iowa 349; *Brown v. Butters*, 40 Iowa 544; *Sargent v. Pittman*, 16 Iowa 469.

In *Mississippi* it has been held to be the duty of the appraisers to ascertain and deduct the amount of prior incumbrances. *Doe v. Natchez Ins. Co.*, 8 Smed. & M. (Miss.) 197.

In *Nebraska* the appraisers ascertain the amount of prior incumbrances, which are deducted by the sheriff from the real value of the property as found by the appraisement. *American Invest. Co. v. McGregor*, 48 Neb. 779; *Smith v. Foxworthy*, 39 Neb. 214; *Rosenfield v. Chada*, 10 Neb. 421; *Sessions v. Irwin*, 8 Neb. 5. And it is the duty of the appraisers to ascertain the actual amount due upon liens and incumbrances, and specially to enumerate the same. *Rosenfield v. Chada*, 10 Neb. 421; *Sessions v. Irwin*, 8 Neb. 5.

In *Kansas* and *Ohio* it has been held that the appraisers must value the property without reference to any liens or incumbrances. *DeJarnette v. Verner*, 40 Kan. 224; *Baird v. Kirtland*, 8 Ohio 21.

6. *American Invest. Co. v. McGregor*, 48 Neb. 779; *Smith v. Foxworthy*, 39 Neb. 214; *Craig v. Stevenson*, 15 Neb. 363.

7. *Stumph v. Reger*, 92 Ind. 286.

8. *Schultz v. Loomis*, 40 Neb. 152.

9. *McKeighan v. Hopkins*, 19 Neb. 33.

by joint debtors, it is not necessary to appraise each one's share separately.¹

A Railroad must be appraised as an entirety.²

Different Items. — Appraisers will be presumed to take into consideration every thing which passes by the levy, and it is not necessary to estimate in detail the value of the different items that go to make up the aggregate value.³

On Day of Sale. — Where the law requires that the appraisement shall be made on the day of sale it is not optional with the officers to disregard it.⁴

Second Appraisement. — In *Nebraska* a second appraisement cannot be made until the property has been twice advertised and twice offered for sale,⁵ unless the first appraisement is vacated by order of the court.⁶

g. NECESSITY OF CONCURRENCE. — It has been held that all of the appraisers must agree, to constitute a valid appraisement,⁷ but it has been suggested that where the required number had been appointed and all had acted, an appraisement by the majority might be sufficient;⁸ and in extending executions it is uniformly held that a majority appraisement is valid, provided all of the appraisers were present and acted.⁹

4. Return — a. CONTENTS. — Where a return upon appraisement shows a substantial compliance with the spirit of the law, it

1. *Dwinel v. Soper*, 32 Me. 119.

2. *Ludlow v. Clinton Line R. Co.*, 1 Flipp. (U. S.) 25, where the court said: "It is against the declared policy of the state to disintegrate a line of railroad by a sale of a portion of the land over which it runs. The whole road and the land necessary for its operation, together with the franchises of the corporation to maintain the railroad and demand compensation for the transportation of passengers and property, must be sold, and for the purposes of the sale, such property is to be considered as one tract of land, lying in different counties, and subject to appraisal and the forms of law usual in other cases of a judicial sale of lands."

3. *Payne v. Farmers', etc., Bank*, 29 Conn. 415.

4. *Ayres v. Duprey*, 27 Tex. 593.

5. *Burkett v. Clark*, 46 Neb. 466; *Hubbard v. Draper*, 14 Neb. 500.

6. *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *Hubbard v. Draper*, 14 Neb. 500.

7. *U. S. v. Slade*, 2 Mason (U. S.) 71, where the court said: "The act requires the appraisement to be made by

all the appraisers; and I am not aware that it has ever been held that an appraisement by two only is under any circumstances valid. If the appraisement be made by all, though the certificate thereof be signed only by two, it may be good if a good reason be stated for the omission, such as the death of the third appraiser."

8. *Harrison v. Stipp*, 8 Blackf. (Ind.) 456, where the court said: "The appraisement in the present case was made by two appraisers only, selected by the sheriff. To render it a valid appraisement under the Act of 1841, which required the selection of three, it should have appeared that three had been appointed and that that number had acted. If it had so appeared, an appraisement made by the majority might have been sufficient, but in this instance there is no reason to suppose that more than two had been appointed."

9. *McLellan v. Nelson*, 27 Me. 129; *Munroe v. Reding*, 15 Me. 153; *Phillips v. Williams*, 14 Me. 411; *Moffitt v. Jaquins*, 2 Pick. (Mass.) 331; *Barrett v. Porter*, 14 Mass. 143; *Whitman v. Tyler*, 8 Mass. 284; *Hopkins v. Haywood*, 36 Vt. 318.

is sufficient to sustain such appraisement.¹ When the defendant is entitled to notice of appraisement the return must show that such notice was given, but the mode of giving such notice need not be stated.² It must clearly appear by whom the appraisers were appointed,³ and when an officer appoints an appraiser for the debtor the reason therefor should appear in the return.⁴ Further, it must appear from the return that the appraisers chosen were qualified to act as such,⁵ and that they were properly sworn.⁶

1. *Paine v. Spratley*, 5 Kan. 525.

A return to the appraisement which states that the appraisers were summoned by the sheriff and sworn, and to which the appraisers signed their names under seal, attested by the sheriff, is properly executed, and, in an ejectment by a purchaser at an execution sale, evidence is not admissible to attack a return which on its face appears sufficient. *Gudger v. Penland*, 118 N. Car. 832.

Where the return is silent as to the subject of appraisement, it is presumed that the officer did his duty and that such appraisement was made. *Hale v. Talbott*, 86 Ind. 447.

That the return states that the property was sold to the highest bidder, does not admit the inference that there was no appraisement, but the appraisement may be proved. *Thurston v. Barnes*, 10 Ind. 289.

Where an appraisement was made before the passage of an act making the return of the sheriff a part of the record, and the copy thereof was also filed with the clerk before the act took effect, but the sheriff's return of the appraisement in his general return to the execution was not made or due till after the date of the said enactment, the latter return of the proceedings, including that of the appraisement, became part of the record. *Daniels v. McBain*, 2 Ohio St. 407.

Where a return showed that the appraisement was made by the sheriff alone, but was verified by the defendant, and was indorsed, "levied on goods and chattels as per inventory and appraisement annexed," it was held sufficient to cut out subsequent levies where it appeared to be in conformity with a long-continued practice in the county. *Flinn v. Fennimore*, 7 Houst. (Del.) 262.

2. *Howe v. Wildes*, 34 Me. 566; *Means v. Osgood*, 7 Me. 146; *Stanton v. Bannister*, 2 Vt. 464.

A return that the debtor neglected to

choose an appraiser was held sufficient because by implication it alleged that he had notice; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47.

3. *Harriman v. Cummings*, 45 Me. 351; *Banister v. Higginson*, 15 Me. 73; *Cogswell v. Mason*, 9 N. H. 48.

A Return that the Appraisers Were Appointed by an Agent or Attorney is sufficient, and implies authority on the part of such agent or attorney. *Roop v. Johnson*, 23 Me. 335; *Chappell v. Hunt*, 8 Gray (Mass.) 427.

4. *Johnson v. Huntington*, 13 Conn. 47; *Fitch v. Tyler*, 34 Me. 463; *Keen v. Briggs*, 46 Me. 467; *Thompson v. Oakes*, 13 Me. 407; *Sturdivant v. Sweetsir*, 12 Me. 520; *Smith v. Keen*, 26 Me. 411; *Nickerson v. Whittier*, 20 Me. 223; *Bugnon v. Howes*, 13 Me. 154; *Dewey v. Tobey*, 126 Mass. 93; *Brooks v. Norris*, 124 Mass. 172; *Randall v. Wyman*, 16 Gray (Mass.) 334; *Dooley v. Wolcott*, 4 Allen (Mass.) 406; *Shields v. Hastings*, 10 Cush. (Mass.) 247; *Leonard v. Bryant*, 2 Cush. (Mass.) 32.

A return that "the said debtor being absent, I have chosen E. W. an appraiser for the debtor," was held insufficient. *Woodward v. Gates*, 4 N. H. 548.

5. *Johnson v. Huntington*, 13 Conn. 48; *Pierce v. Strickland*, 26 Me. 277; *Williams v. Amory*, 14 Mass. 20; *Bradley v. Bassett*, 2 Cush. (Mass.) 417; *Laughlin v. Schuyler*, 1 Neb. 409; *Day v. Roberts*, 8 Vt. 413; *Libbey v. Copp*, 3 N. H. 45.

A return that the appraisers are freeholders is not sufficient to satisfy a requirement that they be indifferent freeholders. *Fitch v. Smith*, 9 Conn. 43; *Russ v. Gilman*, 16 Me. 209.

6. *Kansas*. — *Paine v. Spratley*, 5 Kan. 525.

Maine. — *Bamford v. Melvin*, 7 Me. 14; *Howard v. Turner*, 6 Me. 106.

Massachusetts. — *Chamberlain v. Doty*, 18 Pick. (Mass.) 495; *Williams*

b. TIME OF FILING.—Publication of notice of sale cannot legally be made until a copy of the appraisement has been filed in the clerk's office.¹

c. AMENDMENT.—The appraisers may amend their return at any time before filing the same,² and after filing when it can be done in accordance with the truth and the rights of third parties have not intervened.³ It has been held that after the lapse of a number of years such amendment cannot be made;⁴ nor will an amendment be permitted if the amended return would still be insufficient.⁵

5. Objections and Irregularities.—A **Material Mistake** of the appraisers will vitiate the appraisement,⁶ but error without prejudice will not vitiate the sale.⁷ A mere mistake of judgment as to the value of land will not authorize the court to set a sale aside.⁸ In *Nebraska* the objection that the appraisement is too low must be made before the sale occurs,⁹ except upon the ground of fraud.¹⁰ Mere clerical errors or omissions will not vitiate the sale.¹¹

v. Amory, 14 Mass. 20; *Wellington v. Gale*, 13 Mass. 483; *Davis v. Maynard*, 9 Mass. 242; *Barnard v. Fisher*, 7 Mass. 71; *Kellenberger v. Sturtevant*, 11 Cush. (Mass.) 160; *Leonard v. Bryant*, 2 Cush. (Mass.) 32.

New Hampshire.—*Porter v. Bean*, 1 N. H. 363; *Ainsworth v. Dean*, 21 N. H. 400.

Ohio.—*Patrick v. Oosterout*, 1 Ohio 27. *Vermont.*—*Sleeper v. Newbury Seminary*, 19 Vt. 451. A return that the appraisers were sworn according to law was held sufficient. *Eastman v. Curtis*, 4 Vt. 616.

1. *Burkett v. Clark*, 46 Neb. 466, overruling *La Flume v. Jones*, 5 Neb. 256; *Merritt v. Borden*, 2 Disney (Ohio) 503.

2. *Pate v. Harper*, 94 N. Car. 26. It was held proper, in an execution sale, to amend the return of the appraisers by incorporating a survey of the premises necessary for the proper location of the same. *Gudger v. Penland*, 118 N. Car. 832.

3. *Glidden v. Philbrick*, 56 Me. 222; *Harriman v. Cummings*, 45 Me. 351.

4. An amendment was refused after the lapse of twenty-six years, *Russ v. Gilman*, 16 Me. 209; and after six years, when an officer was out of office and had become a party in interest, *Pierce v. Strickland*, 26 Me. 277.

5. *Wolcott v. Ely*, 2 Allen (Mass.) 338.

6. As a mistake in the tract of land levied on. *Vallandingham v. Worthington*, 85 Ky. 83.

7. *American Invest. Co. v. McGregor*, 48 Neb. 779, wherein the property was misdescribed in the appraisement, but the right property was appraised, and, further, the appraisers deducted the incumbrances from the total value of several pieces of property, appraised separately, but each parcel sold for more than two-thirds of its appraised value. The misdescription was held not prejudicial.

In *Hubbard v. Draper*, 14 Neb. 500, the fact that the sale was made after a second and unauthorized appraisement was held not an objection, in view of the fact that it conformed to a prior and valid one as to the price realized.

And where the premises were appraised at \$2,500, and by mistake the defendant's interest was appraised at only \$143.77, and the property brought at sale \$1,675, the mistake was held not prejudicial. *Drew v. Kirkham*, 8 Neb. 477; *Miller v. Lanham*, 35 Neb. 886.

8. *Vallandingham v. Worthington*, 85 Ky. 83; *Lawrence v. Edelen*, 6 Bush (Ky.) 55.

9. *Nebraska Rule.*—*Overall v. McShane*, 49 Neb. 64; *Burkett v. Clark*, 46 Neb. 466; *Best v. Zutavern*, (Neb. 1898) 74 N. W. Rep. 81; *Kearney Land, etc., Co. v. Aspinwall*, 45 Neb. 601; *Ecklund v. Willis*, 44 Neb. 129; *Smith v. Foxworthy*, 39 Neb. 214; *Vought v. Foxworthy*, 38 Neb. 790.

10. *Kearney Land, etc., Co. v. Aspinwall*, 45 Neb. 601.

11. *Vought v. Foxworthy*, 38 Neb. 790;

Prior to Entry of Order of Sale. — It has been held that an appraisal prior to the entry of the order of sale does not invalidate such sale.¹

Material Variance. — If an appraisalment is fairly susceptible of two interpretations, and the variance is material, it will be set aside.²

Joint Owners. — Where an entire estate is appraised as the property of the debtor when in fact he was the owner of an undivided portion only, the appraisalment is valid as to such debtor's undivided portion.³

An Irregular Appraisalment may be set aside and a new one ordered, and at the same time a restraining order issued because of such irregular appraisalment may be dissolved.⁴

An Appraisal and Sale of an Entire Tract of land under a judgment for the sale of so much of the land as is necessary to pay the installment due will not prevent the court from ordering another sale of the land to pay the balance when matured, if the debtor himself purchased the land on the first sale, knowing that the judgment did not cover the unmatured part of his debt.⁵

Collateral Attack. — The fact that there was an entire failure of appraisalment cannot be taken advantage of collaterally;⁶ nor can a return of an appraisalment sufficient on its face be attacked collaterally.⁷

Improvements of Prior Purchaser. — It is not a sufficient objection to an appraisalment, that improvements made by a purchaser under a prior sale, which was set aside, were not included in such appraisalment.⁸

IX. NOTICE OF SALE — 1. Necessity of Notice — a. IN GENERAL. — The statutes of the various states prescribe the notice to be given, and under every kind of judicial sale such notice is in general imperative.⁹

Moore v. Wingate, 53 Mo. 398, where it was held that a mistake in date might be corrected or proved by extrinsic evidence. *McVey v. McVey*, 51 Mo. 406, where it was held that the failure to append the signatures to an appraisalment in which the affidavit was made and signed by the appraisers was a sufficient compliance with the statute.

1. *Noland v. Barrett*, 122 Mo. 181, an administrator's sale.

2. *Ohio L. Ins., etc., Co. v. Goodin*, 10 Ohio St. 557.

3. *Glidden v. Philbrick*, 56 Me. 222; *Swanton v. Crooker*, 49 Me. 455.

4. *Thompson v. Bragg*, 32 Ind. 482.

5. *Wheeler v. Bleakley*, (Ky. 1896) 35 S. W. Rep. 1031.

6. *Bell v. Green*, 38 Ark. 78; *Noland v. Barrett*, 122 Mo. 181; *Neligh v. Keene*, 16 Neb. 407.

7. *Gudger v. Penland*, 118 N. Car. 832; *Welch v. Welch*, 101 N. Car. 565; *Burton v. Spiers*, 87 N. Car. 87; *Spoon v. Reid*, 78 N. Car. 244.

8. *State Bank v. Green*, 11 Neb. 303.

9. *Tracy v. Roberts*, 88 Me. 310, where a guardian's sale was held void by reason of the failure to give notice of such sale. *Mechanics' Bank v. Pitt*, 44 Mo. 364 an execution sale; *Glenn v. Wootten*, 3 Md. Ch. 514, trustee's sale under decree; *Burton v. Wolfe*, 4 Harr. (Del.) 221, where the court set aside both a sale and inquisition on the ground of want of legal notice either of the inquisition or of the sale; *Bailey v. Bailey*, 9 Rich. Eq. (S. Car.) 392, a commissioner's sale. *Loyd v. Anglin*, 7 Yerg. (Tenn.) 428, where a statute expressly declaring that all sales made without the notice prescribed shall be void was sustained.

δ. WAIVER. — It has been held that the advertising of property previous to its sale on execution is for the benefit of the debtor and to protect his rights; and that he may waive the same and a valid sale be made without advertisement;¹ and further, that a debtor may, by his conduct, waive such advertisement.² Where personal notice is required to be given to the defendant in execution such notice may be dispensed with, either by express waiver³ or by the conduct of the defendant.⁴ Where the capacity to sell does not exist in the execution debtor he cannot waive the advertisement.⁵ And the waiver of such advertisement may be refused where the rights of other creditors would be prejudiced.⁶

c. FAILURE OF NOTICE — EFFECT. — The statutes and decisions of the various states are not in harmony as to the effect of the sale where there has been a failure of notice as required by law. Under some jurisdictions the title of the property so sold is held good, and the remedy is against the officer in damages for the failure to give such notice.⁷ In some cases it is held that

1. Express Waiver. — *Huffman v. Gaines*, 47 Ark. 226; *Howard v. Schmidt*, 29 La. Ann. 129; *Burroughs v. Wright*, 16 Vt. 620.

2. Implied Waiver. — Where a debtor suffers the execution to be satisfied and accepts the surplus of the proceeds of the sale and retains it after notice of an irregularity in the notice of the sale, he waives such irregularity. *Huffman v. Gaines*, 47 Ark. 226.

By appointing an appraiser the debtor cures any defect in the advertisement of a judicial sale. *Howard v. Schmidt*, 29 La. Ann. 129.

Where an execution debtor induced a third person to purchase property previously sold under a defective notice of sale, it was held that he had waived his right to take advantage of such defective notice. *M'Clure v. M'Cormick*, 5 Blackf. (Ind.) 129; *McCormick v. Wheeler*, 36 Ill. 114.

3. Personal Notice. — *Carney v. Carney*, 10 Yerg. (Tenn.) 491; *Richards v. Meeks*, 11 Humph. (Tenn.) 455; *Noe v. Purchipile*, 5 Yerg. (Tenn.) 215.

4. Carney v. Carney, 10 Yerg. (Tenn.) 491, where the court said: "As the notice required by law is for his benefit, he may waive his right to require it. And if he should do so, either by express words or by acts equivalent thereto, he shall not afterwards be heard to say he had not the notice required by law. But to say that if the defendant in an execution is present at the sale of his land and does not object

to it and notify the bidders that he has not had the notice, he shall be bound by his silence * * * is going too far. It is enough, in my opinion, to hold the sale valid if he shall actually promote it or consent that it may be made — his mere silence is not sufficient."

5. Esneault v. Cooley, 16 La. Ann. 165, where the court said: "The husband and wife could not sell the total property without the authority of justice, and as a consequence they could not waive the formalities required by law for a forced sale. Hence the waiver of the advertisement deprived the sale of its character of a formal sale."

6. Right of Waiver Denied. — *Gibbs v. Neely*, 7 Watts (Pa.) 305, where an agreement between an execution creditor and the debtor that personal property levied on should be sold on notice less than that required by the statute was held to be fraudulent and void as to any other creditor with an execution levied subsequently upon the same property. *Hiligsberg's Succession*, 1 La. Ann. 340, where it was held that a debtor under failing circumstances could not waive any of the formalities required by law.

7. Remedy Against Officer — California. — *Smith v. Randall*, 6 Cal. 47; *Harvey v. Fisk*, 9 Cal. 94.

Georgia. — *Johnson v. Reese*, 28 Ga. 353; *Hendrick v. Davis*, 27 Ga. 167; *Brooks v. Rooney*, 11 Ga. 423.

Indiana. — *White v. Cronkhite*, 35 Ind. 483.

the sale is absolutely void,¹ and uniformly that the sale will be set aside upon motion made in seasonable time.² It has also been held that a failure of notice will not invalidate a sale to an innocent purchaser.³

d. DEFECTIVE NOTICE — EFFECT. — The effect of a defective notice, as well as a failure of notice, cannot be positively stated, owing not only to the conflicting decisions in different jurisdictions, but also to different decisions in the same jurisdictions. Some decisions would seem to hold that a material defect in the advertised notice renders a sale absolutely void,⁴ but the weight of authority would seem to be that an innocent purchaser is not affected by any irregularity or omission in the advertisement,⁵

Kentucky. — *Lawrence v. Speed*, 2 Bibb (Ky.) 401.

Massachusetts. — *Whitaker v. Sumner*, 7 Pick. (Mass.) 551.

Texas. — *Morris v. Hastings*, 70 Tex. 26.

In *Smith v. Randall*, 6 Cal. 50, the court said: "It has been often decided that the provisions of statutes similar to ours with respect to levy and notice of sale under execution are merely directory, and the failure of the officer to comply with the requirements of the law, in this respect, would not vitiate such sale, but the party aggrieved by his neglect is left to his remedy by an action against the officer. *Webber v. Cox*, 6 T. B. Mon. (Ky.) 111; *Hayden v. Dunlap*, 3 Bibb (Ky.) 216. This rule is founded in justice and sound policy."

In *Brooks v. Rooney*, 11 Ga. 428, the court said: "We believe this to be sound doctrine, and that although the failure in the performance of the sheriff's duty might subject him to an action, in which he would be compelled to indemnify the owner of the land which might be irregularly sold, or the creditor to the extent of the injury received by such sale, yet it would not destroy the title of the purchaser, who has a right to presume that a public officer, known to possess the power to sell, has taken every previous step required of him by the law under which he sells."

In *White v. Cronkhite*, 35 Ind. 485, the court said: "Carrying out this theory of the law, the legislature has provided that any sheriff who shall sell any real estate without giving the previous notice directed, or shall sell the same otherwise than in the manner prescribed, shall forfeit and pay to the party injured not less than ten nor

more than two hundred dollars, in addition to such other damages as the party may have sustained, to be recovered from the sheriff, or from him and his sureties, in an action on his official bond."

1. *Hobart v. Upton*, 2 Sawy. (U. S.) 302, a guardian's sale; *Hughes v. Watt*, 26 Ark. 228; *Thomas v. Le Barron*, 8 Met. (Mass.) 355; *Den v. Philhower*, 24 N. J. L. 796; *Bailey v. Balley*, 9 Rich. Eq. (S. Car.) 392.

2. *Moreland v. Bowling*, 3 Gill (Md.) 500; *Mechanics' Bank v. Pitt*, 44 Mo. 364.

3. *Huffman v. Gaines*, 47 Ark. 226; *Hanks v. Neal*, 44 Miss. 212; *Natchez v. Minor*, 10 Smed. & M. (Miss.) 246.

4. For various special instances of defective notice, see the various subdivisions under this head. See also *Wellman v. Lawrence*, 15 Mass. 326, where an administrator's sale advertised to be held on Friday the 17th, whereas in fact Friday was the 16th, was held void; *Stoffel v. Reiners*, 3 Mo. App. 33, where a misdescription in the advertisement was held to vitiate the sale; *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474, where a leasehold interest of more than five years was advertised as in the case of personal property, and the sale was held to be void; *Collins v. Smith*, 57 Wis. 284, where an execution sale was held void because the time of publication was insufficient.

In *Texas Sav. Loan Assoc. v. Seitzler*, 12 Tex. Civ. App. 551, the name "Stezler" for "Seitzler" was held insufficient, and the omission to state the "addition" in the description was held to nullify the sale.

5. *Arkansas.* — *Steward v. Pettigrew*, 28 Ark. 373; *Files v. Harbison*, 29 Ark. 307.

and further that the requirement as to notice is merely directory, does not render the sale void, and cannot be taken advantage of in collateral proceedings.¹ The insufficiency of an advertisement under which another sale was attempted but not made will not invalidate a subsequent sale under a proper advertisement.²

e. NOTICE OF ADJOURNMENT. — General rules applicable to notice of sale apply to notice of adjournment, but the manner of giving such notice of adjournment varies in different jurisdictions. It has been held that upon the failure of a purchaser to comply with his bid the property may be resold within legal hours on the same day without re-advertising,³ and that an adjournment of one day would not render a sale void, but only voidable by proper proceeding in apt time.⁴ So it is held that notice of adjournment may be made by proclamation at the time of the sale,⁵ but if it appears that prejudice has resulted, the sale

Illinois. — Osgood *v.* Blackmore, 59 Ill. 261.

Indiana. — Armstrong *v.* Jackson, 1 Blackf. (Ind.) 209.

Iowa. — Cooley *v.* Wilson, 42 Iowa 425.

Kentucky. — Kilby *v.* Haggin, 3 J. J. Marsh. (Ky.) 208.

Mississippi. — Natchez *v.* Minor, 10 Smed. & M. (Miss.) 246.

Missouri. — Mitchell *v.* Nodaway County, 80 Mo. 257; Draper *v.* Bryson, 17 Mo. 71; Curd *v.* Lackland, 49 Mo. 451.

New York. — Wood *v.* Morehouse, 45 N. Y. 368.

North Carolina. — Dula *v.* Seagle, 98 N. Car. 458.

1. *Alabama.* — Holly *v.* Bass, 68 Ala. 206.

California. — Frink *v.* Roe, 70 Cal. 296; Harvey *v.* Fisk, 9 Cal. 94.

Georgia. — Johnson *v.* Reese, 28 Ga. 353.

Illinois. — Pollard *v.* King, 63 Ill. 36; Moffitt *v.* Moffitt, 69 Ill. 641.

Kansas. — Rounsaville *v.* Hazen, 33 Kan. 71.

Louisiana. — McMicken *v.* Morgan, 9 La. Ann. 208.

Massachusetts. — Nott *v.* C. T. Sampson Mfg. Co., 142 Mass. 479.

Mississippi. — Bland *v.* Muncaster, 24 Miss. 62; Minor *v.* Natchez, 4 Smed. & M. (Miss.) 602.

Missouri. — Hendrickson *v.* St. Louis, etc., R. Co., 34 Mo. 188; McNair *v.* Hunt, 5 Mo. 301.

Nebraska. — Nebraska L. & T. Co. *v.* Hamer, 40 Neb. 281.

South Carolina. — *Ex p.* Alexander,

35 S. Car. 409; Maddox *v.* Sullivan, 2 Rich. Eq. (S. Car.) 4.

Texas. — Thulemeyer *v.* Jones, 37 Tex. 560.

Canada. — Lee *v.* Howes, 30 U. C. Q. B. 292; Osborne *v.* Kerr, 17 U. C. Q. B. 134.

In Nott *v.* C. T. Sampson Mfg. Co., 142 Mass. 479, a query was raised in a guardian's sale under a license of the Probate Court as to whether or not a defective notice renders the sale void. The case was disposed of by confirmation in an equitable proceeding under a special statute.

In McNair *v.* Hunt, 5 Mo. 301, the question as to the sufficiency of the notice arose under an interpretation of the Spanish laws, and it was held that a defective notice would not render the proceeding void, and the validity of the sale could not be questioned in a collateral suit.

In Thulemeyer *v.* Jones, 37 Tex. 560, it was held, under an act providing for an "official journal," that the failure to advertise in such journal did not render the sale void.

2. Empkie *v.* McLean, 15 Neb. 629.

3. Humphrey *v.* McGill, 59 Ga. 649.

4. Jackson *v.* Spink, 59 Ill. 404.

5. *Maine.* — Wilson *v.* Buckman, 71 Me. 545.

New Jersey. — Allen *v.* Cole, 9 N. J. Eq. 286; Cox *v.* Halsted, 2 N. J. Eq. 311.

New York. — La Farge *v.* VanWagenen, 14 How. Pr. (N. Y. Supreme Ct.) 54.

North Carolina. — Wade *v.* Saunders, 70 N. Car. 270.

will be set aside.¹ On the contrary, it has been held that an adjournment of a sale necessitates notice *de novo*.²

2. Personal Notice — When Required. — Statutory enactments in a number of the states require that personal notice of the time and place of sale shall be given to the defendant if, under some jurisdictions, he be a resident of the county;³ in others, if he is in actual occupation or possession of the premises;⁴ and in still others, if the officer shall find the debtor within his precinct.⁵

Where a Debtor Cannot Be Found, it is sometimes provided that notices may be left at his last and usual place of abode;⁶ and in other jurisdictions, that if service cannot be made upon the defendant, the same shall be had upon the tenant of the premises, if there be such tenant.⁷

The Manner in which such notice shall be served is not always clearly stated, but in general the statute must be fairly complied with.⁸

Tennessee. — *Luther v. McMichael*, 6 Humph. (Tenn.) 298.

In *La Farge v. Van Wagenen*, 14 How. Pr. (N. Y. Supreme Ct.) 54, an adjourned sale was sustained, although no particular time of day was named. The adjournment, however, was made necessary because of the bad faith of the defendant, and a notice of such adjournment appeared in one issue of a weekly paper in which the sale had previously been advertised.

In *Wade v. Saunders*, 70 N. Car. 270, a sale advertised to take place on the first day of the term, as prescribed by law, was held good, although postponed from day to day for five days.

1. *Chamberlain v. Larned*, 32 N. J. Eq. 295, in which case a sale was adjourned from week to week in the office of the sheriff, and resulted in misleading the owner of the property.

2. *Patten v. Stewart*, 26 Ind. 395; *Givan v. Doe*, 5 Blackf. (Ind.) 260.

3. *Wolf v. Heathers*, 4 Harr. (Del.) 325; *Lewis v. Woodall*, 4 Houst. (Del.) 543.

In the Absence of Statutory Requirement no personal notice need be served. *Crumpton v. Baldwin*, 42 Ill. 165; *Keene Five-cent Sav. Bank v. Marsh*, 31 Kan. 771.

4. *Jensen v. Woodbury*, 16 Iowa 515; *Christian v. Mynatt*, 11 Lea (Tenn.) 615; *Lafferty v. Conn*, 3 Sneed (Tenn.) 221; *Farquhar v. Toney*, 5 Humph. (Tenn.) 502; *Fleming v. Maddox*, 30 Iowa 239, where the court said: "There are two kinds of possession of real property known to the law — actual and constructive. It is actual

when in the immediate occupancy of the party. It is actual where the owner goes upon the land to take possession, and exercises acts of ownership over it. It is actual also where one having the title is in possession of lands by his tenant, agent, or steward. 2 Bouv. Law Dict. 352, title Possession; *Langworthy v. Myers*, 4 Iowa 39; *Wall v. Nelson*, 3 Litt. (Ky.) 398; *Humphrey v. Jones*, 3 T. B. Mon. (Ky.) 261; *Bell v. Longworth*, 6 Ind. 274; *Speed v. Buford*, 3 Bibb (Ky.) 75. Constructive possession is where one claims to hold by virtue of some title, without having the actual occupancy, as when the owner of a tract of land regularly laid out is in possession of a part, he is constructively in possession of the whole. 2 Bouv. Law Dict. 352, title Possession. Under our statute 'all persons owning lands not held by an adverse possession shall be deemed to be seized and possessed of the same.' Rev. Stat., § 2207."

5. *Parker v. Abbott*, 130 Mass. 25.

6. *Holmes v. Jordan*, 163 Mass. 147, where a return that notice was given by serving the same at the debtor's last and usual place of abode was held sufficient.

7. *Lewis v. Woodall*, 4 Houst. (Del.) 543; *Wolf v. Heathers*, 4 Harr. (Del.) 325.

8. Whether a notice of sale of land by depositing a letter in the post-office, addressed to a defendant residing out of the county but within the state, is a lawful notice, was raised but not decided in *Burton v. Wolfe*, 4 Harr. (Del.) 221.

Notice served upon the administrator

Effect of Failure to Give. — The decisions as to the effect of a failure to give notice as required by the statute are conflicting. It has been held, however, that such requirement is merely directory;¹ and, on the other hand, that the failure to give such notice is sufficient ground for setting the sale aside.²

The Notice Must Be of the Particular Sale in question, and cannot be supplied by notice of a previously advertised sale which did not take place.³

Waiver. — The place of sale must be specified, and the mere presence of the defendant at the sale will not constitute a waiver.⁴ Nor will acquiescence and silence on the part of the defendant constitute a waiver.⁵

3. By Posting. — Under statutes requiring the notice of sale to

has been considered sufficient without notice to the heirs of a deceased debtor, under a statute requiring that notice be given to the debtor. *Atkins v. Sawyer*, 1 Pick. (Mass.) 351.

A return as follows was sustained: "I gave notice in writing to the within-named judgment debtor of the time and place of sale by serving the same at her last and usual place of abode, and by mailing a like notice to her address as described in said execution, in a securely sealed envelope, fully prepaid." *Holmes v. Jordan*, 163 Mass. 147.

Service of notice is not satisfied by putting one of the notices of sale on the front door of the shop used by the debtor on the lot sold, although from the testimony it may be probable that the debtor saw the notice some time before the sale. *Richards v. Meeks*, 11 Humph. (Tenn.) 455.

Service by leaving a copy at the dwelling house of the defendant in his absence was held sufficient. *Shultz v. Elliott*, 11 Humph. (Tenn.) 184.

Service upon the tenant or other person residing upon the land was held insufficient to satisfy a statute requiring service to be made upon the defendant in possession. *Lafferty v. Conn*, 3 Sneed (Tenn.) 221.

1. *Shaffer v. Bledsoe*, 118 N. Car. 279, where it was held that the return of the sheriff as to the service or notice was conclusive, and the purchaser's title under the sheriff's deed was sustained.

White v. Farley, 81 Ala. 565, where the court said: "The same is true as to the alleged failure of the sheriff to give personal notice of the levy to the defendant in execution, who is the complainant in the present bill, as required of him by section 3195 of the

Code (1876). It can stand upon no higher ground than a failure of the sheriff to advertise the sale of lands levied on, and this, as often held, is a mere irregularity, not vitiating the validity of the sale. A judgment against the owner, an execution thereon, a levy, and a sheriff's deed is all that is requisite. *Ware v. Bradford*, 2 Ala. 676; *Ray v. Womble*, 56 Ala. 32. The precise point was so decided in *Love v. Powell*, 5 Ala. 58, more than forty years ago, and may now be regarded as a rule of property not to be unsettled."

2. *Fleming v. Maddox*, 30 Iowa 239; *Jensen v. Woodbury*, 16 Iowa 518, where the court said: "Although the statute uses the words 'may be set aside,' it does not thereby invest the District Court with such discretion that its action cannot be reviewed on appeal; in other words, we are inclined to hold that the language shall be construed as mandatory rather than as permissive; and yet we are not prepared to hold that in every possible case within the letter of the statute, the sale *shall* be set aside. For instance, if it should be shown that the execution defendant had actual knowledge of the levy and the time and place of sale twenty days previous to the day fixed, whereby the object of the statute is fully met, it would be very competent for a court to hold the case to be not within the statute."

3. *Prater v. McDonough*, 7 Lea (Tenn.) 670.

4. *Hinson v. Hinson*, 5 Sneed (Tenn.) 322.

5. *Carney v. Carney*, 10 Yerg. (Tenn.) 491, overruling *Noe v. Purchapile*, 5 Yerg. (Tenn.) 215.

be made by posting one or more notices, it has been held that such requirement is merely directory, and that a failure to post such notice will not render the sale void,¹ and that the remedy is against the sheriff in damages if any loss occurs by reason thereof.² Again it has been held that such a failure of notice is sufficient ground to set aside the sale,³ and further that statutory notices of a sale are indispensable to its validity.⁴ No general rule can be given as to what constitutes compliance with the statute as to posting notices, but each case must depend upon the facts as they appear.⁵ A valid sale cannot be made where the officer has no jurisdiction to post the notices required by law.⁶ Where the statute requires that notice of sale shall be given by publication and posting, it has been held that publication alone is sufficient,⁷ and also, to the contrary, that both forms must be used.⁸

4. By Handbills.—Provision is made in some of the earlier statutes for notice of sale by handbills,⁹ and in others notice may be given by handbills if there is no newspaper published in the county.¹⁰ A notice by handbills in a county where a newspaper is published is generally no notice at all.¹¹

1. *Jones v. Planters' Bank*, 3 Humph. (Penn.) 76; *Johnson v. Reese*, 28 Ga. 353; *Hendrick v. Davis*, 27 Ga. 167.

2. *Johnson v. Reese*, 28 Ga. 353; *Hendrick v. Davis*, 27 Ga. 167.

3. *Terry v. Swinford*, (Ky. 1897) 41 S. W. Rep. 553; *Rudderow v. Dudley*, 41 N. J. Eq. 611, wherein a failure to post notices as required by law in a sale of land under partition was set aside on condition that the purchaser be placed in the same condition as before the sale by repayment of the purchase-money with interest, within twenty days.

4. *New York Baptist Union v. Atwell*, 95 Mich. 239, a case in which a sale under a mortgage foreclosure was in question, and wherein the general rule was laid down as applying to all sales under a statute requiring notice of sale to be posted in three public places in the township where the sale was to be made. See also *Burton v. Wolfe*, 4 Harr. (Del.) 221, where the court said, as to the advertisements of sale, that the sheriff must be prepared to prove the putting up of at least one notice in each hundred of the county, according to law; that the posting of such notices is expressly required by law, and must not be left in any doubt.

5. *Fox v. Tie*, 1 La. Ann. 334; *Averill v. Jackson City Bank*, (Mich. 1897) 72 N. W. Rep. 15; *Pollard v. King*, 63 Ill. 36; *Holmes v. Jordan*, 163 Mass. 147; *Austin v. Soule*, 36 Vt. 651.

6. *Lewis v. Norton*, 164 Mass. 270.

7. *McCurdy v. Baker*, 11 Kan. 111; *State v. Becket*, 3 McCord L. (S. Car.) 290; *Parrat v. Neligh*, 7 Neb. 456; *Drew v. Kirkham*, 8 Neb. 477; *Fitch v. Dunlap*, 2 Ohio 78; *Mapp v. Thompson*, 9 Ga. 42.

8. *Averill v. Jackson City Bank*, (Mich. 1897) 72 N. W. Rep. 15; *Copmeier v. O'Neil*, 47 Wis. 593.

In Idaho the statute is in the alternative, and either form may be used. *Ollis v. Kirkpatrick*, 2 Idaho 976.

9. *McMichael v. McDermott*, 17 Pa. St. 353.

10. *Curd v. Lackland*, 49 Mo. 451; *Walton v. Harris*, 73 Mo. 489.

11. *Curd v. Lackland*, 49 Mo. 451, wherein it was held that where a stranger purchased for a good and adequate consideration in ignorance of the fact that notice was given by handbills where publication was required, and received a deed good upon its face, the sale was valid, and such stranger was protected, but not to such an extent as to give him such an interest as to entitle him to relief in equity.

Where the publisher of the only newspaper in the county refuses to publish a notice of sale, there is, in contemplation of law, no newspaper published in the county, and the alternative provision of the statute may be used. *Walton v. Harris*, 73 Mo. 489.

5. **By Publication** — *a. IN GENERAL.* — Statutes of the various states usually prescribe that notice of the sale shall be published for a definite length of time in some newspaper published in the county.¹ The officer conducting the sale has the right and duty of selecting the newspaper in which such publication shall be made, and no one else has any authority to dictate the place of such publication.² Where official gazettes are provided for, publication is usually in such gazette.³ The commencement of the publication prior to the signing of the decree will not invalidate the sale,⁴ nor will the death of the defendant pending publication.⁵

b. CONTENTS OF NOTICE — (1) *In General* — *Conformity to Decree.* — Where a sale is made under a decree, the advertised notice should conform to such decree;⁶ but where the decree is in conflict with the statute, the latter controls.⁷

Question of Law. — The sufficiency of a notice under the statute is a question for the court, and not for a jury.⁸

1. See *Ollis v. Kirkpatrick*, 2 Idaho 976; *Thacher v. Devol*, 50 Ind. 30, wherein an execution sale by authority of a judgment obtained in the United States court was held void because the notice of sale was published in a newspaper other than that in the county in which the property was situated, although there were newspapers of general circulation published in the county in which the property was situated. *Shaffer v. Bledsoe*, 118 N. Car. 279, wherein it was held that such requirement was merely directory, and that the purchaser acquired a good title under the sheriff's deed where the return of the levy and sale stated that such sale was duly advertised.

2. *Northern Counties Invest. Trust v. Cadman*, 101 Cal. 200; *State v. Holliday*, 35 Neb. 327; *Smith v. Foxworthy*, 39 Neb. 214.

In Iowa the code provides that the judgment creditor may designate the newspaper. *Herriman v. Moore*, 49 Iowa 171.

3. *State v. Becket*, 3 McCord L. (S. Car.) 290.

4. *Kromer v. Friday*, 10 Wash. 621, a sale in partition where the finding of the court had in fact been made prior to the publication, but the decree had not been signed.

5. *Wood v. Morehouse*, 45 N. Y. 368.

6. *Gould v. Garrison*, 48 Ill. 258; *Conroy v. Carroll*, 82 Md. 127; *Farmers' Bank v. Clarke*, 28 Md. 145; *Glenn*

v. Wootten, 3 Md. Ch. 514; *Latrobe v. Herbert*, 3 Md. Ch. 375.

7. *Thompson v. U. S. Loan Com'rs*, 79 N. Y. 54; *Spring v. Sandford*, 7 Paige (N. Y.) 554, wherein the court observed: "The objection that the decree directs the premises to be sold upon a three weeks' notice only, when the statute requires six, is not sustained by the fact as appears from the decree itself. It is true the decree directs the master to give three weeks' previous notice of the time and place of sale in such newspapers printed in the city of New York as he may deem proper; but it also directs that he shall give notice 'in such other manner as the law and rules and practice of this court may require.' This last clause is of itself sufficient to make it the duty of the master to advertise the premises for sale for the time and in the manner required by statute; and the previous clause requiring the master to advertise for three weeks in such papers in the city as he may think proper, if it is not mere surplusage, must be construed as an authority to the master to advertise for a portion of the time required by the statute in more than one paper. The master has given the correct construction to the general direction to give notice in such other manner as the law required, and has advertised the premises for the term of six weeks, as the partition law required."

8. *Prater v. McDonough*, 7 Lea (Tenn.) 670.

Title and Amount.—The title of the case¹ and amount of the decree² may properly be stated in the notice, but this is generally not essential.

Name of Defendant.—In general it is not necessary, although proper, to state the name of the execution defendant in the notice.³

Signature.—Advertised notices may properly be signed by a deputy.⁴

Several Executions against the same defendant in the hands of the officer at the same time should be enforced under one advertisement.⁵

Prejudicial Errors Only Regarded.—Only such mistakes or omissions as are calculated to deter or mislead bidders, or to depreciate the value of the property, or to prevent it from bringing a fair price, constitute sufficient ground for setting aside the sale.⁶

(2) **Description—Sufficiency Generally.**—The description of the property in the published notice of sale should be such as will best enable the public to understand what particular property is to be offered for sale,⁷ but mere inaccuracies or mistakes not calculated to mislead will not invalidate the sale.⁸ Where property

1. Ray v. Oliver, 6 Paige (N. Y.) 489.

2. Stratton v. Reisdorph, 35 Neb. 314.

3. Perkins v. Spaulding, 2 Mich. 157; Cunningham v. Schley, 6 Gill (Md.) 207; Chapman v. Morrill, 19 Hun (N. Y.) 318; Harrison v. Cachelin, 35 Mo. 79.

See Jackson v. Spink, 59 Ill. 404, where, under a statute providing that the notice of sale should specify the name of the plaintiff and defendant in the execution, and subjecting the officer to a penalty for failure to comply with such statute, and further that the validity of the sale should not be affected by reason of any irregularity unless the purchaser had notice of the same, it was held that it was not the intent of the legislature to declare such sales void as were affected by an irregularity or omission, and further that the provision subjecting the officer to a penalty for noncompliance indicated that the requirements of the statute were merely directory.

4. Wallis v. Thomas, 6 La. Ann. 76.

5. Southard v. Pope, 9 B. Mon. (Ky.) 261.

6. Nebraska L. & T. Co. v. Hamer, 40 Neb. 281; Field v. Brokaw, 59 Ill. App. 442, wherein the giving of the Christian name of one of the defendants as Cornelia, instead of Cornelius, was held not to invalidate the sale; Horton v. Bassett, 16 R. I. 419, wherein

the plaintiff's name was published as Bartlett, instead of Bassett, and the error was held immaterial.

7. Newman v. Jackson, 12 Wheat. (U. S.) 570; Collier v. Vason, 12 Ga. 443.

8. "The words 'acres or arpents' were used in the advertisement of the property when the word 'acres' alone should have been used, but as the advertisement contained a specific description of the property and at the close a correct statement of the quantity of land in acres, the use of the word 'arpents' was held mere surplusage and not prejudicial." Thompson v. Barr, 7 La. Ann. 670.

A notice describing the property as "lot 6, block 2, of H.'s addition to L.," and reference made to the recorded plat, when in fact there were three H.'s additions to L., the lot in question being in the second addition, which was the only one which contained a lot 6 in block 2, was held sufficient. Noland v. Lee's Summit Bank, 129 Mo. 57.

The omission to state the name of the county in which the land was situated was held not to invalidate the sale. Duncan v. Matney, 29 Mo. 368.

A description of land as "situate in the northerly part of the city of Providence, being the lot of land numbered (10), ten on a plat of the land of S. W., surveyed and platted by H. F. W.,

is sold under a decree of the court by foreclosure of mortgage or otherwise, a description in the advertisement following the description in such decree is sufficient.¹

An Error in the Description of the land to be sold so gross as to convey to prospective purchasers no adequate information as to the location of the property to be sold will invalidate a sale thereunder,² but under some circumstances the defendant in execu-

July 7, 1845," was held sufficient provided the plat referred to was recorded. *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64.

1. *Beck v. Smyrna Bank*, 5 Houst. (Del.) 120; *Miller v. Lanham*, 35 Neb. 886; *Model Lodging House Assoc. v. Boston*, 114 Mass. 133.

2. *Tatum v. Croom*, 60 Ark. 487, wherein a sale was held void for a patent ambiguity because the lands sold were described as the northeast part of the southeast quarter of the southeast quarter of a certain section, without otherwise identifying the land. In this case the court said: "As the mistake was not only in the execution of the deed, but in the proceedings anterior to that, and upon which the sale was based, we think the court properly refused to reform the deed. The case of *Steward v. Pettigrew*, 28 Ark. 373, does not conflict with this ruling, for the execution debtor did not, in that case, complain of the sale, but on the contrary he ratified it, and for a valuable consideration agreed to correct the mistake. This fact brought that case within the rules that courts of equity follow in correcting mistakes made in the execution of voluntary conveyances and agreements. 1 Story's Equity, p. 165-179. While one of the ordinary duties of a court of equity is to furnish relief against mistakes in the execution of voluntary agreements and conveyances, as a rule they refuse to aid the defective execution of statutory powers."

Various Illustrations. — In *Steward v. Pettigrew*, 28 Ark. 373, an advertisement described a quarter-section other than that upon which the levy was made, and the court said: "The continuance of the mistake in the advertisement, though an irregularity, did not deprive the sheriff of the power to sell nor make the sale void. The rule is that a *bona fide* purchaser of property at a sheriff's sale is not affected by any irregularity or omission by the sheriff in advertising or conducting the sale. *Newton v. State Bank*, 14 Ark.

9; *Ringgold v. Patterson*, 15 Ark. 209; *Newton v. State Bank*, 22 Ark. 19."

In *Boggs v. Douglass*, 89 Iowa 150, the petition in an attachment described the property as in township 73, instead of township 72, the correct description, and this error was carried into the decree and advertisement of sale thereunder. It was held that the purchaser at such sale acquired no title to the property.

In *Wright v. Roussel*, 5 La. Ann. 126, an advertisement was held void under a description of 640 arpents when in fact the land contained 640 acres.

In *Lay v. Shaubhut*, 6 Minn. 273, ten lots were attached, and through an error in the advertised notice but two were properly described. Execution was returned satisfied in full. The court granted relief to the attaching creditor, and permitted him to issue execution as though none had ever issued, except as against those who, relying upon the apparent satisfaction of the judgment, had purchased such part of the property as was apparently released from the lien of the attachment and judgment by the entry of satisfaction on the record.

In *Helmer v. Rehm*, 14 Neb. 219, the court said: "The land attached and ordered sold by the judgment was the north half of the southeast quarter of section thirty in township twelve north, range five east; and this is the tract which the sheriff returned as sold under a notice given on the 9th of April of a sale to take place on the 10th of May, 1881. Referring to the notice, it is found that the description of the land to be sold was the north half (N. $\frac{1}{2}$) of the southwest quarter (S. E. $\frac{1}{4}$) of said section. * * * This notice was clearly defective. It is true that the abbreviated number in parenthesis is correct, and possibly might have upheld the sale if the court had seen fit to confirm it. But however this might be, I do not think that this court would be warranted in saying that with such a

tion, by acquiescing in the confirmation of the sale, or by permitting a deed to issue and title to be claimed thereunder, may waive his right to object.¹

Improvements. — The notice of sale need not describe the character or number of the improvements if it sufficiently identifies the property;² but the contrary has been held.³

Notice Accurate — Petition Erroneous. — Property sold under an accurate description in the notice of sale, although founded upon an erroneous description in the petition, will pass the title to the purchaser upon confirmation.⁴

(3) **Designating Place.** — In general a sale is void under a notice which does not specifically state the place at which such sale will be held,⁵ but where a notice is sufficient to warrant the belief that no prejudice resulted the sale will be sustained.⁶

notice there was an unlawful exercise of the supervisory control given to the district judge over sales in setting this one aside."

In *Merwin v. Smith*, 2 N. J. Eq. 182, the sheriff advertised lands specifically, and further added, "together with all his [the defendant's] other real estate in the county of Atlantic, a more particular description of which will be given on the day of sale." It was held that the advertisement did not authorize the sale of any lands except those specifically described.

In *Wheatley v. Terry*, 6 Kan. 427, the notice of sale described the property as the undivided half of lot two, whereas the decree and order of sale described it as the undivided half of lot five. The sale was held void.

1. *Cooley v. Wilson*, 42 Iowa 425, wherein the defendant was present at the sale, knew that his property was being sold, and yet remained silent until the deed was made and the title claimed thereunder. It was held that his remedy was by motion to set the sale aside made in apt time. In *Woodhull v. Little*, 102 N. Y. 165, a partition sale, more than 1,000 separate lots were involved and through a number of adjournments about one-half of the lots were sold. Later a new notice of sale was published, intended to cover the balance of the lots, but by accident the lots were not described. The sale was confirmed without objection upon due notice to all of the parties. It was held that the error in the notice of sale did not render it void.

2. *Allen v. Cole*, 9 N. J. Eq. 286.

3. *Oldham v. Hossenger*, 5 Houst. (Del.) 434, where a failure to notice in

the advertisement a barn as one of the principal improvements on the premises was held sufficient to invalidate the sale.

4. *Hubermann v. Evans*, 46 Neb. 784, a guardian's sale, where a petition for license to sell described the property as being in block W, whereas it was in block U. The sale was confirmed and the title of a *bona fide* purchaser was upheld.

5. *Blodgett v. Hitt*, 29 Wis. 169, an administrator's sale, in which no place was designated in the notice. See also *Hartley v. Croze*, 38 Minn. 325, an administrator's sale, where the only designation as to the place of sale was "Duluth, in said county of St. Louis." This was held insufficient and the sale void.

6. *Little v. Sinnett*, 7 Iowa 324, an administrator's sale, wherein the court said: "Another objection to the notice is that it does not name a place. The town is named twice, one of which instances must refer to the sale and the other to the locality of the property. But no place in the town is mentioned. We might doubt whether the same rule in this respect is to be applied to a small village which might be to a large city, whose population equaled a county or even a state. But without showing that mistake occurred, or that an unusual or improper place was adopted, this imperfection cannot be regarded as sufficient to render the notice void and to overturn the sale. If some actual detriment were shown to result from the manner of stating the time or the place of sale, it might put the case in a different light, but without this, and regarding only the face of the

(4) *Designating Time.* — The notice of sale must of necessity designate the time at which the sale will be held,¹ unless the hour of sale is fixed by statute.² A sale under a notice which contains a patent ambiguity will not be sustained,³ but a mistake not calculated to mislead will not invalidate the sale.⁴

c. *DURATION OF NOTICE — For the Time Prescribed.* — The exact length of time which must intervene between the first date of publication and the day of sale is not exactly settled, but the weight of authority is clearly that the time prescribed by the statute for advertisement must be fully complied with to constitute a valid sale.⁵ This rule is, however, contradicted in some jurisdictions,

paper, it is difficult for a court of equity to hold these things fatal, when it seems almost apparent that no real harm was wrought to any one."

1. In *School Trustees v. Snell*, 19 Ill. 156, the notice stated that the sale would be made "on the second day of January next," without any statement as to the hour. It was held that the notice was insufficient.

In *Cole v. Porter*, 4 Greene (Iowa) 510, under the code, directing execution sales to be made between nine o'clock in the forenoon and four o'clock in the afternoon, it was held that a valid sale might be made under a notice fixing the time of sale as between the hours of two and five o'clock in the afternoon, on the presumption that the officer sold the property during the legal hours.

In *Coxe v. Halsted*, 2 N. J. Eq. 311, a notice of sale which specified the time between the hours of twelve and five in the afternoon was sustained, although it was suggested as more convenient to designate a particular hour.

In *Northrop v. Cooper*, 23 Kan. 433, a notice stating that the property would be sold between the hours of ten o'clock A. M. and four P. M. was sustained.

The Entire Omission to state the time in the notice renders the sale void. *Blodgett v. Hitt*, 29 Wis. 169.

Sale on Two Different Days. — Sales will not be set aside because the property was advertised for sale on two different days by different sets of advertisements, where it appears that the second advertisement was induced by an additional levy, and also that no injury resulted from the sale under such circumstances. *McDonald v. Cook*, 11 Mo. 633.

2. *Evans v. Robberson*, 92 Mo. 192, holding that it is the duty of the sheriff selling land under execution to sell

between the hours fixed by the statute, but not asserting that such hours should be stated in the advertisement of sale.

3. *Patent Ambiguity.* — In *Thayer v. Roberts*, 44 Me. 247, the notice stated that the sale would take place on Saturday, the 24th day of the month, when the 24th day of the month was Sunday. The notice was held invalid.

In *Hendrix v. Nesbitt*, 96 Ky. 652, the sale was advertised to take place on County Court day, and gave the date as October 12, whereas October 10 was County Court day, and the sale was made on the 10th. The evidence showed that the advertisement actually misled the defendant, and the sale was set aside.

4. *Mistake Not Misleading.* — *Jensen v. Weinlander*, 25 Wis. 477, where the sale was advertised to take place on the 6th of December, 1761, instead of 1861.

5. *California.* — *Hellman v. Merz*, 112 Cal. 661.

Georgia. — *Boyd v. McFarlin*, 58 Ga. 208.

Kansas. — *Watkins v. Williams*, 33 Kan. 149; *Whitaker v. Beach*, 12 Kan. 493; *McCurdy v. Baker*, 11 Kan. 112.

Louisiana. — *Gernon v. Bestick*, 15 La. Ann. 697, where thirty days' notice was held requisite to the validity of a judicial sale of landed property; *Luckett v. Crain*, 29 La. Ann. 128.

Maine. — *Sawyer v. Wilson*, 61 Me. 529, where a defective notice for want of sufficient time was held not to be cured by a postponement of the sale on the day appointed therefor to one remote enough to answer the statutory requirements.

New Jersey. — *Parsons v. Lanning*, 27 N. J. Eq. 70, where, under a statute requiring four weeks' notice, an intervening time of twenty-six days was held insufficient.

and an advertisement held sufficient if inserted the requisite number of weeks required by statute, although full weeks had not elapsed between the date of the first publication and the date of sale.¹

In Computing Time either the date of the first publication or the day of the sale is excluded and the other included.²

Successive Weeks. — Where the statute requires notice to be published for a certain number of "weeks successively" or "successive weeks," the usual interpretation is that publication must be made for the full number of weeks, and that a notice is insufficient where the full time did not elapse between the date of the first insertion and the time of sale.³ Such statutes have, however, been interpreted as meaning simply the prescribed number of successive weekly publications, independent of the time intervening between the first publication and the date of sale.⁴

Prescribed Number of Days. — Where a statute requires that a publication of notice shall be made for a certain number of days before the date of sale, by advertisement in some newspaper printed in the county, such advertisement must be inserted in each edition of the paper.⁵ This rule seems to be uniform, with the exception of a dictum in an early case.⁶

New York. — *Denning v. Smith*, 3 Johns. Ch. (N. Y.) 332. In *Romaine v. McMillen*, 5 How. Pr. (N. Y. Supreme Ct.) 318, it was held that in a sale in partition the notice must be for six weeks, the statutory time; that the rule of court No. 54 had no application to such sales, such rule applying only in cases where no time is fixed by statute.

Wisconsin. — *Collins v. Smith*, 57 Wis. 284, holding that under a statute requiring six weeks' notice in a sale of land on execution, a publication first made on June 24, and last on July 29, the sale taking place on August 2, was insufficient and the sale void. In *Herriock v. Graves*, 16 Wis. 157, a publication first made on the 9th day of June, and for six weeks till the 21st day of July, was held sufficient.

United States. — *Early v. Doe*, 16 How. (U. S.) 610.

1. Contrary Doctrine. — *Wood v. Morehouse*, 45 N. Y. 368; *Olcott v. Robinson*, 21 N. Y. 151 [*reversing* *Olcott v. Robinson*, 20 Barb. (N. Y.) 148]; *Hollister v. Vanderlin*, 165 Pa. St. 248; *Maddox v. Sullivan*, 2 Rich. Eq. (S. Car.) 4.

Laches in Raising Objection. — See *McBride v. Gwynn*, 33 Fed. Rep. 402, where objection made two years after the sale that the notice of sale was defective in that it was not published the

length of time required by law by but one day was not sustained because such objection should have been made in apt time.

Collateral Attack. — In *Doe v. Jackson*, 51 Ala. 514, it was held that the validity of the sale was not affected when collaterally assailed by the fact that only three weeks' notice of the sale was given, instead of forty days as required.

2. *Smith v. Rowles*, 85 Ind. 264; *Meredith v. Chancey*, 59 Ind. 466; *Sanders v. Norton*, 4 T. B. Mon. (Ky.) 464; *Worley v. Naylor*, 6 Minn. 192; *Hagerman v. Ohio Bldg., etc., Assoc.*, 25 Ohio St. 186; *Williamson v. Farrow*, 1 Bailey L. (S. Car.) 611; *Manning v. Dove*, 10 Rich. L. (S. Car.) 395.

3. *Meredith v. Chancey*, 59 Ind. 466; *Smith v. Rowles*, 85 Ind. 264; *Francis v. Norris*, 2 Miles (Pa.) 150; *Boyd v. McFarlin*, 58 Ga. 208; *Early v. Doe*, 16 How. (U. S.) 610.

4. *Pearson v. Bradley*, 48 Ill. 250; *Frazier v. Steenrod*, 7 Iowa 339; *Hollister v. Vanderlin*, 165 Pa. St. 248.

5. *Rounsaville v. Hazen*, 33 Kan. 71; *Watkins v. Williams*, 33 Kan. 149; *Whitaker v. Beach*, 12 Kan. 493; *McCurdy v. Baker*, 11 Kan. 112; *Lawson v. Gibson*, 18 Neb. 137; *Harris's Petition*, 14 R. I. 637.

6. *Craig v. Fox*, 16 Ohio 563, under a

Under a Statute Requiring Weekly Publications, a publication in a weekly newspaper is sufficient,¹ and where the publication is made in a daily paper, one insertion each week is sufficient.²

Prescribed Period. — Where the statute requires that the publication shall be made for a certain period "next before said sale," a failure to continue the publication in the last edition of the paper prior to the sale is a fatal defect.³

Premature Publication. — The fact that the notice was printed and published in advance of the day of the week on which the publication was usually made is not material.⁴

d. CHARACTER OF NEWSPAPER — In General. — Under the various statutes requiring notice of sale to be given by publication in some newspaper, it is impossible to give any absolute rule by which to determine in each instance whether or not an advertisement in a particular newspaper will constitute a legal publication. The adjudicated cases, however, bear out fully the general underlying principle of requiring publication to be made in such a manner that general publicity will be given, competition invited,

statute requiring that lands taken in execution shall not be sold until the officer causes public notice of the time and place of sale to be given by advertisement in some newspaper for at least thirty days before the day of sale. The case, however, was decided upon other grounds. See also criticism of this case in *Lawson v. Gibson*, 18 Neb. 137, and *Whitaker v. Beach*, 12 Kan. 493.

1. *Rounsaville v. Hazen*, 33 Kan. 71; *Watkins v. Williams*, 33 Kan. 149; *Whitaker v. Beach*, 12 Kan. 493; *McCurdy v. Baker*, 11 Kan. 112; *Lawson v. Gibson*, 18 Md. 137.

2. *Harris's Petition*, 14 R. I. 637; *Matter of Cunningham*, 73 Cal. 558, in which case the court said: "The phrase 'three weeks successively' evidently means the same thing as 'three successive weeks.' It simply indicates the time during which the sale must be advertised, and not the manner of the publication, as that it shall be published successively during that period. The word 'successively' refers to weeks, and not to the publications of the paper. It is, therefore, within the provisions of section 1705, Code of Civil Procedure, a case in which the judge or court may order a publication for a less number of times than each issue of the paper; that is, it is not otherwise expressly provided. In this instance such an order was made by the court."

3. *Hellman v. Merz*, 112 Cal. 661; *Hartley v. Croze*, 38 Minn. 325; *Wat-*

kins v. Williams, 33 Kan. 149; *Rounsaville v. Hazen*, 33 Kan. 71; *Whitaker v. Beach*, 12 Kan. 493; *McCurdy v. Baker*, 11 Kan. 112; *Valentine v. McCue*, 26 Hun (N. Y.) 456, a foreclosure sale, wherein the court said: "The statute (Code, § 1678) requires that the notice of sale must be given by publishing it at least twice in each week for three successive weeks immediately preceding the sale, upon two days in each week, and the notice of sale was so published. It is certainly not necessary to cite any authority to establish the legal proposition that a week is a period of seven days of time, commencing at twelve o'clock on Saturday night and ending at the same hour on the following Saturday night. The first day is called Sunday, and the seventh Saturday. See 2 Bouv. Law Dict. 647; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 361. See also *Bunce v. Reed*, 16 Barb. (N. Y.) 347; *Anonymous*, 1 Wend. (N. Y.) 90; *Steinle v. Bell*, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 171. The period of a week, therefore, is seven full days, and when a publication is directed to be made twice a week for three weeks it means that there shall be a period of twenty-one days before the sale, calculated by weeks, during each of which two publications shall be made, and this shall occur without regard to the day of the week when the publication was commenced."

4. *Wilson v. Scott*, 29 Ohio St. 636.

and the object sought to be obtained by the notice, namely, the attendance of bidders, conserved.¹

Paper Devoted to Legal News. — Thus the various papers throughout the country devoted to the dissemination of legal news have been held to be newspapers, under the various statutes,² with but few exceptions.³

1. Illustrations. — In *Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273, under a statute which required publication to be made in a "newspaper, if there is any, published in the city or town wherein the mortgaged premises are situated," it was held that a newspaper called the *Dighton Rock* was published in Fall River, where it had the same contents as a newspaper called the *Fall River Advertiser*, but a different heading and date line, and was printed in Fall River, and a few copies of it sent to Dighton to regular subscribers and for sale or distribution.

In *Smith v. Foxworthy*, 39 Neb. 214, it was held, under a statute requiring publication to be made in some newspaper of general circulation, that general circulation in any particular portion of the county was not required.

In *State v. Holliday*, 35 Neb. 327, the court said: "The object of advertising property for sale is in order that publicity may be given to the sale and competition invited. Legal advertisements should not be inserted in an obscure paper where the probabilities are that they will be seen by but few, where there is a paper of general circulation in the county, because the object of the law will be in part at least defeated."

In *Williams v. Colwell*, 18 Misc. Rep. (N. Y. Supreme Ct.) 399, 26 Civ. Pro. Rep. (N. Y.) 66, a paper mainly devoted to financial and mercantile affairs, but containing several columns of local and general news, with a large home and foreign circulation by subscription, although not sold on the news stands, was held to be a newspaper within the meaning of the statute.

In *Craig v. Fox*, 16 Ohio 564, it was held that publication in a newspaper which circulated in the city, but did not circulate throughout the county, was not such a publication as justified the confirmation of the sale, although the letter of the law had been literally complied with.

2. In *Maass v. Hess*, 140 Ill. 576, 41 Ill. App. 282, the *National Corpora-*

tion Reporter, a weekly publication of twenty pages, including a colored cover of four pages, three of which were occupied with advertisements and the front one by the title, and the intermediate pages with reading matter, mainly but not exclusively relating to law and finance of interest to corporations, was held to be a newspaper within the meaning of Rev. Stat. Ill., c. 100, § 1, and the notice was consequently valid.

In *Pentzel v. Squire*, 161 Ill. 346, the *Chicago Law Journal Weekly*, a secular newspaper of general circulation, with sixteen pages of twelve and one-half inches in length, and ten inches in width, circulating among lawyers and laymen, containing reports of adjudicated cases, news of general nature, and with a weekly circulation of 3,875 copies, was held to be a newspaper under the statute.

In *Railton v. Lauder*, 126 Ill. 219, 26 Ill. App. 655, the *Chicago Daily Law Bulletin*, a publication of thirty years' standing, and devoted largely to legal matters and court notices, but containing a variety of advertising matter and news of a general and secular character, and circulating among lawyers and business men generally, was held to be a newspaper of general circulation within the meaning of the statute.

In *Kerr v. Hitt*, 75 Ill. 51, the *Chicago Legal News*, although devoted principally to legal notices, was held to be a newspaper under a statute.

In *Benkendorf v. Vincenz*, 52 Mo. 441, the *St. Louis County Legal Record and Advertiser* was held to be a newspaper for the purpose of publishing judicial notices, *following Kellogg v. Carrico*, 47 Mo. 157.

See also *Lynch v. Durfee*, 101 Mich. 171.

3. Exceptions. — *Beecher v. Stephens*, 25 Minn. 146, where the court said: "The question which we are asked to determine is whether the *Northwestern Reporter* is a newspaper, within the contemplation of the statute? This is a twelve-page weekly publication, somewhat differing in size and shape

Religious Newspapers. — Likewise, publication of notice in a weekly religious newspaper is held to be sufficient to constitute a "lawful" publication,¹ although such religious weekly contains matter of special interest to a particular religious denomination, but contains in addition the general news of the day.²

Proscribed Sunday Paper. — Under a "Sunday law" statute, publication of notice in a Sunday newspaper is void.³

Other Than "Official Journal." — Publication in a paper other than an "official journal" provided for by statute is valid.⁴

c. PROOF OF NOTICE. — Proof of publication is usually and properly made by affidavit of the publisher of the paper or some one connected therewith who is acquainted with the facts.⁵ And proof of publication in a paper printed by a corporation made by an agent of such corporation is sufficient.⁶ In *Iowa*, in a guard-

from an ordinary newspaper, though the difference is not such as to render it improper to denominate it a newspaper, provided its usual contents are, in general character, like the usual contents of newspapers. It purports to be and is 'devoted specially to the interests of the legal profession.' Its usual contents are the general laws of this state, published shortly after their passage, the 'decisions' of the Supreme Court of this state, the 'decisions' of the Supreme Court of Wisconsin, and occasional decisions of other courts, a court directory, cards of attorneys and counselors at law, a list of transfers of real estate in Ramsey county, advertisements and notices of law books, about a page of miscellaneous business advertisements, and legal anecdotes. Except as above, it does not publish, nor assume to publish, what is understood by the current news or news of the day. Newspapers are of so many varieties that it would be next to impossible to give any brief definition which would include and describe all kinds of newspapers. We are not called upon to incur the risk of giving any such definition at this time. It will be sufficient for all the purposes of this case to say that in the ordinary understanding of the word a newspaper is a publication which usually contains, among other things, what is called the general news, the current news, or the news of the day; and nothing which does not usually contain such news, and is intended for general circulation, is a newspaper, in the ordinary sense of the word. Such a newspaper is a publication adapted to the general reader. Now, in the absence of some control-

ling consideration to the contrary, the statute is to be taken to have used the word newspaper in its ordinary sense, or, as Gen. Stat., c. 4, § 1, expresses it, 'according to the common and approved usage of the language;' and when the object of the publication of a summons is considered, the reasonableness of such a construction of the word newspaper as requires the publication to be made where it will be likely to meet the eye of the general reader is quite apparent. For these reasons we are of opinion that the Northwestern Reporter, though it may properly enough be denominated a 'legal newspaper,' is not a newspaper within the meaning of the statute above cited."

1. *Hernandez v. Drake*, 81 Ill. 34.

2. *Hull v. King*, 38 Minn. 349.

3. *Shaw v. Williams*, 87 Ind. 158;

Smith v. Wilcox, 24 N. Y. 353.

4. *Thulemeyr v. Jones*, 37 Tex. 560.

5. *School Trustees v. Snell*, 19 Ill. 156; *Gray v. Worst*, 129 Mo. 122; *Wescott v. Archer*, 12 Neb. 345; *Craig v. Fox*, 16 Ohio 564; *Sexton v. Rhames*, 13 Wis. 99.

6. *Maass v. Hess*, 140 Ill. 576; *Pentzel v. Squire*, 161 Ill. 346, where, under a statute providing that when any notice shall be required by law or order of court, or by the contract, to be published in any newspaper, and no other mode of proving the same is provided, a certificate of the publisher, by himself or his authorized agent, with a written or printed copy of said notice annexed, stating the number of days which the same shall have been published and the dates of the first and last papers containing the same, shall be sufficient evidence of the publication therein set

ian's sale, the affidavit of the guardian as to publication of notice is recognized as the legal method of proof.¹ In a trustee's sale proof of publication was admitted to supplement an omission in the printer's affidavit,² and parol evidence³ and affidavits⁴ have been admitted in execution sales, but an amended affidavit was refused where parties in interest had refused to bid on property under the belief that the publication was insufficient as shown by the original affidavit on file.⁵

X. CONDUCT OF SALE — 1. Place of Sale — a. CONFORMITY TO NOTICE. — The sale must be held at the place designated in the notice of sale.⁶ And the fact that the defendant in execution directed the levy and sale will not be construed as a waiver of his right to have the property sold in conformity with the notice.⁷

b. COUNTY IN WHICH THE PREMISES ARE SITUATED. — The authorities unite in declaring that the property must be sold in the county in which it is situated.⁸ Where property is

forth (2 Starr & Curt. Anno. Stat., p. 1674), the following certificate of publication was approved by the court: "This is to certify that the notice, a true copy of which is hereto annexed, was published in The Chicago Law Journal Weekly, a secular newspaper of general circulation, published weekly in the city of Chicago, Cook county and state of Illinois, by the Law Journal Print, a corporation existing under the laws of the state of Illinois, three times, for three weeks successively; that the date of the first publication was the 31st day of January, A. D. 1896, and the last publication was the 14th day of February, A. D. 1896.

"In testimony whereof the Law Journal Print has caused this certificate to be signed by its authorized agent, and the corporate seal thereof to be affixed, this 15th day of February, A. D. 1896.

Law Journal Print.
Fred. L. Morrison,
Authorized Agent."

1. Frazier v. Steenrod, 7 Iowa 339.

2. Gray v. Worst, 129 Mo. 122.

3. Cocke v. Lane, 3 Smed. & M. (Miss.) 763.

4. By affidavit of the publisher it was shown that the paper designated by the sheriff in his return as "The Democrat" was the same paper as designated in the proof of publication "The Columbus Democrat," and it was held that there was no conflict or inconsistency. Kuhn v. Kilmer, 16 Neb. 699.

5. Hellman v. Merz, 112 Cal. 661.

6. Murphy v. Hill, 77 Ind. 129; Per-

kins v. Spaulding, 2 Mich. 157; Evarts v. Burgess, 48 Vt. 205; Hall v. Ray, 40 Vt. 576; Talley v. Starke, 6 Gratt. (Va.) 339.

7. Murphy v. Hill, 77 Ind. 129.

8. **Indiana.** — In Holmes v. Taylor, 48 Ind. 169, it was held that lands in different counties embraced in one mortgage may be foreclosed in either county, and that each tract must be sold at the door of the court-house of the county wherein it is situated.

In Thacher v. Devol, 50 Ind. 30, it was held that a sale made by virtue of an execution issued on a judgment obtained in the United States court could not be executed in a county other than that in which the premises were situated. See also Jenners v. Doe, 9 Ind. 461.

Kansas. — Morrell v. Ingle, 23 Kan. 32.

Michigan. — Baker v. Casey, 19 Mich. 220, where it was held that section 33 of the Water Craft Act (Laws of 1864, p. 109), which confers concurrent jurisdiction upon the Circuit Courts of certain adjoining counties over all water craft within the limits of either county, and provides that process issued in either may be served in the waters of either by the sheriff of either county, will not authorize the sheriff of one county to seize property out of his bailiwick away from the water, nor to pursue and retake there property which had once been in his custody under the act.

Pennsylvania. — Ulshafer v. Stewart, 71 Pa. St. 170; Menges v. Oyster, 4 W. & S. (Pa.) 20.

situated in different counties each tract must be sold in the county of its location,¹ in the absence of special statutory enactment.² Where a judgment has been obtained, and subsequently the premises upon which the judgment is a lien are included within a newly organized county, the sale must take place in such new county³ unless the levy has been made prior to the subdivision.⁴

c. COURT-HOUSE. — By statutory enactment in nearly all the states, all sales of realty must be held at the court-house in the county in which the property is situated,⁵ and where a sale is made by virtue of an execution from the United States court the

South Carolina. — *Finley v. South Carolina Canal, etc., Co.*, 2 Rich. L. (S. Car.) 567, where the sheriff levied upon and sold a tract of ground embraced in two counties, and it was held that the sale was valid for only that portion lying in his own district.

Texas. — *Terry v. O'Neal*, 71 Tex. 592; *Alred v. Montague*, 26 Tex. 733.

United States. — *Short v. Hepburn*, 41 U. S. App. 520, 75 Fed. Rep. 113, where the court said: "And article 2303 is: 'Real property taken by virtue of any execution shall be sold by public auction at the court-house door of the county,' etc. Considering these statutes, the Supreme Court of Texas, without contradiction, so far as we are advised, have uniformly held that a sheriff's sale of lands lying outside of his county is void. *Alred v. Montague*, 26 Tex. 733; *Casseday v. Norris*, 49 Tex. 613; *Lewis v. Dennis*, 54 Tex. 487; *Terry v. O'Neal*, 71 Tex. 594. Counsel for defendant in error cites, as modifying the foregoing decisions, *Oppenheimer v. Reed*, 11 Tex. Civ. App. 367; *Smith v. Perkins*, 81 Tex. 157; *Williams v. Haynes*, 77 Tex. 283. An examination of these cases shows that they are inapplicable, and do not affect the proposition that a sale by a sheriff of land lying and situated outside of his bailiwick is void."

1. *Holmes v. Taylor*, 48 Ind. 169; *Menges v. Oyster*, 4 W. & S. (Pa.) 20; *Finley v. South Carolina Canal, etc., Co.*, 2 Rich. L. (S. Car.) 567; *Alred v. Montague*, 26 Tex. 733.

2. *Fambrough v. Amis*, 58 Ga. 519, where it was held under a special statute that when a tract of land is divided by the line of the county in which the defendant in execution resides the whole tract can be levied upon and sold by the sheriff of that county, as his

property, but not by the sheriff of the adjoining county.

3. *Morrell v. Ingle*, 23 Kan. 32; *Kent v. Roberts*, 2 Story (U. S.) 591.

4. *Tyrell v. Rountree*, 7 Pet. (U. S.) 464, affirming *Tyrell v. Rountree*, 1 McLean (U. S.) 95; *Lofland v. Ewing*, 5 Litt. (Ky.) 42; *Ulshafer v. Stewart*, 71 Pa. St. 170, where, under an express statute, the powers of the officers of a county annexed to another were continued as regarded all pending suits.

5. **Alabama.** — *Anniston Pipe Works v. Williams*, 106 Ala. 334, where, under Ala. Code, § 2907, providing that execution sales of land shall be at the court-house of the county, it was held that such sale could be at the court-house where a city court was held under the provisions of an act making it co-ordinate with the Circuit and Chancery courts.

Arkansas. — *Sessions v. Peay*, 23 Ark. 39.

California. — *Smith v. Morse*, 2 Cal. 524.

Georgia. — *Longworthy v. Featherston*, 65 Ga. 165.

Louisiana. — *Union Bank v. Smith*, 3 La. Ann. 147.

Mississippi. — *Koch v. Bridges*, 45 Miss. 247.

Missouri. — *Mers v. Bell*, 45 Mo. 333, where judgment was obtained in the Common Pleas Court, but the sale was held at the court-house door of the Circuit Court, and under the statutes such sale was held valid.

North Carolina. — *Biggs v. Brickell*, 68 N. Car. 239, where a sale made at the court-house door under a general statute was sustained in spite of the fact that a local law required the sale to be made on the premises.

Texas. — *Hickey v. Behrens*, 75 Tex. 488; *Grace v. Garnett*, 38 Tex. 157; *Howard v. North*, 5 Tex. 290.

state law directing the place of sale governs.¹ In some jurisdictions the place of sale is left to the discretion of the officer holding the writ.² Where the circumstances are such that a literal compliance with the statute is impossible, a sale will be sustained if good faith is shown and no prejudice has resulted.³

d. VOID SALES OF REALTY.—A sale of realty held at an improper place is void.⁴

e. PERSONALTY—(1) *In General.*—In the Sale of Personal Property it is an invariable rule that the property sold must be exposed in the presence of the purchaser.⁵ This rule is relaxed only where

1. *Smith v. Cockrill*, 6 Wall. (U. S.) 756; *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Sinclair v. Stanley*, 64 Tex. 67; *Casseday v. Norris*, 49 Tex. 613; *Moody v. Moeller*, 72 Tex. 635.

2. *Howland v. Pettet*, 15 R. I. 603, where a sale twenty miles distant from the premises was sustained although it was customary to hold sales on the premises, as it appeared from the circumstances that bidders would be less likely to be present on the premises than at the place selected for the sale. *Cowgill v. Cahoon*, 3 Harr. (Del.) 23, where the discretionary rights of the sheriff were recognized, but held subject to review for abuse of such discretion.

3. *Longworthy v. Featherston*, 65 Ga. 165, where at the time of the sale the court-house was burned. The sheriff went to the site of the burned court-house, and, the sun being hot, adjourned the sale to a grove near by and in full view. The sale was well attended and the property brought a full price. The sale was sustained.

In *Wilhelm v. Schmidt*, 84 Ill. 183, under a power to sell at the door of the court-house, since destroyed by fire, a sale at the new court-house was sustained.

In *Patterson v. Reynolds*, 19 Ind. 148, the officer, owing to the inclemency of the weather, announced that he would stand inside the court-house door, and did so; and the sale was held valid.

In *Union Bank v. Smith*, 3 La. Ann. 147, where the court-house was removed after the commencement of the judgment, a sale at the new seat of justice was sustained.

In *Perkins v. Spaulding*, 2 Mich. 157, a sale of personal property was held about thirty rods from the place advertised, but in full view of such place. It was held that the sale was

made substantially at the place appointed and was upheld.

In *Hickey v. Behrens*, 75 Tex. 488, the sale was held at "the usual and customary place of making such sales—at the south door of said court-house." The trust deed provided for a sale at the east door. It was held that the deviation from the terms of the deed was immaterial unless injury was shown therefrom.

4. *Koch v. Bridges*, 45 Miss. 247; *Mayers v. Carter*, 87 N. Car. 146; *Sinclair v. Stanley*, 64 Tex. 67; *Tippett v. Mize*, 30 Tex. 362; *Brown v. Christie*, 27 Tex. 75; *Peters v. Caton*, 6 Tex. 554; *Howard v. North*, 5 Tex. 290; *Grace v. Garnett*, 38 Tex. 157.

5. *Smith v. Morse*, 2 Cal. 524; *Paulsen v. Hall*, 39 Kan. 365, holding a sale invalid where the property was seized in one township and advertised and sold in another; *Burns v. Ray*, 18 B. Mon. (Ky.) 392; *Baker v. Casey*, 19 Mich. 220; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Boylan v. Kelly*, 36 N. J. Eq. 331; *Earle v. Gorham Mfg. Co.*, 2 N. Y. App. Div. 460; *Stonebridge v. Perkins*, 2 Misc. Rep. (N. Y. Super. Ct.) 162; *Sheldon v. Soper*, 14 Johns. (N. Y.) 353. See also *Klopp v. Witmoyer*, 43 Pa. St. 219; *Brown v. Lane*, 19 Tex. 203.

In *Linnendoll v. Doe*, 14 Johns. (N. Y.) 222, where part of the property was present and part absent, the sale was held valid only as to the property present.

In *Warring v. Loomis*, 4 Barb. (N. Y.) 484, a designation by the constable that thirteen of the fattest sheep in the flock would be sold was held too indefinite to sustain the sale.

In *Bennett's Branch Imp. Co.'s Appeal*, 65 Pa. St. 242, a sale of logs mingled in the boom with an immense amount of other logs of the owner and others was held invalid.

circumstances are such as to make actual view inconvenient, and where no prejudice results in the sale of the property,¹ or where the debtor waives the exposure of the property.²

(2) *Void or Voidable*. — The great weight of authority is that a sale of personal property is void if made in violation of the rule that the property must be sold in the presence of the bidders.³ On the other hand, it has been held that such sale may be set aside upon motion, but that it is not void.⁴

2. *Time of Sale* — *a. UNDER STATUTES*. — Where a time of sale is fixed by the statutes, a sale made in violation of the same is a nullity.⁵

1. In *Phillips v. Brown*, 74 Me. 549, a barn situated in a sparsely settled place was sold at a convenient place in the neighborhood, and not in view of the barn. The sale was sustained, it appearing that no unfair practice took place, and moreover that the sale occurred in an inclement season of the year.

In *National Bank v. Sprague*, 20 N. J. Eq. 159, a sale of the furniture of a hotel was sustained although the furniture was not in view at the time of the sale, but remained locked in a room of the hotel, it not appearing that any one desiring to inspect it was refused leave.

In *Earle v. Gorham Mfg. Co.*, 2 N. Y. App. Div. 460, a sale of silverware was sustained although the property was in an adjoining room and about a hotel when sold. The rooms, however, were open to the public, and any one could have examined the property.

In *Bruce v. Westervelt*, 2 E. D. Smith (N. Y.) 440, a sale of the contents of a vault was sustained although such vault was apart from the room wherein the sale took place.

In *McNeeley v. Hart*, 8 Ired. L. (N. Car.) 492, it is held that the property need not be literally in the sheriff's hands or directly under his hammer, but it must be in such a situation that the bidders can see it and have an opportunity to examine its quality and value.

See also *Klopp v. Witmoyer*, 43 Pa. St. 219, where it is held that while personal property must be in the power of the sheriff when he sells, and where bidders may inspect it, yet the articles need not be immediately in view when sold.

2. *Gift v. Anderson*, 5 Humph. (Tenn.) 577.

In *Cook v. Timmons*, 67 Ill. 203, not

only the execution debtor, but all the creditors, assented to the sale of a crop of corn three miles away from the field.

In *Earle v. Gorham Mfg. Co.*, 2 N. Y. App. Div. 460, the court said, *obiter*: "It may be added that the defendant in the execution was present at the sale and made no objection. Since then he has fully recognized the plaintiff's title, and has acted for her in her relations to the property."

3. *Arkansas*. — *Kennedy v. Clayton*, 29 Ark. 270; *Rowan v. Refeld*, 31 Ark. 648.

Illinois. — *Tibbetts v. Jageman*, 58 Ill. 43; *Herod v. Bartley*, 15 Ill. 58.

Indiana. — *Murphy v. Hill*, 77 Ind. 129; *Wright v. Mack*, 95 Ind. 332; *Gaskill v. Aldrich*, 41 Ind. 338.

Kentucky. — *Bostick v. Keizer*, 4 J. J. Marsh. (Ky.) 597.

Michigan. — *Winfield v. Adams*, 34 Mich. 437.

New York. — *Linnendoll v. Doe*, 14 Johns. (N. Y.) 222; *Cresson v. Stout*, 17 Johns. (N. Y.) 116.

North Carolina. — *Ainsworth v. Greenlee*, 3 Murph. (N. Car.) 470; *Blanton v. Morrow*, 7 Ired. Eq. (N. Car.) 47; *Smith v. Tritt*, 1 Dev. & B. L. (N. Car.) 241.

South Carolina. — *Collins v. Montgomery*, 2 Nott & M. L. (S. Car.) 392.

Tennessee. — *Gift v. Anderson*, 5 Humph. (Tenn.) 577.

4. *Foster v. Mabe*, 4 Ala. 402; *Hazard v. Burton*, 4 Harr. (Del.) 62; *Eads v. Stephens*, 63 Mo. 90.

In *Kean v. Newell*, 1 Mo. 754, it was held that an innocent purchaser acquires a good title although the property is not present at the time of the sale, the sheriff being liable in damages if he acts improperly. See also *Morrow v. McGregor*, 49 Ark. 67.

5. *Morey v. Hoyt*, 65 Conn. 516; *Mayers v. Carter*, 87 N. Car. 146; *Grace*

b. CONFORMITY TO NOTICE. — The sale should, as a matter of course, be held at the time designated in the advertised notice of sale.¹ And it is generally held that a failure so to sell renders the sale void.²

c. AFTER RETURN DAY — (1) Real Property. — As to the validity of a sale made after the return day the authorities are conflicting. They resolve themselves into, first, where both the levy and sale are made after the return day, and, second, where the levy is made prior to the return day, but the sale is made after. And the latter proposition is again divided, first as to those states which have special statutes prohibiting the sale after the return day, and second, where there is no special prohibition by statute. As to the first proposition, namely, where both the levy and sale are made after the return day, it is uniformly held that the proceedings are absolutely void.³ And as to the second, where the levy is made prior to the return day, the weight of authority is that the sale may properly be made after the return day where there is no prohibitive statute.⁴ However, many decisions hold

v. Garnett, 38 Tex. 158; *Howard v. North*, 5 Tex. 290; *Brown v. Christie*, 27 Tex. 73, a guardian's sale where it was held that a sale made at a time other than that prescribed by law is void, but that where such sale has been confirmed by the Probate Court it cannot be collaterally questioned in a suit for the land, particularly by a party who in good faith derives his title under a purchase at such sale. *Conrad v. Darden*, 4 Verg. (Tenn.) 308.

1. *State v. Byrd*, 42 Ga. 629; *McConnel v. Gibson*, 12 Ill. 128; *Jarboe v. Colvin*, 4 Bush (Ky.) 70; *Hahn v. Pindell*, 1 Bush (Ky.) 538; *Wheatley v. Terry*, 6 Kan. 427.

2. *State v. Byrd*, 42 Ga. 629; *Wheatley v. Terry*, 6 Kan. 427; *Hahn v. Pindell*, 1 Bush (Ky.) 538.

In *Wienskawski v. Visner*, (Mich. 1897), 72 N. W. Rep. 177, an execution sale prior to the date advertised was held void.

Illinois Rule. — But in Illinois it would seem that a departure furnishes ground for setting aside the sale, but does not render it void. *McConnel v. Gibson*, 12 Ill. 128. See also the following cases where, in connection with other irregularities, the sale was held valid unless objection were made in apt time: *Fairman v. Peck*, 87 Ill. 156; *Hay v. Baugh*, 77 Ill. 500; *Conover v. Musgrave*, 68 Ill. 58; *Osgood v. Blackmore*, 59 Ill. 261; *Jackson v. Spink*, 59 Ill. 404; *Hamilton v. Lubukee*, 51 Ill. 415.

3. *Delaware.* — *West v. Shockley*, 4 Harr. (Del.) 287.

Louisiana. — *Frellsen v. Anderson*, 14 La. Ann. 65.

Mississippi. — *Lehr v. Rogers*, 3 Smed. & M. (Miss.) 468, sold after return day.

Missouri. — *State Bank v. Bray*, 37 Mo. 194; *Jefferson v. Curry*, 71 Mo. 85.

New Hampshire. — *Rangeley v. Goodwin*, 18 N. H. 217.

New Jersey. — *Kemble v. Harris*, 36 N. J. L. 526.

New York. — *Vail v. Lewis*, 4 Johns. (N. Y.) 451.

South Carolina. — *M'Elwee v. Sutton*, 2 Bailey L. (S. Car.) 361; *Ross v. M'Cartan*, 1 Brev. (S. Car.) 507.

Vermont. — *Barnard v. Stevens*, 2 Aik. (Vt.) 429.

4. *California.* — *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217.

Idaho. — *Ollis v. Kirkpatrick*, 2 Idaho 976.

Illinois. — *Bryant v. Dana*, 8 Ill. 344; *Willoughby v. Dewey*, 63 Ill. 246; *Phillips v. Dana*, 4 Ill. 551.

Indiana. — *Lowry v. Reed*, 89 Ind. 442; *Tillotson v. Doe*, 5 Blackf. (Ind.) 590; *Rose v. Ingram*, 98 Ind. 276.

Iowa. — *Wright v. Howell*, 35 Iowa 288; *Moomey v. Maas*, 22 Iowa 380.

Kentucky. — *Harrodsburg Sav. Inst. v. Chinn*, 7 Bush (Ky.) 539; *Cox v. Joiner*, 4 Bibb (Ky.) 94.

Maryland. — *Gaither v. Martin*, 3 Md. 146; *Moreland v. Bowling*, 3 Gill (Md.) 500.

that a sale of real property made under an execution after the return day is void, and this holding is based upon the theory that a levy upon lands vests no right of possession or property in the officer, while a levy upon personal property from the very nature of the case changes the possession and places it in his hands.¹ A sale made after the return day is void under a statute requiring the writ in any event to be returned at the expiration of the time limitation, or otherwise prohibiting the sale after return day without new process.²

(2) *Personal Property*.—The rule is uniform that personal property may be sold after the return day provided it has been reduced to possession prior to that time, and such rule is based upon the fact that the officer's authority rests upon the possession of the property and not upon the writ.³

d. LIMITATIONS.—A valid sale cannot be made after the expiration of the statutory period for which the judgment is a lien,⁴

Massachusetts.—Heywood v. Hil-dreth, 9 Mass. 393.

Michigan.—Ward v. Citizen's Bank, 46 Mich. 332.

Minnesota.—Spencer v. Haug, 45 Minn. 231; Pettingill v. Moss, 3 Minn. 222; Barrett v. McKenzie, 24 Minn. 20.

Missouri.—Kane v. McCown, 55 Mo. 181; State Bank v. Bray, 37 Mo. 194; Stewart v. Severance, 43 Mo. 322.

Nebraska.—Wyant v. Tuthill, 17 Neb. 495; Johnson v. Bemis, 7 Neb. 224.

New York.—Wood v. Colvin, 5 Hill (N. Y.) 230.

Pennsylvania.—McCormick v. Meason, 1 S. & R. (Pa.) 92.

South Carolina.—Leger v. Doyle 11 Rich. L. (S. Car.) 109; Gassaway v. Hall, 3 Hill L. (S. Car.) 289.

Vermont.—Barnard v. Stevens, 2 Aik. (Vt.) 429.

United States.—Remington v. Linthicum, 14 Pet. (U. S.) 84; Wheaton v. Sexton, 4 Wheat. (U. S.) 503; Mason v. Bennett, 52 Fed. Rep. 343.

1. Hawes v. Rucker, 94 Ala. 166; Sheppard v. Rhea, 49 Ala. 125; Smith v. Mundy, 18 Ala. 182; Morgan v. Ramsey, 15 Ala. 190; Doe v. M'Kinnie, 4 Hawks (N. Car.) 279; Love v. Gates, 2 Ired. L. (N. Car.) 14; Overton v. Perkins, 10 Yerg. (Tenn.) 329; Rogers v. Cawood, 1 Swan (Tenn.) 143.

2. *Kansas*.—Shultz v. Smith, 17 Kan. 306.

Mississippi.—Lehr v. Rogers, 3 Smed. & M. (Miss.) 468; Williamson v. Williamson, 52 Miss. 725; Kane v. Preston, 24 Miss. 133.

Nebraska.—Burkett v. Clark, 46 Neb. 466, a case wherein the court said *obiter*: "What is said herein with reference to the return of an execution or order of sale has no application to a case of an officer holding a certified copy of a decree, in and by which decree specific real estate is ordered sold."

Pennsylvania.—Dale v. Medcalf, 9 Pa. St. 108; Cash v. Tozer, 1 W. & S. (Pa.) 519.

Texas.—Cain v. Woodward, 74 Tex. 549; Mitchell v. Ireland, 54 Tex. 301; Hester v. Duprey, 46 Tex. 625; Young v. Smith, 23 Tex. 598; Towns v. Harris, 13 Tex. 508.

3. *Alabama*.—Bondurant v. Buford, 1 Ala. 359; Morgan v. Ramsey, 15 Ala. 190; Evans v. Governor, 18 Ala. 659.

Illinois.—Logsdon v. Spivey, 54 Ill. 104.

Kentucky.—Rudd v. Johnson, 5 Litt. (Ky.) 19.

North Carolina.—Doe v. M'Kinnie, 4 Hawks (N. Car.) 279; Doe v. Stone, 1 Hawks (N. Car.) 329.

Pennsylvania.—Spang v. Com., 12 Pa. St. 358.

Tennessee.—Overton v. Perkins, 10 Yerg. (Tenn.) 329; Evans v. Barnes, 2 Swan (Tenn.) 292; Lester's Case, 4 Humph. (Tenn.) 383.

Texas.—Hamilton v. Ward, 4 Tex. 356.

4. Conwell v. Watkins, 71 Ill. 488, where execution was levied, but no further action was taken for nineteen years, and it was held that the levy

or after the period for which license was granted.¹

c. EFFECT OF DEATH OF DEFENDANT — (1) *Sale of Realty*. — Where an execution issued during the lifetime of the defendant is in process of completion, the death of the defendant would seem, by a preponderance of the authorities, not to abate the proceedings.²

created no lien on the land; that the lien is that of the judgment; and that the lien of the execution did not operate to continue a lien of the judgment beyond the statutory period.

Martin v. Prather, 82 Ind. 535, where it was held that a sheriff's sale of land under an execution issued upon a transcript of a judgment of a justice of the peace filed more than ten years after its rendition is not void for want of revival, but is voidable only in a direct proceeding by the execution defendant, instituted before the sale.

Plaisted v. Hoar, 45 Me. 380, where it was held that the claim of an officer to personal property seized on execution is extinguished by his neglect to advertise and sell it within the time prescribed by statute.

Pasour v. Rhyne, 82 N. Car. 149, holding that a lien acquired by a levy of the writ of *feri facias* upon the land is lost by the issue of an alias *fi. fa.*, and a writ of *venditioni exponas* thereafter issued has no effect to continue or revive the levy of the first *fi. fa.* See also *Lyon v. Russ*, 84 N. Car. 588.

McCahan v. Elliott, 103 Pa. St. 634, where it was held that a judgment after five years loses its lien on real estate only as against other lienholders, creditors, or purchasers; as respects the defendant against whom the judgment was personally obtained, its lien continues after the expiration of five years, as before.

1. *Marr v. Boothby*, 19 Me. 150; *Mason v. Ham*, 36 Me. 573; *Macy v. Raymond*, 9 Pick. (Mass.) 285.

In *Wellman v. Lawrence*, 15 Mass. 326, a sale by an administrator, after a lapse of twelve years from the time of obtaining the license, was held void.

In *Hoffman v. Beard*, 32 Mich. 218, it was held that after the lapse of the period provided for the settlement of estates no license can be issued for the sale of land belonging to the estate. But see *Larzelere v. Starkweather*, 38 Mich. 96, and *Beniteau v. Dodsley*, 88 Mich. 152, where this case is criticised, and it is held that under some circumstances the time may be extended.

2. *Alabama*. — *Brown v. Newman*, 66 Ala. 275; *Hurt v. Nave*, 49 Ala. 459; *Jones v. Ray*, 50 Ala. 599; *Dryer v. Graham*, 58 Ala. 623; *Clark v. Kirksey*, 54 Ala. 219.

Arkansas. — *Barber v. Peay*, 31 Ark. 392.

Illinois. — *Davis v. Moore*, 103 Ill. 445.

Indiana. — *Doe v. Heath*, 7 Blackf. (Ind.) 154; *Doe v. Hayes*, 4 Ind. 117.

Iowa. — *Sprott v. Reid*, 3 Green (Iowa) 489.

Maine. — In *Coffin v. Freeman*, 84 Me. 535, the land was seized and advertised for sale during the lifetime of the judgment debtor.

Maryland. — *Jones v. Jones*, 1 Bland (Md.) 443; *Hanson v. Barnes*, 3 Gill & J. (Md.) 359.

Missouri. — *Lewis v. Coombs*, 60 Mo. 44.

New Jersey. — *Den v. Hillman*, 7 N. J. L. 180.

New York. — In *Wood v. Morehouse*, 45 N. Y. 368, the execution upon the judgment had issued and the premises had been advertised for sale by the sheriff during the lifetime of the judgment debtor, but the sale was made and the proceedings were completed after his death. It was held that the execution of the process was not arrested by the death of the judgment debtor, and that the sheriff could lawfully complete the execution of the process thus commenced.

North Carolina. — *Benners v. Rhinehart*, 107 N. Car. 705; *Aycock v. Harrison*, 65 N. Car. 8.

Ohio. — *Bigelow v. Renker*, 25 Ohio St. 542.

United States. — In *Erwin v. Dundas*, 4 How. (U. S.) 58, it is held that where an execution has issued during the lifetime of the defendant, but no actual levy has been made, the death of the defendant arrests the proceedings, and by implication, if an actual levy had been made under the execution, the death of the defendant would not have prevented completion of the process. See *Bleecker v. Bond*, 4 Wash. (U. S.) 6; *Taylor v. Doe*, 13 How. (U. S.)

(2) *Sale of Personalty*.—Where personal property is levied upon prior to the death of the defendant, the proceedings do not abate.¹

f. EFFECT OF DEATH OF PLAINTIFF.—An execution or order of sale once obtained is not abated by the death of the plaintiff.² But in *Kentucky* it would seem that a contrary rule is held; and in any event, the execution is abated if the levy is not made prior to the death of the plaintiff.³

288; *Mitchell v. St. Maxent*, 4 Wall. (U. S.) 237.

In *Kentucky* the death of the defendant at any time before the sale abates the execution, and a sale thereafter is void. *Huston v. Duncan*, 1 Bush (Ky.) 205, where the court said: "While the levy on movable property puts the thing in the officer's possession, either actually or constructively, and consequently vests him with a special property, a levy on land gives him no such possession, and consequently no such title. The death of the owner of the land, after the levy and before a sale, passes the whole title to his heirs, and without a revivor against them there is no title subject to sale by the levying officer, who could not, if he sell, pass any title to the purchaser. Such a sale, therefore, must be void." *Burge v. Brown*, 5 Bush (Ky.) 535; *Holeman v. Holeman*, 2 Bush (Ky.) 514; *Bristow v. Payton*, 2 T. B. Mon. (Ky.) 91.

In *Tennessee* it is held that a levy upon land does not divest the title of the owner, and therefore upon the death of the owner before the sale the inheritance descends, and the sheriff cannot sell until *scire facias* against the heirs. *Rutherford v. Read*, 6 Humph. (Tenn.) 423; *Stockard v. Pinkard*, 6 Humph. (Tenn.) 120, and *Overton v. Perkins*, 10 Yerg. (Tenn.) 329, where it is held that a *venditioni exponas*, issued against and levied on land in the lifetime of the judgment debtor, but awarded and tested after his death, is void. See also *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511, and *Puckett v. Richardson*, 6 Lea (Tenn.) 49.

In *Texas* the decisions have been somewhat vacillating; the later decisions, however, tend to harmonize with the weight of authority. *Cain v. Woodward*, 74 Tex. 549, where it was held that an execution issued and levied on land subsequently to the death of the defendant is only voidable.

In *Taylor v. Snow*, 47 Tex. 462, the case before the court was the sale of

property under execution after the death of the defendant, and such sale was held relatively void, but it was intimated that a sale under an execution made prior to the death of the defendant might be valid, and the case of *Conkrite v. Hart*, 10 Tex. 140, was practically overruled. See also *Webb v. Mallard*, 27 Tex. 30, *criticising* *Conkrite v. Hart*, 10 Tex. 140. In *Chandler v. Burdett*, 20 Tex. 43; *McMiller v. Butler*, 20 Tex. 403, and *Conkrite v. Hart*, 10 Tex. 140, it was held that a sale under execution issued in the lifetime of the judgment debtor and levied after his death is void, but these cases have been severely criticised, if not overruled, as above shown.

Wisconsin and Indiana.—In *Wisconsin* leave of court to issue execution cannot be granted more than a year after the death of the judgment debtor without proof that his heirs and personal representatives have had an opportunity to pay the judgment on demand, and that the property available for paying debts has come to their hands. *Eaton v. Youngs*, 41 Wis. 507.

In *Indiana* a somewhat similar rule prevails. *Faulkner v. Larrabee*, 76 Ind. 154.

1. *Dodge v. Mack*, 22 Ill. 93; *Logsdon v. Spivey*, 54 Ill. 104; *Grosvenor v. Gold*, 9 Mass. 209; *Thompson v. Ross*, 26 Miss. 198; *Becker v. Becker*, 47 Barb. (N. Y.) 497; *Grant v. Hughes*, 82 N. Car. 216; *Arnold v. Fuller*, 1 Ohio 458; *Erwin v. Dundas*, 4 How. (U. S.) 58; *Parkes v. Moffe*, 1 Cro. Eliz. 181; *Waghorne v. Langmead*, 1 B. & P. 571.

2. *Murray v. Buchanan*, 7 Blackf. (Ind.) 549; *Wing v. Hussey*, 71 Me. 185; *Com. v. Whitney*, 10 Pick. (Mass.) 435; *Gaston v. White*, 46 Mo. 486; *Gregory v. Chadwell*, 3 Coldw. (Tenn.) 390; *Ellis v. Griffith*, 4 D. & L. 279.

3. *Roman v. Stratton*, 2 Bibb (Ky.) 199; *Huey v. Redden*, 3 Dana (Ky.) 488; *Buckner v. Terrill*, 5 Litt. Sel. Cas. (Ky.) 29.

g. HOUR OF SALE. — The sale must be held at the hour designated in the notice.¹ And where the hours between which sales must be made are fixed by law, the officer has no authority to sell at any other time.² Sales should be held during reasonable business hours, and any unusual departure will be sufficient ground for vacating the sale.³

h. ON SPECIAL DAYS — Sunday. — By the common law Sunday is *dies non juridicus*, and in the absence of statutory authorization no legal business can be transacted on that day.⁴

Day of Charter Elections. — A sale held on the day of a charter election is not necessarily void.⁵

Legal Holidays. — In some states service of process on a legal holiday is prohibited by statute.⁶

3. Adjournment. — Under the common law an officer has power to adjourn a sale in his discretion,⁷ but probably not from day to day without advertisement, unless by special statutory authority.⁸ The decisions all agree that the officer has the power, in the exercise of a sound discretion, to adjourn a sale whenever the circumstances are such as to demand it in justice to all parties.⁹

1. *Pickett v. Pickett*, 31 Kan. 727, where a sale made a few minutes before the advertised time and for a grossly inadequate price, was set aside. *McGovern v. Union Mut. L. Ins. Co.*, 109 Ill. 151, where a sale made between half-past eleven and twelve o'clock, under a notice appointing the hour of eleven o'clock, was sustained.

2. *Grace v. Garnett*, 38 Tex. 157; *Cole v. Porter*, 4 Greene (Iowa) 510.

3. In *Russell v. Stoeckel*, 5 Houst. (Del.) 464, a sale of personal property advertised to be sold at eleven o'clock was not sold until late in the afternoon. It was held that while such sale might be voidable, the rights of innocent purchasers would be protected.

In *Rigney v. Small*, 60 Ill. 416, a certificate of purchase stated that the sale was made at four o'clock in the morning. It was held that if true, this would have been ground for setting aside the sale, but that it was not void.

In *McNaughton v. McLean*, 73 Mich. 250, a sale made between nine and ten o'clock in the evening, and after the departure of a large number of bidders, was held void, at least as to persons having knowledge of the facts.

In *Carnrick v. Myers*, 14 Barb. (N. Y.) 9, a sale of property made after sunset was held void.

4. *Shaw v. Dodge*, 5 N. H. 462, and *Crabtree v. Whiteselle*, 65 Tex. 111, where it is held that service of civil process on Sunday is illegal.

In *Baxter v. People*, 8 Ill. 368, and *Hoghtaling v. Osborn*, 15 Johns. (N. Y.) 119, it was held that courts cannot pronounce judgment or do any other act strictly judicial on Sunday unless specially authorized by statute, but that a verdict of the jury may be received on Sunday. See also *Thomasson v. State*, 15 Ind. 449; *Harker v. Addis*, 4 Pa. St. 515; *Swann v. Broome*, 3 Burr. 1595.

5. *King v. Platt*, 37 N. Y. 155.

6. *Crabtree v. Whiteselle*, 65 Tex. 111.

7. *Leader v. Danvers*, 1 B. & P. 359; *Keightley v. Birch*, 3 Campb. 521; *Reynolds v. Hoxsie*, 6 R. I. 463; *Aldrich v. Grimes*, 14 R. I. 219.

8. *Enloe v. Miles*, 12 Smed. & M. (Miss.) 147; *Sanborn v. Chamberlin*, 101 Mass. 409.

9. See *supra*, IX. *Notice of Sale*, for advertisement necessary.

Illinois. — In *Phelps v. Conover*, 25 Ill. 309, the fact that no bidders were present except the plaintiff was held sufficient ground for adjournment, unless the plaintiff would bid on each subdivision. See also *Jackson v. Spink*, 59 Ill. 404.

Iowa. — *Swortzell v. Martin*, 16 Iowa 519, where, considering the discretionary power of the sheriff to adjourn a sale, the court said: "And this discretion must be exercised with a fair and impartial attention to the interests of all parties concerned. Where on the day first fixed there are no bidders at

And under some circumstances a promise to adjourn is binding,¹ but generally it is not so regarded.² The officer may in his discretion adjourn the sale to a different place, provided it is to such a place as he would have had authority to sell at in the first instance.³

4. Who May Conduct — a. IN GENERAL. — In all sales ordered by the court, the latter undoubtedly has authority to designate by whom the sale shall be made, whether it be an officer of the court or some one else.⁴ Thus the court may properly designate, to conduct a sale under a decree, a special master commissioner,⁵ trustees,⁶ a commissioner in chancery,⁷ a clerk of the court,⁸ or

all, or where the amount bid is grossly inadequate, he should ordinarily postpone the sale (Rev. Stat., § 3314), especially if it is requested by the debtor. But if on the day appointed the debtor is present with his friends, and desires the sale to go on, or does not object thereto, it should not be capriciously or without cause adjourned, much less adjourned for the purpose of aiding the creditor or proposed purchasers, or of embarrassing the debtor. Good faith and good judgment are all that the law requires, and these may not be dispensed with."

Maine. — Russell v. Richards, 11 Me. 371.

Massachusetts. — Warren v. Leland, 9 Mass. 265.

Missouri. — In Noland v. Barrett, 122 Mo. 181, in an administrator's sale, an adjournment on account of a snow storm was held not to render the sale void.

New Jersey. — In Bethlehem Iron Co. v. Philadelphia, etc., R. Co., 49 N. J. Eq. 356, it was held that the refusal of an officer to adjourn a sale, in the intelligent and bona fide exercise of his discretion, is not sufficient ground for refusing confirmation.

New York. — M'Donald v. Neilson, 2 Cow. (N. Y.) 139, where it was held that the sheriff should postpone the sale when the property is liable to be sacrificed, and especially where the plaintiff cannot sustain any injury by the delay. Tinkom v. Purdy, 5 Johns. (N. Y.) 346; Perkins v. Proud, 62 Barb. (N. Y.) 420; Kelly v. Israel, 11 Paige (N. Y.) 147.

Pennsylvania. — Hollister v. Vanderlin, 165 Pa. St. 248; Lantz v. Worthington, 4 Pa. St. 153; Kelly v. Creen, 63 Pa. St. 299.

Rhode Island. — Aldrich v. Grimes, 14 R. I. 219; Reynolds v. Hoxsie, 6 R. I. 463; Aldrich v. Wilcox, 10 R. I. 405.

South Carolina. — Miller v. Law, 10 Rich. Eq. (S. Car.) 320, where it was held that the commissioner has a discretion, subject to the control of the court, to withdraw land from sale after it has been offered, and even after a bid has been received and cried. If he does so, the highest and last bidder is not entitled to a conveyance, there being no contract with him.

Vermont. — Jewett v. Guyer, 38 Vt. 210.

United States. — Blossom v. Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196; Richards v. Holmes, 18 How. (U. S.) 143.

In Todd v. Hoagland, 36 N. J. L. 352; Reynolds v. Nye, Freem. (Miss.) 462, and U. S. v. Drennen, Hempst. (U. S.) 320, it was held that the scarcity of bidders and probable sacrifice of the property make it the duty of the sheriff to adjourn the sale.

1. In Collier v. Whipple, 13 Wend. (N. Y.) 224, and Strong v. Catton, 1 Wis. 471, a reasonable assurance to the party in interest that the sale would be postponed was held sufficient ground for avoiding the sale.

2. Goodale v. Holridge, 2 Johns. (N. Y.) 193; Perkins v. Proud, 62 Barb. (N. Y.) 420; Russell v. Richards, 11 Me. 371; Tinkom v. Purdy, 5 Johns. (N. Y.) 346; Jewett v. Guyer, 38 Vt. 210.

3. Omaha L. & T. Co. v. Bertrand, (Neb. 1897) 70 N. W. Rep. 1120.

4. Adams v. Kleckley, 1 S. Car. 142.

5. Mayer v. Wick, 15 Ohio St. 548; American Invest. Co. v. Nye, 40 Neb. 720; State v. Holliday, 35 Neb. 327; Northwestern Mut. L. Ins. Co. v. Mulvihill, (Neb. 1898) 74 N. W. Rep. 78.

6. Bolgiano v. Cooke, 19 Md. 375.

7. Chambers v. Jones, 72 Ill. 275; Connell v. Wilhelm, 36 W. Va. 598.

8. McCrady v. Jones, 36 S. Car. 136.

an auctioneer.¹ And in case of the death of the person designated to conduct the sale, prior to the completion of the sale, such person not having been a court officer, the court may make a new appointment to complete the execution of its decree.²

b. SHERIFF, DEPUTY, OR AUCTIONEER — Sheriff. — It is a well-settled rule that only an officer of the county in which the land is situated can conduct the sale.³

Deputy. — A sale may properly be made by a deputy sheriff under process directed through his principal,⁴ but the sheriff or other officer⁵ has no authority to make an informal appointment of a special deputy to conduct a sale.⁶

Auctioneer. — The officer charged with the conduct of the sale may properly employ an auctioneer,⁷ but the sale must be in the presence and under the direct control of the officer,⁸ although this latter rule has been questioned by authority based, it would seem, on bad reasoning.⁹ An unauthorized stipu-

1. *Covas v. Bertoulin*, 45 La. Ann. 160.

2. *Covas v. Bertoulin*, 45 La. Ann. 160, where the court said: "The legislature has specially provided that 'where a sheriff shall have adjudicated any real estate to any purchaser by virtue of a writ, and said sheriff shall die, resign, or be removed from office without having passed an act of sale to said purchaser, it shall be lawful and the duty of his successor in office to pass such act of sale and to have the same recorded as required by law.' Rev. Stat., § 3585. This statute was only passed in 1867. Acts 1867, p. 138. We do not regard it as enunciating any new principle of law, but simply as enacted *ex abundante cautela* to prevent controversies. It was always the law that official trusts of a sheriff passed to his successor in office. *Bradley v. Frellsen*, 10 La. Ann. 310; *State v. Judge*, 11 La. Ann. 79; *Bell v. Keeffe*, 12 La. Ann. 340. It is true there is no statute covering the like case of auctioneers, but the reason and necessity are the same. We think the articles 130 of the Code of Practice, and 21 of the Civil Code, are ample to confer upon courts the power necessary to complete the execution of their orders which has been interrupted by the death of the officer appointed to execute them. The court was fully justified in appointing a new officer to complete the execution of its order."

3. *Fambrough v. Amis*, 58 Ga. 519; *Hanby v. Tucker*, 23 Ga. 132; *Bybee v. Ashby*, 7 Ill. 151; *Morrell v. Ingle*,

23 Kan. 32; *Walden v. Davison*, 15 Wend. (N. Y.) 575; *Gordon v. Camp*, 3 Pa. St. 349.

4. *Meyer v. Patterson*, 28 N. J. Eq. 239; *Potter v. Luther*, 3 Johns. (N. Y.) 431; *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 63; *Walden v. Davison*, 15 Wend. (N. Y.) 575; *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Craig v. Fox*, 16 Ohio 564; *Glasgow v. Smith*, 1 Overt. (Tenn.) 144; *Wroe v. Harris*, 2 Wash. (Va.) 126; *Levett v. Farrar*, 1 Cro. Eliz. 294.

5. *Culver v. Hardenbergh*, 37 Minn. 225, holding that an executor's or administrator's sale of real estate cannot be made by one not an executor or administrator, and *distinguishing* *Davis v. Hudson*, 29 Minn. 27, and *Mousseau's Will*, 30 Minn. 202.

6. *Meyer v. Patterson*, 28 N. J. Eq. 239.

7. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196; *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154; *Smith v. Harrigan*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 322; *Galbraith v. Drought*, 24 Kan. 591; *Chambers v. Jones*, 72 Ill. 275.

8. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196; *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154.

9. In *Chambers v. Jones*, 72 Ill. 275, a sale made by an agent of the commissioner in his absence was held to be such an irregularity as would authorize the setting aside of such sale if the rights of no innocent purchaser had intervened, but not such as to impair the jurisdiction of the court. In *Myers v.*

lation for a sale by a person other than an officer will not be sustained.¹

c. AFTER TERM OF OFFICE EXPIRES — Personality. — When a sheriff has levied an execution on personal property, it is his duty to make the sale notwithstanding the expiration of his term of office since the levy, and he cannot discharge himself from liability by delivering the execution to his successor in office, unless by statute he is required to deliver uncompleted executions to his successor.² And where a sheriff is re-elected, his previous term is responsible for levies made during that term.³ The removal of a sheriff from office after the attachment of personal property does not destroy his right to keep it to await judgment and execution, or excuse his neglect to deliver it when properly demanded.⁴

Realty. — Some authorities hold that the common-law rule with reference to the sale of real property levied upon by an officer whose term of office expires subsequent to the levy is the same as if it were personal property, and that he must complete the execution,⁵ but this rule is by no means uniform, and it is held that due process must issue to the succeeding officer;⁶ and again, that the new writ may be directed either to the new or the old sheriff.⁷ Where an officer makes a levy and is afterwards removed prior to the sale, and a new officer appointed and qualified, a completion of the levy by a sale made by the old officer is not void, and confirmation of the court renders the sale valid.⁸ Statutory enactments variously direct the sale to be completed by the returning officer⁹ or by the incoming officer.¹⁰

d. PARTY IN INTEREST. — A sale made by an officer who is a party in interest in the judgment and execution is void.¹¹ Nor

McGavock, 39 Neb. 843, a sale made by the attorney of a guardian in the absence of such guardian was held not void.

1. In *Kronschnable v. Knoblauch*, 21 Minn. 56, the attorney for the defendant with express authority stipulated with the plaintiff for a private sale of the property by a private person, and it was held to avoid the sale.

2. *Ryan v. Couch*, 66 Ala. 244; *Leavitt v. Smith*, 7 Ala. 175; *Bondurant v. Buford*, 1 Ala. 359; *Purl v. Duvall*, 5 Har. & J. (Md.) 69; *Smith v. Bodfish*, 39 Me. 136; *State v. Hamilton*, 16 N. J. L. 153; *State v. Roberts*, 12 N. J. L. 114; *Sanderson v. Rogers*, 3 Dev. L. (N. Car.) 38; *Gibbes v. Mitchell*, 2 Bay (S. Car.) 120; *Holmes v. McIndoe*, 20 Wis. 657.

3. *Tyree v. Wilson*, 9 Gratt. (Va.) 59, where it was held that the levy having been made during the first year of the high sheriff's term of office, the sureties of that year are responsible.

4. *Tukey v. Smith*, 18 Me. 125.

5. *Elkin v. People*, 4 Ill. 208; *Evans v. Ashley*, 8 Mo. 178; *State v. Roberts*, 12 N. J. L. 114; *Read v. Stevens*, 1 N. J. L. 306, holding that lands seized in execution by a sheriff may, after his death, before sale, be sold by his executor or administrator.

6. *Clark v. Sawyer*, 48 Cal. 133; *Tarkinton v. Alexander*, 2 Dev. & B. L. (N. Car.) 87; *Leshey v. Gardner*, 3 W. & S. (Pa.) 314; *State Bank v. Beatty*, 3 Sneed (Tenn.) 306.

7. *Sumner v. Moore*, 2 McLean (U. S.) 59; *Holmes v. McIndoe*, 20 Wis. 657.

8. *Doolittle v. Bryan*, 14 How. (U. S.) 563; *Miner v. Cassat*, 2 Ohio St. 199.

9. *Clark v. Pratt*, 55 Me. 546.

10. *Edwards v. Tipton*, 77 N. Car. 222.

11. *Collais v. McLeod*, 8 Ired. L. (N. Car.) 221; *Bowen v. Jones*, 13 Ired. L. (N. Car.) 25.

In *Riner v. Stacy*, 8 Humph. (Tenn.) 288, a levy of an execution by the

can a deputy sheriff conduct a sale under an execution in favor of himself or his principal.¹

c. BOND AND OATH.—In *Virginia* it is held that where an officer is required to give bond, a sale by such officer without giving the required bond is void.² But the general rule appears to be that while a failure to give the bond may avoid the sale under a proper proceeding, it does not render it void,³ and mere irregularities in connection with the execution or approval of the bond will not invalidate the sale.⁴ Except by an express order of the court,⁵ a special master commissioner is not required to take an oath of office,⁶ nor give a bond.⁷ Statutory provisions usually require executors, administrators,⁸ and guardians⁹ to take an oath before entering upon their duties.

5. Manner of Sale—*a. SALE IN PARCELS*—(1) *Distinct Parcels.*—Where an execution is levied upon distinct parcels of ground the rule is uniform that they must be sold separately.¹⁰

owner of the judgment under a special deputation by the sheriff was held void. In *May v. Walters*, 2 McCord L. (S. Car.) 470, it was held that the sheriff cannot even by his deputy serve a writ in his own case.

1. *Chambers v. Thomas*, 3 A. K. Marsh. (Ky.) 537.

2. In *Strayer v. Long*, 89 Va. 471, where three commissioners were decreed to sell the debtor's real estate, the decree providing that those giving a bond might sell alone, a sale by two commissioners, one of whom gave the bond, was held valid, though the third died before the sale was advertised. In *Whitehead v. Bradley*, 87 Va. 676, it was held that a payment by the purchaser to a commissioner who had not given bond as required by law was invalid, unless a certificate by the clerk that such bond had been given was published with the advertisement of sale. In *Tyler v. Toms*, 75 Va. 116, a bond given by two commissioners, each respectively becoming surety for the other, was held insufficient. In *Lloyd v. Erwin*, 29 Gratt. (Va.) 598, the court refused to protect a purchaser who paid the purchase money to an unbonded commissioner. See further *Hess v. Rader*, 26 Gratt. (Va.) 746; *Woods v. Ellis*, 85 Va. 471.

3. *Phelps v. Jones*, 91 Ky. 244; *Nicholl v. Nicholl*, 8 Paige (N. Y.) 350; *Mayer v. Wick*, 15 Ohio St. 548.

4. *Pursley v. Hayes*, 22 Iowa 11; *Myers v. McGavock*, 39 Neb. 843; *Emery v. Vroman*, 19 Wis. 689.

5. *Southwest Virginia Mineral Land*

Co. v. Chase, (Va. 1897) 27 S. E. Rep. 826.

6. *Mayer v. Wick*, 15 Ohio St. 548. See also *Phelps v. Jones*, 91 Ky. 244, where the question is discussed but not determined; *Omaha L. & T. Co. v. Bertrand*, (Neb. 1897) 70 N. W. Rep. 120; *Northwestern Mut. L. Ins. Co. v. Mulvihill*, (Neb. 1898) 74 N. W. Rep. 78.

7. *Northwestern Mut. L. Ins. Co. v. Mulvihill*, (Neb. 1898) 74 N. W. Rep. 78; *Omaha L. & T. Co. v. Bertrand*, (Neb. 1897) 70 N. W. Rep. 1120.

8. *Thornton v. Mulquinne*, 12 Iowa 549; *Parker v. Nichols*, 7 Pick. (Mass.) 111.

9. *Cooper v. Sunderland*, 3 Iowa 114.

10. *Illinois.*—In *Brown v. Duncan*, 132 Ill. 413, it was held that where a decree declares the several liability of parties to a suit to pay their proportionate share of the costs, etc., and awards execution to enforce payment, even if a single execution against all were valid it will not authorize a sale of property of the several parties *en masse*. In *Douthett v. Kettle*, 104 Ill. 356, the court said: "In *Phelps v. Conover*, 25 Ill. 312, the rule was established that where several adjoining tracts of land were levied upon, it was the duty of the sheriff to offer each tract separately, and if no bids were made for one tract add another to it, and so on until all the pieces were offered, and if no bid was made, then sell all the tracts *en masse* for a reasonable bid." See further *Morris v. Robey*, 73 Ill. 462; *Meeker v. Evans*, 25 Ill.

(2) *By Statutory Provision.*—The rule that distinct parcels must be sold separately has been embodied in code and statutory provisions in many of the states.¹ It is further provided in some of the states, by statute, that no more of the property can be sold than is necessary to satisfy the judgment.² The

322; *McMullen v. Gable*, 47 Ill. 67; *Ross v. Mead*, 10 Ill. 172; *Graham v. Day*, 9 Ill. 389; *Day v. Graham*, 6 Ill. 435; *Bradley v. Luce*, 99 Ill. 234; *Berry v. Lovi*, 107 Ill. 612; *Lurton v. Rodgers*, 139 Ill. 554.

Iowa.—*White v. Watts*, 18 Iowa 74; *King v. Tharp*, 26 Iowa 283; *Boyd v. Ellis*, 11 Iowa 97. In *Wood v. Young*, 38 Iowa 102, an objection that the land was sold *en masse*, first made eleven years after the sale, was held not to avail.

Kansas.—*Johnson v. Hovey*, 9 Kan. 61; *Pritchard v. Madren*, 31 Kan. 50; *Bell v. Taylor*, 14 Kan. 277.

Kentucky.—*Vanmeter v. Vanmeter*, 88 Ky. 448; *Terry v. Swinford*, (Ky. 1897) 41 S. W. Rep. 553.

Nebraska.—*Laughlin v. Schuyler*, 1 Neb. 409.

Louisiana.—*Danneel v. Klein*, 47 La. Ann. 928.

New Jersey.—*Morrisse v. Ingliss*, 46 N. J. Eq. 306; *Johnson v. Garrett*, 16 N. J. Eq. 31.

New York.—*Jackson v. Newton*, 18 Johns. (N. Y.) 356; *Woods v. Monell*, 1 Johns. Ch. (N. Y.) 502; *Delaplaine v. Lawrence*, 3 N. Y. 301; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *McIntyre v. Sanford*, 9 Daly (N. Y.) 21.

Pennsylvania.—*Baker v. Chester Gas Co.*, 73 Pa. St. 116; *Ryerson v. Nicholson*, 2 Yeates (Pa.) 516; *Rowley v. Brown*, 1 Binn. (Pa.) 61.

Tennessee.—*Winters v. Burford*, 6 Coldw. (Tenn.) 328.

1. *Arkansas.*—*Feild v. Dortch*, 34 Ark. 399.

California.—*Browne v. Ferrea*, 51 Cal. 552.

Indiana.—*Brake v. Brownlee*, 91 Ind. 359; *Voss v. Johnson*, 41 Ind. 19; *Piel v. Brayer*, 30 Ind. 332; *Bardeus v. Huber*, 45 Ind. 235; *Gregory v. Purdue*, 32 Ind. 453; *Tyler v. Wilkerson*, 27 Ind. 451; *Benton v. Wood*, 17 Ind. 260. In *Reed v. Diven*, 7 Ind. 189, it was held that the execution defendant need not furnish the sheriff with a map or other description showing that the land lies in separate parcels. The sheriff himself must ascertain the fact.

Minnesota.—*Swenson v. Halberg*, 1

McCrary (U. S.) 96; *Hull v. King*, 38 Minn. 349; *Mohan v. Smith*, 30 Minn. 259; *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281; *Tillman v. Jackson*, 1 Minn. 183.

Missouri.—*Gordon v. O'Neil*, 96 Mo. 350, holding that a provision of the statute directing the sheriff to sell so much of the property as may be necessary to pay the tax assessment implied the power in the officer to divide the property and that it was his duty so to do; *Sheehan v. Stackhouse*, 10 Mo. App. 469; *Wellshear v. Kelley*, 69 Mo. 343; *Bouldin v. Ewart*, 63 Mo. 333; *Rector v. Hartt*, 8 Mo. 448; *Hicks v. Perry*, 7 Mo. 346; *Lewis v. Whitten*, 112 Mo. 318.

New York.—*Hargin v. Wicks*, 92 Hun (N. Y.) 155; *Cunningham v. Cassidy*, 17 N. Y. 276.

North Dakota.—*Power v. Larabee*, 3 N. Dak. 503.

South Dakota.—*Deadwood First Nat. Bank v. Black Hills Fair Assoc.*, 2 S. Dak. 145.

Tennessee.—*Ament v. Brennan*, 1 Tenn. Ch. 431; *Cooke v. Walters*, 2 Lea (Tenn.) 116.

Texas.—In *Moore v. Perry*, (Tex. Civ. App. 1896) 35 S. W. Rep. 838, the provision of Rev. Stat. Texas 1879, art. 2305, declaring that if land in any town or city taken in execution consists of several lots, each shall be offered by the sheriff for sale separately if susceptible of separate sale by reason of the character of the improvements thereon, was held to apply to a sale under the order of the court issued upon a judgment in an action on a street improvement certificate.

The *Oregon Statute* provides that several known lots or parcels shall be sold separately or otherwise as is likely to bring the highest price.

In *Bank of British Columbia v. Page*, 7 Oregon 454, this provision of the statute is construed to leave the matter entirely to the discretion of the sheriff as to whether he will sell in separate parcels or not. See also *Griswold v. Stoughton*, 2 Oregon 61.

2. *French v. Edwards*, 13 Wall. (U. S.) 506, construing as mandatory a

weight of authority is that such statutes are merely directory, and that a noncompliance will not render the sale *ipso facto* void.¹ However, it has been held by good authority that the flagrant violation of such directory statute renders the sale absolutely void.²

(3) *Susceptible of Division — In General.* — Some authorities hold that not only must distinct parcels be sold separately, but that where the property is susceptible of division it must be so divided and sold.³

Discretion of Officer. — In many cases it is doubtful whether real estate levied upon is legally susceptible of division, and in such cases it is uniformly held that the officer is clothed with a discretion, and his action in the premises made in good faith, and without abuse of discretion, is conclusive.⁴

statute of *California* which provided that the sheriff in selling property upon a judgment recovered by the state against property for delinquent taxes should only sell the smallest quantity which any purchaser will take to pay the judgment and costs. *Stead v. Course*, 4 Cranch (U. S.) 403, a tax sale, opinion by Marshall, C. J.; *Wheeler v. Kennedy*, 1 Ala. 292; *Kinney v. Knoebel*, 51 Ill. 112; *Drake v. Murphy*, 42 Ind. 82; *Piel v. Brayer*, 30 Ind. 332; *Gregory v. Purdue*, 32 Ind. 453; *Benton v. Wood*, 17 Ind. 260; *Gordon v. O'Neil*, 96 Mo. 350; *Lewis v. Whitten*, 112 Mo. 318.

In *Indiana* it is provided that the rents and profits be first offered, and if no bids are received the fee simple may be sold. *Nix v. Williams*, 110 Ind. 234; *Milburn v. Phillips*, 136 Ind. 680.

1. *Arkansas.* — In *Feild v. Dortch*, 34 Ark. 399, a provision that lands be sold under execution in forty-acre tracts was held directory and at the option of the owner, and that in the absence of instructions the sheriff could exercise his sound discretion in making the sale.

California. — *San Francisco v. Pixley*, 21 Cal. 57; *Browne v. Ferrea*, 51 Cal. 552.

Indiana. — *Brake v. Brownlee*, 91 Ind. 359.

Minnesota. — *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281; *Tillman v. Jackson*, 1 Minn. 183.

Missouri. — *Sheehan v. Stackhouse*, 10 Mo. App. 469; *Bouldin v. Ewart*, 63 Mo. 330; *Rector v. Hartt*, 8 Mo. 448; *Wellshear v. Kelley*, 69 Mo. 343; *Lewis v. Whitten*, 112 Mo. 318.

New York. — *Hargin v. Wicks*, 92

Hun (N. Y.) 155; *Cunningham v. Cassidy*, 17 N. Y. 276.

North Dakota. — *Power v. Larabee*, 3 N. Dak. 502.

United States. — *Swenson v. Halberg*, 1 McCrary (U. S.) 96, construing a *Minnesota* statute.

2. *French v. Edwards*, 13 Wall. (U. S.) 506; *Brake v. Brownlee*, 91 Ind. 359.

3. In *McLean County Bank v. Flagg*, 31 Ill. 290, the decision rests upon the construction of an act regulating sales on executions, which provides that when any property, real or personal, shall be taken in execution, if such property be susceptible of division, it shall be sold in such quantities as may be necessary to satisfy such executions and costs. *Cowen v. Underwood*, 16 Ill. 22.

In *Nelson v. Bronnenburg*, 81 Ind. 193, it was held that whenever it is doubtful whether real estate levied on is really susceptible of division, the action of the sheriff, taken in good faith and without abuse of discretion, is conclusive. See also *Wright v. Yetts*, 30 Ind. 185; *Drake v. Murphy*, 42 Ind. 82; *Benton v. Wood*, 17 Ind. 260; *Reed v. Diven*, 7 Ind. 189; *Craig v. Stevenson*, 15 Neb. 362, where a sale *en masse* of three city lots, each of which was covered in part by a dwelling house, was sustained. *Laughlin v. Schuyler*, 1 Neb. 409; *Eaton v. Ryan*, 5 Neb. 47; *Mevey's Appeal*, 4 Pa. St. 80.

4. *Nelson v. Bronnenburg*, 81 Ind. 193; *Nix v. Williams*, 110 Ind. 234; *Wright v. Yetts*, 30 Ind. 185; *Bardeus v. Huber*, 45 Ind. 235, holding that an execution sale of real estate as an entirety to satisfy a judgment of \$365.80, comprising four acres of ground, one

(4) *Option of Debtor.* — The Iowa Code provides that the defendant may submit to the officer holding the execution a plan of division of the land levied upon, and that the officer must sell according to such plan so much of the land as may be necessary to satisfy the debt and costs, and no more.¹ In the absence of some statutory provision giving the debtor the option to dictate the order and plan of sale it would seem that while he might have the right to be heard and perhaps to have his suggestions followed if reasonable, yet the officer would not be compelled to follow such dictation.² Statutory enactments and decisions requiring the sale of property in parcels are uniformly held to be for the benefit of the execution debtor, and they are therefore directory and may be waived by the execution debtor, either expressly³ or by laches.⁴ In the absence of a showing to the contrary, the presumption is always in favor of the validity of the officer's action.⁵

b. *SALE EN MASSE — After Offer in Parcels.* — The authorities generally hold that after the several parcels have been offered separately and no bids have been received, the property may then be offered and sold as an entirety.⁶ In *Michigan*, however, the rule seems to be mandatory, and if the property cannot be sold in parcels no sale can be made.⁷

part of which had on it a store and dwelling house and stable and an orchard worth from \$1,500 to \$2,000, and was separated by a fence and wagon road from the other, which had on it a saw and grist mill, and was worth from \$2,000 to \$2,500, was void. *National Bank v. Sprague*, 20 N. J. Eq. 159; *Merwin v. Smith*, 2 N. J. Eq. 182; *O'Donnell v. Lindsay*, 29 N. Y. Super. Ct. 523; *Bank of British Columbia v. Page*, 7 Oregon 454.

1. Iowa Code, § 3088; *Taylor v. Trulock*, 59 Iowa 558.

2. *King v. Platt*, 37 N. Y. 155, where the court said: "I do not agree with the learned counsel for the motion that the defendant had the right to determine the order of sale, and the authorities quoted do not sustain that position; but in the absence of all directions by the court the defendant has a right to be heard on the subject, his suggestions considered, and, if for the best, followed." *Gregory v. Purdue*, 32 Ind. 453, where substantially the same conclusion is reached as in *King v. Platt*, 37 N. Y. 155.

3. *Joyce v. Madison First Nat. Bank*, 62 Ind. 188; *Vilas v. Reynolds*, 6 Wis. 214.

4. *Nix v. Draughon*, 56 Ark. 240; *Reynolds v. Tenant*, 51 Ark. 87; *Roberts v. Fleming*, 53 Ill. 196; *Richey v.*

Merritt, 108 Ind. 347; *Wood v. Young*, 38 Iowa 102, where an objection made eleven years after the sale was held not to avail; *Power v. Larabee*, 3 N. Dak. 502; *Hargin v. Wicks*, 92 Hun (N. Y.) 155; *Atcheson v. Hutchison*, 51 Tex. 223.

5. *Eggers v. Redwood*, 50 Iowa 289.

6. *Cohen v. Menard*, 136 Ill. 130; *Bressler v. Martin*, 42 Ill. App. 356; *Van Valkenburg v. School Trustees*, 66 Ill. 103; *Phelps v. Conover*, 25 Ill. 309, where it was held the duty of the sheriff to offer each tract separately, using his own judgment as to the subdivision, and if the smallest subdivision will not sell, then add another to it, and so on, when if it does not sell he may sell the same in bulk; *Mugge v. Helgemeier*, 81 Ind. 120, where it was held that the property may be sold as an entirety after the offer of the rents and profits, the fee simple in parcels singly and in combinations of two and three, etc., and no bids received; *Weaver v. Guyer*, 59 Ind. 195; *Connecticut Mut. L. Ins. Co. v. Brown*, 81 Iowa 42; *Lamb v. McConkey*, 76 Iowa 47; *Burmeister v. Dewey*, 27 Iowa 468; *Deadwood First Nat. Bank v. Black Hills Fair Assoc.*, 2 S. Dak. 145.

7. *Udell v. Kahn*, 31 Mich. 195. In *Durm v. Fish*, 46 Mich. 312, a sale of mortgaged premises as an entirety

When Better Price Can Be Obtained. — The rule requiring distinct parcels to be sold separately, having for its purpose the realization of as large an amount as possible from the sale, it is uniformly held that when the property is so situated or of such a nature as to command a higher price if sold as an entirety, such method may properly be pursued although the property is capable of division.¹

c. PERSONAL PROPERTY. — In general the rules covering the sale of real estate as to divisibility and sale in parcels apply to personal property; and where the property can be divided and sold in separate parcels it should be done.² The rule as to sale in parcels does not interfere with the duty of the officer to sell the property in such manner as will produce the highest price.³ Where property is sold subject to a chattel mortgage it must be sold in one parcel that the rights of the mortgagee may be protected.⁴ Unless prohibited by statute,⁵ real and personal property necessarily connected may be sold together.⁶

was held void although the premises had been mortgaged as a single parcel, but subsequently a release of a portion had left the remainder in distinct parcels. It was held, however, that a subdivision made by the mortgagor, but without the mortgagee's concurrence, subsequent to the execution of the mortgage, would not necessitate a sale in parcels. And this suggestion is sustained in *Larzelere v. Starkweather*, 38 Mich. 96.

1. See the following cases:

California. — *Gleason v. Hill*, 65 Cal. 17.

Georgia. — *Parker v. Glenn*, 72 Ga. 637.

Illinois. — *Bressler v. Martin*, 42 Ill. App. 356; *McMullen v. Gable*, 47 Ill. 67; *Ross v. Mead*, 10 Ill. 172.

Indiana. — *Jones v. Kokomo Bldg. Assoc.*, 77 Ind. 340.

Iowa. — *Connecticut Mut. L. Ins. Co. v. Brown*, 81 Iowa 42.

Kansas. — *Bell v. Taylor*, 14 Kan. 277.

Maryland. — *Hopper v. Hopper*, 79 Md. 400.

Michigan. — *Gency v. Maynard*, 44 Mich. 578.

Nebraska. — *Craig v. Stevenson*, 15 Neb. 362.

New York. — *Anderson v. Austin*, 34 Barb. (N. Y.) 319.

Rhode Island. — *Howland v. Pettey*, 15 R. I. 603.

Tennessee. — *Stephens v. Taylor*, 6 Lea (Tenn.) 307.

Wisconsin. — *Maxwell v. Newton*, 65 Wis. 261.

United States. — *Hill v. National Bank*, 97 U. S. 450.

2. *Wright v. Mack*, 95 Ind. 332; *Burns v. Ray*, 18 B. Mon. (Ky.) 392; *American Wine Co. v. Scholer*, 85 Mo. 496; *Boylan v. Kelly*, 36 N. J. Eq. 331; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Sheldon v. Soper*, 14 Johns. (N. Y.) 353.

In *Lawrence v. Speed*, 2 Bibb (Ky.) 401, the sale of a negro woman and her child was held to be an exception to the rule.

In *Pennsylvania* the authorities are somewhat conflicting. It would seem, however, that the sale of personal property *en masse* (*Furbush v. Greene*, 108 Pa. St. 503; *Smith v. Meldren*, 107 Pa. St. 348), or in parcels (*Yost v. Smith*, 105 Pa. St. 628), is not fraudulent *per se*. An early case held that failure to sell in parcels renders the sale absolutely void (*Klopp v. Witmoyer*, 43 Pa. St. 219), but later decisions considerably moderate this rule. In *Furbush v. Greene*, 108 Pa. St. 503, a sale of goods and machinery in one lump was sustained. The sale, however, was attacked by attaching creditors upon the ground of fraud. See *Smith v. Meldren*, 107 Pa. St. 351; *Yost v. Smith*, 105 Pa. St. 628.

3. *McLean County Bank v. Flagg*, 31 Ill. 200.

4. *Tift v. Barton*, 4 Den. (N. Y.) 171; *Harvey v. McAdams*, 32 Mich. 472.

5. *Breeze v. Bange*, 2 E. D. Smith (N. Y.) 474.

6. *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140.

d. MISCELLANEOUS — (1) *Sufficient to Satisfy Debt.* — Independent of statutory enactments it is held that the officer has no authority to sell more of the property than is sufficient to satisfy the judgment.¹

(2) *Equity of Redemption.* — Two distinct equities of redemption in different parcels of land under mortgages to different persons cannot be sold together on an execution against the mortgagor.²

(3) *Several Liability.* — Where execution is awarded against several defendants and fixes the proportionate share of each defendant, it will not authorize the sale of the property of the several parties *en masse*.³

e. INVERSE ORDER AND MARSHALING — (1) *In General.* — The rules of equity require that when one of two creditors has two or more funds to which he may resort, and the other creditor has but one, the creditor having the larger lien must first exhaust the property not included in the other's lien.⁴ And this rule has been extended to necessitate the sale of various parcels conveyed by the defendant at different times, in the inverse order of their alienation.⁵

(2) *Sale under Judgment.* — In sales under judgment the equitable rules are enforced, and the judgment creditor may be compelled in equity to resort first to the debtor's property not alienated, if any such remain.⁶ This rule is, however, questioned in an early case.⁷ The equitable rule is in general still further enforced when all the debtor's property has been alienated, and the creditor is compelled to exhaust the property in the inverse order of alienation.⁸ In *Georgia*, however, it is held that where the debtor has disposed of all his property a judgment creditor

1. *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 411; *Gregson v. Tuson*, 153 Mass. 325, an administrator's sale, under a license to sell only what was necessary to pay certain debts and charges, made in excess of such authority, and it was held void although the statute provided that no sale of realty by an administrator by license of court should be avoided because of any irregularity in the proceedings.

2. *McCone v. Courser*, 64 N. H. 506. In *North v. Dearborn*, 146 Mass. 17, it was held that if a mortgagor by one deed mortgages two parcels of land, and subsequently convey his equity of redemption in each parcel to a different grantee, he so far severs his interest in the different parcels by these conveyances that it is no ground of objection that his interest in each parcel is levied upon and sold separately on an execution against him.

3. *Brown v. Duncan*, 132 Ill. 413.

4. *Story Eq. Jur.* (13th ed.), § 643.

5. See article FORECLOSURE OF MORTGAGES, vol. 9, p. 411, *et seq.*

6. *Relfe v. Bibb*, 43 Ala. 519; *Marshall v. Moore*, 36 Ill. 321; *Dodds v. Snyder*, 44 Ill. 53; *Hurd v. Eaton*, 28 Ill. 122; *Massie v. Wilson*, 16 Iowa 390; *Clowes v. Dickenson*, 9 Cow. (N. Y.) 403, 5 Johns. Ch. (N. Y.) 235. See also *McCormick's Appeal*, 57 Pa. St. 54.

7. *Bevis v. Landis*, 6 Jones Eq. (59 N. Car.) 312, where the sale of a slave under an execution was sustained although such slave had been sold subject to the judgment lien, and the debtor had other property out of which to satisfy the judgment, and the sheriff and execution purchaser had notice of the purchase.

8. *Ritter v. Cost*, 99 Ind. 80; *Merritt v. Richey*, 97 Ind. 236.

may levy upon any of such property regardless of the order of alienation.¹ And in *Iowa*, where encumbered real estate is subsequently sold in parcels to different purchasers, each must contribute proportionately and independently of the rule of inverse order.² Where property is sold under execution subject to several mortgages given at different times to different persons, the mortgagees have the right to insist that the unencumbered portion be first sold.³ And, further, the general rule is invoked to give a prior mortgagee the advantage of a sale in the inverse order of mortgaging.⁴ In *Oregon* the code provision entitles the third person upon request to have his property sold separately.⁵

6. Terms and Conditions — a. IN GENERAL. — The officer can sell only upon such terms as are provided in the decree or in the law in force covering the particular sale,⁶ but he may prescribe terms which will exclude irresponsible and fraudulent bidding.⁷

b. DEPOSIT. — An immediate compliance with the terms of the sale may be demanded,⁸ or in the absence of a special decretal order a deposit may be required in the discretion of the officer.⁹

c. CASH OR CREDIT. — In the absence of special statutory provision or decretal direction, the sale must be for cash.¹⁰ But such rule applies at the option of the officer when the judgment cred-

1. *Barden v. Grady*, 37 Ga. 660.

2. *Barney v. Myers*, 28 Iowa 472.

3. *Ritch v. Eichelberger*, 13 Fla. 169; *Massie v. Wilson*, 16 Iowa 390.

4. *Schryver v. Teller*, 9 Paige (N. Y.) 173.

5. *Hill's Anno. Code Oregon*, § 292; *Balfour v. Burnett*, 28 Oregon 72.

6. *Hooper v. Castetter*, 45 Neb. 67; *Bruschke v. Wright*, 166 Ill. 183; *Reynolds v. Wilson*, 15 Ill. 395; *Barbour v. Tompkins*, 31 W. Va. 410, in which case the court said: "It is also assigned as error that the terms of the deed of trust were not followed in the decree. Several Virginia cases are cited. The rule in Virginia is different from ours. Here it is held that where there are judgment liens and trust-deed liens on land, and a resort to a court of equity is necessary to fix priorities and enforce the liens, that the rules of a court of equity will be followed in the terms of the sale. This certainly would be so when, as here, there are many judgment liens prior to the trust deed. The court did not err in decreeing the sale on time."

7. *National Bank v. Sprague*, 20 N. J. Eq. 159.

8. *Irby v. Irby*, 11 Lea (Tenn.) 165; *Sauer v. Steinbauer*, 14 Wis. 71. But see *Aldrich v. Wilcox*, 10 R. I. 405, wherein it was held an oppression to

demand cash on the spot by the terms of the sale, and that a reasonable time for the payment, to be determined by the particular circumstances of each case, should in all cases be allowed.

9. *Dills v. Jasper*, 33 Ill. 263; *Kenton v. Meisse*, 12 Mont. Co. L. Rep. (Pa.) 114, holding that a change of terms from \$100 to \$250 down did not affect the validity of the sale, although a prospective bidder was deterred.

10. *Griffin v. Thompson*, 2 How. (U. S.) 244; *People v. Mayhew*, 26 Cal. 656; *Foster v. Thomas*, 21 Conn. 291; *Jones v. Thacker*, 61 Ga. 336; *Phillips v. Behn*, 19 Ga. 298; *Ruckle v. Barbour*, 48 Ind. 285; *Swope v. Ardery*, 5 Ind. 213; *Richards v. Adamson*, 43 Iowa 248; *Swortzell v. Martin*, 16 Iowa 519; *Chase v. Monroe*, 30 N. H. 427; *Maples v. Howe*, 3 Barb. Ch. (N. Y.) 611; *Sedgwick v. Fish*, Hopk. (N. Y.) 594; *Sherman v. Boyce*, 15 Johns. (N. Y.) 444; *Meng v. Houser*, 13 Rich. Eq. (S. Car.) 210; *Sauer v. Steinbauer*, 14 Wis. 75.

In *Chandler v. Goodrich*, 58 N. H. 525, it was held that a judgment is not satisfied by a sale on credit in violation of an order to sell for cash. But see *McCluskey v. McNelly*, 8 Ill. 578, where it is held that if an officer selling on execution chooses to give a credit to a purchaser the sale is good, especially

itor is the purchaser.¹ The court may properly order a sale on credit when not in contravention of any statute and when deemed for the best interest of all parties.² Or a sale may be on credit by consent of all the parties,³ and the court may properly direct the security to be taken.⁴ Where the terms are for part cash and the balance credit, a sale may be for all cash.⁵

7. Who May Not Purchase — *a. IN GENERAL.* — The general rule prohibiting one holding a position of confidence or trust from acquiring a beneficial interest in the subject-matter of such trust applies to judicial sales, and prohibits the purchase by one occupying a fiduciary relation.⁶

b. OFFICER CONDUCTING SALE — *In General.* — The foregoing general rule prohibits the officer conducting the sale from purchasing, either directly⁷ or through the mediation of a third person,⁸ although a sale to an attaching officer has been permitted.⁹

if done with the concurrence of the plaintiff; *Williamson v. Berry*, 8 How. (U. S.) 544, where the court says: "In the acts for the relief of Clarke, sale is the word used and frequently repeated. No other term, in reference to the power given to sell a part of the devised premises, is used. The chancellor's order is that Clarke is permitted to sell. No words are used in the acts to qualify the term sale. There is not anything to raise a presumption that Clarke was permitted to sell for anything else than cash. Even the debts of Clarke, which the chancellor thought he had the jurisdiction to order the payment of, are directed to be paid out of the proceeds of the sale. We think, therefore, that the deed executed by Clarke to De Grasse, being upon a consideration other than for cash, is not valid to pass the premises in dispute to De Grasse or to his alienees."

1. In *Isler v. Andrews*, 66 N. Car. 552, it was held that he may demand cash payment in full although the judgment creditor be the purchaser.

In *Delespine v. Campbell*, 52 Tex. 4, it was held that a purchaser who pays the amount of his bid by crediting the amount on his judgment under foreclosure is not a purchaser for value. But see *Merwin v. Smith*, 2 N. J. Eq. 182, wherein it is held that security may not be required of an authorized agent of the plaintiff for the performance of his contract, nor can he refuse the bid of such agent for want of such security.

2. *Reynolds v. Wilson*, 15 Ill. 395; *Wright v. Cummings*, 19 La. Ann. 353,

a sale of succession property; *Hopper v. Williams*, 75 Md. 191; *Hooper v. Castetter*, 45 Neb. 67.

3. *Sedgwick v. Fish*, Hopk. (N. Y.) 594; *Maples v. Howe*, 3 Barb. Ch. (N. Y.) 611.

4. In *Hopper v. Williams*, 75 Md. 191, it was held that where two trustees appointed to sell real estate are unable to agree after sale made as to the security to be given by the purchaser, and the matter in question is submitted to the court upon the respective reports of the trustees and the answer of the purchaser, it is a wise exercise of the discretion of the court to require security to be given by the purchaser to the satisfaction of only one of the trustees.

5. In *Halleck v. Guy*, 9 Cal. 182, it was held that a purchaser paying all cash under terms entitling him to a credit is entitled to a reduction for the interest.

6. *Michoud v. Girod*, 4 How. (U. S.) 554; *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456; *Robinson v. Clark*, 7 Jones L. (52 N. Car.) 562; *Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. Cas. (N. Y. C. Pl.) 252, wherein the general proposition is elaborately discussed and numerous citations given.

7. *Harrison v. McHenry*, 9 Ga. 164; *Stapp v. Toler*, 3 Bibb (Ky.) 450.

In *Shotwell v. Munroe*, 42 Mo. App. 669, it was held that if a purchase be made by a number of persons of whom the sheriff is one, the sale is void.

8. *Downing v. Lyford*, 57 Vt. 507.

9. *Arnold v. Brown*, 24 Pick. (Mass.) 89.

A sale to an Officer's Clerk is regarded as suspicious and will be subjected to close scrutiny.¹

c. DEPUTY, AUCTIONEER, APPRAISER, OR JUDGE. — A Deputy comes within the rule for his principal,² unless he is plaintiff or assignee under a writ directed to such principal.³

Auctioneer. — The rule with respect to an auctioneer is not clearly settled; it would seem, however, that a general auctioneer is prohibited from purchasing,⁴ but that a mere crier is not.⁵

Appraisers. — Under statutory prohibitions, a sale to an appraiser is held to be void⁶ or voidable.⁷

Judge. — A judge ordering the sale cannot himself become the purchaser, either directly⁸ or indirectly.⁹

d. TRUSTEES OR EXECUTORS OR ADMINISTRATORS. — A Trustee cannot purchase.¹⁰

Nor Can an Executor or Administrator Purchase directly¹¹ or through a

1. Massey v. Young, 73 Mo. 260.
2. Perkins v. Thompson, 3 N. H. 144; Mills v. Goodsell, 5 Conn. 475; Woodbury v. Parker, 19 Vt. 354, wherein a sale to a deputy was held void. In Cowles v. Hardin, 101 N. Car. 388, the sale was held voidable.
3. Jackson v. Collins, 3 Cow. (N. Y.) 89.
4. Brock v. Rice, 27 Gratt. (Va.) 812; Galbraith v. Drought, 24 Kan. 592; Terwilliger v. Brown, 44 N. Y. 237; Smith v. Harrigan, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 324, wherein the court said: "The auctioneer being therefore the agent for one or both of the parties at the same or different times during the sale, and the falling of his hammer fixing the rights of the buyer and seller, and his memorandum signed by him being a sufficient written contract in law to bind both parties under the statute of frauds, it seems but right that, as between the parties, he should be indifferent. This, of course, does not mean that he should not exert himself for the seller in order to obtain the best price possible, for to him he owes that duty up to the time when the property is struck off; still he should be indifferent in the sense that he should have no interest so opposed to bona fide bidders or purchasers at the sale as would induce him, while acting presumably as agent for another, to take the position and the advantages accruing to a principal. It has been repeatedly held that a person will not be permitted to conduct negotiations under pretense of acting as agent for

another and then take the position and advantages accruing to a principal. Nor will one acting as trustee or in a fiduciary relation to others be permitted to deal with the trust property for his own profit or advantage."
5. Swires v. Brotherline, 41 Pa. St. 135; Crook v. Williams, 20 Pa. St. 342.
6. Reno v. Hale, 28 Neb. 646; McKeighan v. Hopkins, 19 Neb. 34.
7. Terrill v. Auchauer, 14 Ohio St. 80.
8. Livingston v. Cochran, 33 Ark. 294.
9. Hoskinson v. Jaquess, 54 Ill. App. 59, wherein a judge of the Probate Court caused his wife to purchase lands sold under a decree issued from his own court, and afterwards confirmed the sale, and it was declared fraudulent.
10. Wormley v. Wormley, 8 Wheat. (U. S.) 421; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co., 16 Md. 456; Price v. Thompson, 84 Ky. 219.
11. Georgia. — Worthy v. Johnson, 8 Ga. 236, sale held voidable.
Indiana. — Shaw v. Swift, 1 Ind. 565, and Murphy v. Teter, 56 Ind. 545, sale held voidable.
Louisiana. — Scott v. Gorton, 14 La. 115, sale held void.
Massachusetts. — Litchfield v. Cudworth, 15 Pick. (Mass.) 23, sale held voidable.
Michigan. — Dwight v. Blackmar, 2 Mich. 330.
Mississippi. — Bland v. Muncaster, 24 Miss. 62, and Temples v. Cain, 60 Miss. 478, sale held voidable.

third person.¹ But this rule is subject to permissive statutes,² cases in which he has an interest in the property,³ and rights of innocent purchasers from such executor or administrator.⁴

c. GUARDIAN, RECEIVER, OR TENANT — Guardian. — A purchase may not be made by a guardian,⁵ nor on behalf of such guardian,⁶ but such latter purchase is not *ipso facto* void.⁷

A Receiver is held to be incapacitated from purchasing at a sale which he is ordered to make.⁸

A Tenant in Common may purchase his cotenant's estate under a prior incumbrance given by the latter.⁹ And a tenant's adverse

New Jersey. — *Smith v. Drake*, 23 N. J. Eq. 302, sale held voidable.

New York. — *Terwilliger v. Brown*, 44 N. Y. 237.

North Carolina. — *Froneberger v. Lewis*, 70 N. Car. 456, wherein it was held against the policy of the law for an administrator to purchase at his own sale, and if he does so the sale may be treated as a nullity or full payment enforced.

Pennsylvania. — *Musselman v. Eshleman*, 10 Pa. St. 394.

Texas. — *Fortune v. Killebrew*, 70 Tex. 437; *Hamblin v. Warnecke*, 31 Tex. 91, sale held void.

Virginia. — *Davies v. Hughes*, 86 Va. 909, sale held void.

But see *Bogart v. Bell*, 112 Ala. 412, wherein the question was not raised, but the payment of the purchase money by an administrator is considered.

1. *Peirce v. Graham*, 85 Va. 227; *Boyd v. Blankman*, 29 Cal. 20; *Harris v. Parker*, 41 Ala. 604, held voidable; *Miles v. Wheeler*, 43 Ill. 123, held void; *Blood v. Hayman*, 13 Met. (Mass.) 231, held voidable; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Smith v. Drake*, 23 N. J. Eq. 302.

2. *Price v. Springfield Real Estate Assoc.*, 101 Mo. 107, wherein a former law is referred to as permitting an administrator to purchase at three-fourths of the appraised value; *Briant v. Jackson*, 99 Mo. 585, *construing* Rev. Stat. Mo. 1879, § 166, holding that the prohibition upon executors and administrators purchasing applies only to probate sales.

3. *Linman v. Riggins*, 40 La. Ann. 761, holding that an administrator who is the surviving partner in community of the deceased may purchase; *Penny v. Jackson*, 85 Ala. 67, holding that an executor or administrator may purchase when he has an interest in the

property sold, and the sale is made in the ordinary manner and no unfairness is shown.

4. In *Blood v. Hayman*, 13 Met. (Mass.) 231, it was held that the title of a third person acquired *bona fide* from a purchaser at an administrator's sale for the benefit of the administrator will be protected.

5. *Hoskins v. Wilson*, 4 Dev. & B. L. (N. Car.) 243; *Mann v. McDonald*, 10 Humph. (Tenn.) 275; *Worthy v. Johnson*, 8 Ga. 236, where the sale was held voidable; *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3, a decision under a statutory prohibition; *Dugan v. Denyse*, 13 N. Y. App. Div. 214, where the court says: "Although there was no statutory prohibition covering the question, it does not follow that the law authorized a person occupying a fiduciary relation to become a purchaser at a foreclosure sale where the rights of the *cestui que trust* were involved and obtain the beneficial interest thereunder. On the contrary, it was the settled common-law doctrine, always enforced by a court of equity, that such purchase inured to the benefit of the *cestui que trust*." *Gardner v. Ogden*, 22 N. Y. 327. There is, however, this distinction, which becomes of controlling importance in this case, that whereas the statutory prohibition rendered the sale absolutely void, the common-law principle, enforced as an equitable rule, made such sale voidable only, at the instance of the *cestui que trust*. *Forbes v. Halsey*, 26 N. Y. 65; *Barr v. New York, etc., R. Co.*, 125 N. Y. 277; *Harlington v. Erie County Sav. Bank*, 101 N. Y. 257.

6. *Willey v. Tindal*, 5 Del. Ch. 194.

7. *Hoskins v. Wilson*, 4 Dev. & B. L. (20 N. Car.) 243.

8. *Sheldon v. Saenz*, 59 How. Pr. (N. Y. Supreme Ct.) 377.

9. *Burr v. Mueller*, 65 Ill. 258.

title acquired by purchase at a tax sale has been recognized,¹ but not his title acquired at a judicial sale prior to surrendering possession.²

f. STATE, COUNTY, OR TOWN. — Conflicting decisions prohibit a state³ or county⁴ from purchasing at sales under execution in its favor, but permit a town⁵ so to purchase.

g. PUBLIC OFFICIAL AT HIS TAX SALE — A County Treasurer⁶ or Tax Collector⁷ is prohibited from purchasing at a tax sale conducted by him.

8. Who May Purchase. — The limitations as to purchasing placed upon those occupying fiduciary relations may be waived by the parties in interest,⁸ or the transaction upheld by authorization of the court.⁹ Aside from the prohibitions noted any person may become the purchaser, including the plaintiff,¹⁰ general¹¹ or attaching creditor,¹² defendant,¹³ mortgagee,¹⁴ stockholder,¹⁵ heirs,¹⁶ a surety,¹⁷ a fraudulent grantee,¹⁸ an agent without disclosing his principal,¹⁹ an attorney for the plaintiff²⁰ or defend-

1. Weichselbaum v. Curlett, 20 Kan. 709.

2. In Lausman v. Drahos, 10 Neb. 172, it was held that a tenant purchasing property of his landlord at a judicial sale will be presumed to make such purchase for the purpose of protecting his possession, and the landlord may redeem. In the case stated, the tenant had failed to surrender his lease or notify the absent landlord.

3. Littleton v. State, 2 Lea (Tenn.) 669.

4. Williams v. Lash, 8 Minn. 496, wherein it was held that a county has no capacity to purchase real estate sold on execution in its favor where the purchase is not made for the public use of the county within the meaning of the statutes then in force.

5. Corinth v. Locke, 62 Vt. 411, holding that a plaintiff town may purchase and hold real estate on execution in its favor.

6. Spicer v. Rowland, 39 Kan. 740, holding that a purchase is void if made by the county treasurer or firm of which he is a member.

7. Chandler v. Moulton, 33 Vt. 246.

8. Woodbury v. Parker, 19 Vt. 354; Litchfield v. Cudworth, 15 Pick. (Mass.) 23; Mills v. Goodsell, 5 Conn. 475; Scott v. Freeland, 7 Smed. & M. (Miss.) 409.

Musselman v. Eshleman, 10 Pa. St. 394, held that suit to set aside an administrator's purchase must be brought within twenty-one years, or ten years

after the heirs have reached their majority.

9. Kirkpatrick v. Corning, 48 N. J. Eq. 302, holding that a receiver or trustee authorized by the court to bid and buy at a sale of the trust property may bid and buy for another as well as for himself.

10. National F. Ins. Co. v. Loomis, 11 Paige (N. Y.) 431; Lane v. White, 12 Wis. 381; Blum v. Rogers, 71 Tex. 668, holding that the judgment creditor may purchase and need not in fact pay the purchase price, but that it may be credited upon the execution.

11. Worland v. Kimberlin, 6 B. Mon. (Ky.) 608; Benners v. Rhinehart, 107 N. Car. 705.

12. Arnold v. Brown, 24 Pick. (Mass.) 89.

13. Neilson v. Neilson, 5 Barb. (N. Y.) 565, wherein it was held that one defendant may purchase real estate of his codefendant; Robinson v. Parker, 3 Smed. & M. (Miss.) 114; Kilgo v. Castleberry, 38 Ga. 512.

14. Brown v. Frost, 10 Paige (N. Y.) 243. See also article FORECLOSURE OF MORTGAGES, vol. 9, p. 510.

15. Pewabic Min. Co. v. Mason, 145 U. S. 349.

16. Briant v. Jackson, 99 Mo. 585; Howell v. McCreery, 7 Dana (Ky.) 388.

17. Carlos v. Ansley, 8 Ala. 900.

18. Seals v. Pfeiffer, 77 Ala. 278.

19. National F. Ins. Co. v. Loomis, 11 Paige (N. Y.) 431.

20. Le Conte v. Irwin, 19 S. Car. 554.

ant¹ or administrator;² but the last proposition is disputed.³

9. **Bidding**—*a. MANNER OF BID*—(1) *In General*.—A bid may be made orally, spoken aloud or privately, or in writing, in words or figures, or by a wink or nod, or in any manner by which the bidder signifies his willingness and intention to give a particular price.⁴

(2) *By Letter*.—Thus a bid may properly be made by letter.⁵ But such bids should be announced by the officer selling.⁶

(3) *Compliance with the Statute of Frauds*.—There is much conflict of authority as to whether or not judicial sales are within the statute of frauds, requiring some note or memorandum of the sale to be made in writing and signed by the parties. The weight of authority would seem to be that they are not within such provision.⁷ But sales closely analogous to judicial sales are held to be within the statute of frauds.⁸

Execution Sales.—Technical execution or sheriffs' sales are held to be within the statute of frauds, and some memorandum of the sale in writing is required to be made.⁹ But the contrary doc-

But see *Busey v. Hardin*, 2 B. Mon. (Ky.) 407, holding that a purchase by plaintiff's counsel in connection with great inadequacy was ground for avoiding the sale.

1. *Saunders v. Gould*, 134 Pa. St. 445, in which case the sale and purchase were in the interest of the debtor.

2. In *Grayson v. Weddle*, 63 Mo. 523, it was held that an attorney of the administrator may purchase, giving full value and in good faith.

3. In *West v. Waddill*, 33 Ark. 575, it was held that an attorney of the administrator is prohibited from purchasing.

4. *Millingar v. Daly*, 56 Pa. St. 245.

5. *Tyree v. Williams*, 3 Bibb (Ky.) 365; *Dickerman v. Burgess*, 20 Ill. 267; *Thomson v. Ritchie*, 80 Md. 247.

6. *Dickerman v. Burgess*, 20 Ill. 267.

7. *California*.—*Halleck v. Guy*, 9 Cal. 181.

Illinois.—*Bozza v. Rowe*, 30 Ill. 198.

Maryland.—*Harrison v. Harrison*, 1 Md. Ch. 331.

Missouri.—*Stewart v. Garvin*, 31 Mo. 36.

New York.—*Andrews v. O'Mahoney*, 112 N. Y. 567; *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200. But see *Bicknell v. Byrnes*, 23 How. Pr. (N. Y. Supreme Ct.) 486, and *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431, wherein it was held that the master's memorandum of sale is a sufficient compliance with the statute of frauds.

Pennsylvania.—*King v. Gunison*, 4 Pa. St. 171; *Fulton v. Moore*, 25 Pa. St. 468.

8. *Bozza v. Rowe*, 30 Ill. 198, an administrator's sale; *Hutton v. Williams*, 35 Ala. 503, a judicial sale under an order of the Probate Court; *Smith v. Arnold*, 5 Mason (U. S.) 414, holding an administrator's sale to be within the statute of frauds of Rhode Island.

9. *Georgia*.—In *Howell v. Shewell*, 96 Ga. 454, it is held that one who, as agent of the owner of real estate, engages an auctioneer to make the sale thereof at public outcry cannot, as the auctioneer's clerk, make an entry or memorandum of the sale so as to bind a bidder to whom the property was knocked off by the auctioneer.

Indiana.—*Jones v. Kokomo Bldg. Assoc.*, 77 Ind. 340; *Chapman v. Harwood*, 8 Blackf. (Ind.) 83; *Gossard v. Ferguson*, 54 Ind. 519; *Elston v. Castor*, 101 Ind. 426; *Hadden v. Johnson*, 7 Ind. 394. In *Ruckle v. Barbour*, 48 Ind. 274, it is held that a memorandum of the sale made in a private sale book kept by the sheriff, stating the name of the purchaser and the amount for which the land sold, but not signed by the sheriff or his deputy, is not a sufficient memorandum to satisfy the statute of frauds.

Maryland.—*Spencer v. Pearce*, 10 Gill & J. (Md.) 294; *Barney v. Patterson*, 6 Har. & J. (Md.) 182; *Hanson v. Barnes*, 3 Gill & J. (Md.) 359; *Duvall v. Waters*, 1 Bland (Md.) 569.

trine has been declared,¹ and in any event the return of the sheriff is a sufficient compliance with the statute.²

b. OFFICER BIDDING.—An officer may properly receive and cry a single bid when such bid is definite and certain and no discretion is vested in him.³ But the officer cannot act as the agent of another in bidding when a discretion is implied or given.⁴ By statutory enactment,⁵ and decision,⁶ a constable

Massachusetts.—*Sanborn v. Chamberlin*, 101 Mass. 409.

Minnesota.—*Armstrong v. Vroman*, 11 Minn. 220.

Missouri.—*Alexander v. Merry*, 9 Mo. 514.

New York.—*Simonds v. Catlin*, 2 Cal. (N. Y.) 61.

United States.—*Remington v. Linthicum*, 14 Pet. (U. S.) 84, *construing the law as it existed in Maryland.*

England.—*Blagden v. Bradbear*, 12 Ves. Jr. 467.

1. *Tate v. Greenlee*, 4 Dev. L. (15 N. Car.) 149; *Emley v. Drum*, 36 Pa. St. 123; *Nichol v. Ridley*, 5 Yerg. (Tenn.) 63.

2. *Remington v. Linthicum*, 14 Pet. (U. S.) 84; *Jones v. Kokomo Bldg. Assoc.*, 77 Ind. 340; *Duvall v. Waters*, 1 Bland (Md.) 569; *Sanborn v. Chamberlin*, 101 Mass. 409.

In *Armstrong v. Vroman*, 11 Minn. 220, it was held that the proper evidence of a sale of real estate on execution is the certificate prescribed by statute, and no other note or memorandum is required to make it a valid contract.

3. In *Richards v. Holmes*, 18 How. (U. S.) 148, the court said: "It is true he employed the auctioneer to bid for him, but this fact alone could not depreciate the price. Such an authority may be used for fraudulent purposes; but if fairly used, its tendency is to enhance the price; and in this case there is no evidence that it was intended to be, or in fact was, unfairly used. On the contrary, there seems to be no room for doubt that the price bid by the auctioneer for Harper was more than any other person was willing to give. It must be remembered that the auctioneer was not employed as the agent of the creditor to purchase the property for him at the least price at which it could be obtained. Such an agency an auctioneer should not undertake. It is inconsistent with his relation to the seller, and with the faithful discharge of his duty to the seller." See also *Wenner v. Thornton*, 98 Ill. 156;

Moore v. Pye, 10 Kan. 246, holding that if the sheriff promises to bid for some person and then refuses to do so, he is not guilty of any official mistake, that he at most is only guilty of disregarding his duty as agent for such person, and that the plaintiff has no right to have the sale set aside for the neglect of his own agent; *Requa v. Rea*, 2 Paige (N. Y.) 339, wherein the master had written instructions from the complainant not to sell the premises below a specified sum, and the court said: "The master had no right to permit the property to be struck off to a third person below the sum limited in his instructions. He should either have adjourned the sale and given notice thereof to the complainant's solicitor, or have put up the property in the name of the complainant at the \$2600, and, if no person bid more, should have struck it off to him at that sum. If he had adopted the latter course, the complainant would have been compelled to take the property at that price." In *Brannin v. Broadus*, 94 Ky. 33, 14 Ky. L. Rep. 726, it is held that an execution plaintiff may leave a specific bid for the full amount of his debt with the officer making the sale of the lands under the execution, and a cry of the bid by such officer is not in violation of a statute simply prohibiting him in his own behalf from buying or bidding for property at his own sale. But see *Dixon v. Sharp*, 1 A. K. Marsh. (Ky.) 211, where it was held that a sale of lands under execution on the bid of the sheriff conducting the sale is void even though the sheriff bid as the agent of another.

4. *Caswell v. Jones*, 65 Vt. 457, holding that an officer at an execution sale clothed with the discretionary authority to bid in the property cannot so act, and a sale made in pursuance of such bid is void; *Knight v. Herrin*, 48 Me. 533; *Harrison v. McHenry*, 9 Ga. 164.

5. *Chambers v. State*, 3 Humph. (Tenn.) 237.

6. *Sparling v. Todd*, 27 Ohio St. 521.

may not receive and cry any bids except such as are offered at the time and place of sale.

c. WITHDRAWING BID.— Until a bid is accepted it is a mere proposal and may be withdrawn by the bidder,¹ but he cannot retract his bid after its acceptance.² The next highest bidder is not bound where the highest bid is withdrawn or rejected.³

d. REJECTING BID.— An officer may properly refuse to entertain a bid of an irresponsible bidder;⁴ nor is the officer obliged to entertain any bids coupled with conditions not in conformity with his power.⁵ If he fails to note a bid the sale may be reopened although the purchase has been declared.⁶ But an officer has no right to reject a bid otherwise admissible, simply because the time limit for bidding has expired;⁷ nor should he reject a bid once accepted where there is danger that loss to the parties will result from so doing.⁸

e. ASSIGNING BID.— Substitution of another person for the bidder, or an assignment of the bid, is proper in the absence of any fraud connected therewith, and the deed should properly issue to such substitute.⁹ But it has been held that an assignee, before the certificate of purchase has been filed for record or the sale confirmed, cannot object to any subsequent action of the court in regard to the sale.¹⁰

1. *National Bank v. Sprague*, 20 N. J. Eq. 159; *Durnford v. Degruys*, 8 Martin (La.) 220; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *Barnes v. Zoercher*, 127 Ind. 105.

In *Donaldson v. Kerr*, 6 Pa. St. 486, an adjournment of the sale was held to be a withdrawal of a bid by implication.

In *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196, an adjournment of the sale and its final discontinuance were held to deprive the highest bidder of the right to a confirmation of the sale to him.

In *U. S. v. Vestal*, 4 Hughes (U. S.) 467, the refusal of the officer to entertain the highest bid of a responsible bidder furnished such bidder sufficient ground for a resale to commence at the price of his bid, but he could not be declared the purchaser.

In *Fuson v. Connecticut General L. Ins. Co.*, 53 Iowa 609, an agent who exceeded his instructions was permitted to withdraw his bid by paying the costs. The bid was withdrawn and the sheriff made a return of the facts, and also that he had elected to treat the sale as a nullity.

2. *Dills v. Jasper*, 33 Ill. 263; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *Gray v. Case*, 51 Mo. 463.

3. *Dazet v. Landry*, 21 Nev. 291.

4. *Merwin v. Smith*, 2 N. J. Eq. 182. In *Den v. Zellers*, 7 N. J. L. 153, the rejection of a bid made by a transient having little or no visible property, and not supposedly able to pay the purchase money, was held good.

In *Thomson v. Ritchie*, 80 Md. 247, a bid by letter from an unknown and apparently irresponsible source was held properly rejected.

In *Hildreth v. Turner*, 89 Va. 858, the rejection of a bid by the purchaser at a former sale who had failed to complete his purchase was held proper.

5. *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281.

6. *Head v. Clark*, 88 Ky. 362.

7. *Parker v. Pratt*, 8 N. J. Eq. 104.

8. *Dills v. Jasper*, 33 Ill. 263.

9. *Florida*. — *Mann v. Jennings*, 25 Fla. 730.

Georgia. — *Parler v. Johnson*, 81 Ga. 254.

Illinois. — *Chytraus v. Smith*, 141 Ill. 231; *Harwood v. Cox*, 26 Ill. App. 374.

Maryland. — *Cohen v. Wagner*, 6 Gill (Md.) 236; *Farmers' Bank v. Clarke*, 28 Md. 145.

New Jersey. — *Guarantee Trust, etc., Co. v. Jenkins*, 40 N. J. Eq. 451.

10. *Harwood v. Cox*, 26 Ill. App. 374.

f. OPENING BIDDING. — The English practice¹ of opening biddings upon a substantial offer of an advanced price does not generally prevail in this country.² But in some instances a discretion has been granted equivalent in fact to such practice,³ and in others such practice has been distinctly recognized.⁴

g. ENFORCING BID. — The successful bidder at a sale subjects himself to the jurisdiction of the court, and may be compelled to complete his purchase or otherwise be dealt with as the practice of the court permits.⁵

1. *Bourn v. Bourn*, 13 Sim. 189; *White v. Wilson*, 14 Ves. Jr. 152.
2. *Forman v. Hunt*, 3 Dana (Ky.) 614; *Cohen v. Wagner*, 6 Gill (Md.) 236; *State Bank v. Green*, 11 Neb. 303; *Wakeman v. Price*, 3 N. Y. 334; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *National Bank v. Jarvis*, 28 W. Va. 805; *Adams v. Haskell*, 10 Wis. 123; *Kneeland v. Smith*, 13 Wis. 591; *Pewabic Min. Co. v. Mason*, 145 U. S. 349.
3. *Dupuy v. Gorman*, 9 Lea (Tenn.) 144; *Hamilton's Estate*, 51 Pa. St. 58.
4. *Dula v. Seagle*, 98 N. Car. 458; *Ewald v. Crockett*, 85 Va. 299; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586; *Mason v. Martin*, 64 Miss. 572.
5. *Alabama*. — *Lamkin v. Crawford*, 8 Ala. 153; *Green v. Jordan*, 83 Ala. 220; *Robinson v. Garth*, 6 Ala. 204; *Bell v. Owen*, 8 Ala. 312.
- District of Columbia*. — *Cox v. Cox*, 18 D. C. 1.
- Georgia*. — *Sharman v. Walker*, 68 Ga. 148; *Cureton v. Wright*, 73 Ga. 8; *Glenn v. Black*, 31 Ga. 393; *Barlow v. Toole*, 80 Ga. 9.
- Illinois*. — *Hill v. Hill*, 58 Ill. 239.
- Indiana*. — *Hunt v. Gregg*, 8 Blackf. (Ind.) 105.
- Kentucky*. — *Williams v. Glenn*, 87 Ky. 87; *Avritt v. Bricken*, (Ky. 1897) 38 S. W. Rep. 1090; *Vance v. Foster*, 9 Bush (Ky.) 389.
- Louisiana*. — *McKenzie v. Bacon*, 40 La. Ann. 157; *Milttenberger v. Hill*, 17 La. Ann. 52.
- Maryland*. — *Bolgiano v. Cooke*, 19 Md. 375; *Farmers', etc., Bank v. Martin*, 7 Md. 342; *Shaefer v. O'Brien*, 49 Md. 253.
- Massachusetts*. — *Cobb v. Wood*, 8 Cush. (Mass.) 228.
- Mississippi*. — *Mason v. Martin*, 64 Miss. 572; *Adams v. Griffin*, 3 Smed. & M. (Miss.) 556; *Mount v. Brown*, 33 Miss. 566.
- Missouri*. — *Reed v. Shepperd*, 38 12 Encyc. Pl. & Pr. — 5
- Mo. 464; *Gray v. Case*, 51 Mo. 463; *Wimer v. Obear*, 23 Mo. 242.
- Nebraska*. — *Clark, etc., Invest. Co. v. Way*, (Neb. 1897) 71 N. W. Rep. 1021; *McKinley-Lanning L. & T. Co. v. Hamer*, (Neb. 1897) 72 N. W. Rep. 1042; *Nye, etc., Co. v. Fahrenholz*, 49 Neb. 276; *Hooper v. Castetter*, 45 Neb. 67; *Maul v. Hellman*, 39 Neb. 322; *Gregory v. Tingley*, 18 Neb. 318; *Phillips v. Dawley*, 1 Neb. 320; *Jones v. Null*, 9 Neb. 254.
- Nevada*. — *Sweeney v. Hawthorne*, 6 Nev. 129.
- New Jersey*. — *Townshend v. Simon*, 38 N. J. L. 239; *Shinn v. Roberts*, 20 N. J. L. 435.
- New York*. — *Chappell v. Dann*, 21 Barb. (N. Y.) 17; *Toole v. Toole*, 112 N. Y. 333; *Wallace v. Berdell*, 105 N. Y. 7; *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200; *Goodwin v. Simonson*, 74 N. Y. 133; *Brasher v. Cortlandt*, 2 Johns. Ch. (N. Y.) 505; *Cazet v. Hubbell*, 36 N. Y. 677.
- North Carolina*. — *Matter of Yates*, 6 Jones Eq. (N. Car.) 212; *McKee v. Lineberger*, 69 N. Car. 217; *Hudson v. Coble*, 97 N. Car. 260; *Isler v. Andrews*, 66 N. Car. 552; *Flemming v. Roberts*, 84 N. Car. 532.
- Ohio*. — *Bisbee v. Hall*, 3 Ohio 449.
- Pennsylvania*. — *Girard v. Taggart*, 5 S. & R. (Pa.) 19; *Freeman v. Husband*, 77 Pa. St. 389; *Gaskell v. Morris*, 7 W. & S. (Pa.) 32.
- Rhode Island*. — *Stimson v. Mead*, 2 R. I. 541.
- Tennessee*. — *Deaderick v. Watkins*, 8 Humph. (Tenn.) 520; *Blackmore v. Barker*, 2 Swan (Tenn.) 340; *Still v. Boon*, 5 Sneed (Tenn.) 380; *Deaderick v. Smith*, 6 Humph. (Tenn.) 138; *Mosby v. Hunt*, 9 Heisk. (Tenn.) 675; *Munson v. Payne*, 9 Heisk. (Tenn.) 672.
- Utah*. — *Kershaw v. Dyer*, 6 Utah, 239.
- Virginia*. — *Redd v. Dyer*, 83 Va. 331; *Woods v. Ellis*, 85 Va. 471; *Clark*

Sale Must Be First Confirmed.—Before proceeding to subject a purchaser to liability on his bid the sale should be reported and confirmed.¹

Demand and Tender.—And prior to any proceeding, a demand should be made on the purchaser for the amount of his bid and a tender made of a deed.²

Notice.—Before a resale is ordered it is usually held necessary to give the purchaser notice to show cause why he fails to complete his purchase.³ But a notice of the time and place of the second sale is not necessary,⁴ and as the purchaser is charged with notice of all the proceedings⁵ it is held that further proceedings may be had upon motion without notice to him.⁶ The courts generally recognize their power to enforce the contract of purchase by compelling the purchaser to pay the full amount of his bid.⁷

Action in the Name of the Sheriff.—And the sheriff may sue in his own name to recover from the purchaser the full amount of his bid,⁸ or for a deficiency remaining after a resale.⁹ So an action may be brought in their own names by commissioners who have

son *v.* Read, 15 Gratt. (Va.) 288; Williams *v.* Blakey, 76 Va. 254; Long *v.* Weller, 29 Gratt. (Va.) 347; Mosby *v.* Withers, 80 Va. 82.

West Virginia.—Glenn *v.* Blackford, 23 W. Va. 182.

Wisconsin.—Ogilvie *v.* Richardson, 14 Wis. 158.

United States.—Camden *v.* Mayhew, 129 U. S. 73.

England.—Lansdown *v.* Elderton, 14 Ves. Jr. 513.

1. Schaefer *v.* O'Brien, 49 Md. 253; Hudson *v.* Coble, 97 N. Car. 260; Hill *v.* Hill, 58 Ill. 239.

2. Phillips *v.* Goldman, 75 Mo. 686, and Williams *v.* Lines, 7 Blackf. (Ind.) 47, in both of which cases it was so held under a statutory proceeding. McKee *v.* Lineberger, 69 N. Car. 217.

3. Hill *v.* Hill, 58 Ill. 239; Schaefer *v.* O'Brien, 49 Md. 253; Gaskell *v.* Morris, 7 W. & S. (Pa.) 32.

4. Gaskell *v.* Morris, 7 W. & S. (Pa.) 32.

5. Nye, etc., Co. *v.* Fahrenholz, 49 Neb. 276; Blackmore *v.* Barker, 2 Swan (Tenn.) 340.

6. Blackmore *v.* Barker, 2 Swan (Tenn.) 340; Munson *v.* Payne, 9 Heisk. (Tenn.) 672; Mosby *v.* Hunt, 9 Heisk. (Tenn.) 675; Still *v.* Boon, 5 Sneed (Tenn.) 380.

7. *Alabama.*—Lamkin *v.* Crawford, 8 Ala. 153.

Georgia.—Sharman *v.* Walker, 68

Ga. 149; Glenn *v.* Black, 31 Ga. 393; Cureton *v.* Wright, 73 Ga. 8.

Louisiana.—Miltenerberger *v.* Hill, 17 La. Ann. 52.

Nebraska.—Clark, etc., Invest. Co. *v.* Way, (Neb. 1897) 71 N. W. Rep. 1021; Hooper *v.* Castetter, 45 Neb. 67; Maul *v.* Hellman, 39 Neb. 322; Gregory *v.* Tingley, 18 Neb. 318; Jones *v.* Null, 9 Neb. 254; Phillips *v.* Dawley, 1 Neb. 320.

New Jersey.—Townshend *v.* Simon, 38 N. J. L. 239.

New York.—Cazet *v.* Hubbell, 36 N. Y. 677; Chappell *v.* Dann, 21 Barb. (N. Y.) 17.

North Carolina.—McKee *v.* Lineberger, 69 N. Car. 217.

Rhode Island.—Stimson *v.* Mead, 2 R. I. 541.

Tennessee.—Deaderick *v.* Smith, 6 Humph. (Tenn.) 138; Blackmore *v.* Barker, 2 Swan (Tenn.) 340.

Virginia.—Woods *v.* Ellis, 85 Va. 471; Williams *v.* Blakey, 76 Va. 254.

Wisconsin.—Ogilvie *v.* Richardson, 14 Wis. 158; Atkinson *v.* Richardson, 18 Wis. 245.

8. Bell *v.* Owen, 8 Ala. 312; Sharman *v.* Walker, 68 Ga. 148; Glenn *v.* Black, 31 Ga. 393; Jones *v.* Null, 9 Neb. 254; Townshend *v.* Simon, 38 N. J. L. 239; Chappell *v.* Dann, 21 Barb. (N. Y.) 17; McKee *v.* Lineberger, 69 N. Car. 217.

9. Robinson *v.* Garth, 6 Ala. 204; Sharman *v.* Walker, 68 Ga. 148.

sold land under a decree.¹ A judgment creditor, however, cannot maintain such an action,² and it would seem that the sheriff is not bound to bring such action.³

Execution. — It is held that a judgment and award of execution may be made on motion filed in the original case.⁴

Attachment. — The purchaser may be proceeded against by rule where he has failed to pay the purchase-money,⁵ or by attachment,⁶ or for contempt.⁷

Resale. — The court may, however, order a resale of the property upon failure to pay the purchase price.⁸

Liability for Deficiency. — In the absence of other circumstances affording relief, a purchaser who has necessitated the resale of the property by a failure to complete his bid will be liable for any deficiency that may arise upon such resale.⁹ But this doctrine

1. *Shinn v. Roberts*, 20 N. J. L. 435.

2. *Galpin v. Lamb*, 29 Ohio St. 529; *Harvey v. Adams*, 9 Lea (Tenn.) 289.

3. *Bisbee v. Hall*, 3 Ohio 449; *Harvey v. Adams*, 9 Lea (Tenn.) 289.

4. *Blackmore v. Barker*, 2 Swan (Tenn.) 340; *Ogilvie v. Richardson*, 14 Wis. 158.

5. *Williams v. Blakey*, 76 Va. 254.

6. *Camden v. Mayhew*, 129 U. S. 73 [citing the following cases: *Blossom v. Milwaukee, etc., R. Co.*, 1 Wall. (U. S.) 656; *Lansdown v. Elderton*, 14 Ves. Ch. 512; *Brasher v. Cortlandt*, 2 Johns. Ch. 506; *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 207; *Smith v. Arnold*, 5 Mason (U. S.) 420; *Requa v. Rea*, 2 Paige (N. Y.) 341; *Casamajor v. Strobe*, 1 Sim. & S. 381; *Anderson v. Foulke*, 2 Har. & G. (Md.) 362]. "If, as is clear," said the court, "the purchaser may be required, by rule or attachment, to pay into court the entire sum bid by him, and thus complete his purchase, it is difficult to see why a bidder, sought to be made liable for a deficiency resulting from a resale caused by his refusal to make his bid good, may not be proceeded against in the same suit by rule, or in any other mode devised by the court that will enable him to meet the issue as to his liability. That issue in the present case was tried upon pleadings and proof, and there is no pretense that the appellant had not full opportunity to present his defense before the final order now under review was made."

7. See also *Goodwin v. Simonson*, 74 N. Y. 133.

8. *Mosby v. Withers*, 80 Va. 82; *Sweeney v. Hawthorne*, 6 Nev. 129; *Mason v. Martin*, 64 Miss. 572.

9. *Alabama*. — *Robinson v. Garth*, 6 Ala. 204.

Georgia. — In *Barlow v. Toole*, 80 Ga. 9, where a sale was made under two *fi. fas.*, the purchaser refused to complete his bid, and a sale was then made by virtue of two older *fi. fas.* The court said: "The declaration is founded, apparently, upon the statute (Code, § 3655), and certainly the statute does not fit the case. It provides for one of two remedies, either to bring an action for the whole bid or to resell the property and sue for the difference. Here there was no resale, but fresh levies upon other *fi. fas.*; and the second sale was as much an original sale and as little a resale as the first was. So that there could be no action maintained upon the statute."

Illinois. — *Hill v. Hill*, 58 Ill. 239.

Indiana. — In *Hunt v. Gregg*, 8 Blackf. (Ind.) 105, it was held that if the execution plaintiff buys land at a sheriff's sale at a price exceeding the amount of the execution, and refuses to make payment, the sheriff may, by motion against the purchaser, recover the excess with ten per cent. damages thereon.

Louisiana. — *Miltenberger v. Hill*, 17 La. Ann. 52.

Maryland. — *Schaefer v. O'Brien*, 49 Md. 253.

Massachusetts. — *Cobb v. Wood*, 8 Cush. (Mass.) 228.

Mississippi. — In *Mason v. Martin*, 64 Miss. 574, the court said: "One who procures a resale under 'an act in relation to the confirmation of sales under decrees in chancery,' approved Feb. 28, 1894, Acts, p. 71, thereby assures the court that the property at the resale

was disputed in an early case.¹ The purchaser, however, is not liable if upon the resale no loss occurs,² and the remedy is held to lie only against the actual purchaser and not against a substitute.³ A defaulting purchaser has no claim upon any excess that may arise upon a resale.⁴

Measure of Damages. — In isolated cases it is held that the measure of damages is the loss actually sustained,⁵ and that no action will lie unless some damage is shown.⁶

Sale on Credit. — Where a sale is made on credit secured by note or bond of a purchaser, the same remedies lie to enforce payment as in actions to compel completion of purchase.⁷

Custodia Legis. — In some jurisdictions, land sold under a decree is held *in custodia legis* as security for the purchase-money.⁸

Bidder Relieved. — While the rule of *caveat emptor* generally applies to judicial sales, the bidder may be relieved from a jurisdictional defect⁹ where the terms of resale vary from those at the first sale,¹⁰ and where, before the sale is consummated, material defects in the title are discovered which the record does not disclose,¹¹ or for mutual mistake or fraud.¹² But where the true

shall bring the amount stipulated in the bond, renders himself amenable to the court as a bidder, and is to be treated as starting bidding on resale at that sum, for all which the required bond is intended as a security. If there is not a better bid this party is to become the purchaser and to be dealt with as such." See also *Mount v. Brown*, 33 Miss. 566.

Nebraska. — *Jones v. Null*, 9 Neb. 254.
New Jersey. — *Townshend v. Simon*, 38 N. J. L. 239; *Shinn v. Roberts*, 20 N. J. L. 435.

Utah. — *Kershaw v. Dyer*, 6 Utah 239, construing Comp. Laws Utah (1888), § 3437, which provide that if a purchaser refuses to pay, the officer may again sell the property and sue the bidder for any loss that may occur.

1. *Grier v. Yontz*, 5 Jones L. (N. Car.) 371.

2. *Reed v. Shepperd*, 38 Mo. 464.

3. *Wimer v. Obear*, 23 Mo. 242, construing section 42 of the act regulating executions, Rev. Code 1845, p. 483, and which decision apparently would not apply in the absence of a special statute, nor in a technical judicial sale, as the court questioned whether such section embraced a sale in partition.

4. *Miltenerberger v. Hill*, 17 La. Ann. 52.

5. *Lamkin v. Crawford*, 8 Ala. 153.

6. *Adams v. Griffin*, 3 Smed. & M. (Miss.) 556.

7. *Farmers', etc., Bank v. Martin*, 7

Md. 342; *Still v. Boon*, 5 Sneed (Tenn.) 380; *Munson v. Payne*, 9 Heisk. (Tenn.) 672; *Fleming v. Roberts*, 84 N. Car. 532; *Clarkson v. Read*, 15 Gratt. (Va.) 288.

8. *Fleming v. Roberts*, 84 N. Car. 532; *Glenn v. Blackford*, 23 W. Va. 182; *Long v. Weller*, 29 Gratt. (Va.) 347.

9. *Riddle v. Hill*, 51 Ala. 224, where in the purchaser at an administrator's sale was relieved from liability on his purchase-money notes, it appearing that the sale was void for want of jurisdiction.

10. *Hare v. Bedell*, 98 Pa. St. 485; *Freeman v. Husband*, 77 Pa. St. 389.

11. *Nash's Succession*, 48 La. Ann. 1573.

12. In *Redd v. Dyer*, 83 Va. 335, the court said: "This doctrine is, of course, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts, or fraud. But the mistake must be mutual; for the mistake of one of the parties occasioned by his own culpable negligence does not entitle him to relief as against the other, who is free from negligence. *Long v. Weller*, 29 Gratt. (Va.) 347. And it is scarcely necessary to say that where fraud or mistake is relied on by a purchaser, after the sale has been confirmed, it must be clearly and distinctly charged and proved. *Hord v. Colbert*, 28 Gratt. (Va.) 49; *Gregory v. Peoples*, 80 Va. 355."

condition of the title is fully set forth in the record, the purchaser is remediless.¹ And where the purchaser himself undertakes the disbursement of the proceeds of the sale, he does so at his own peril.²

h. CHILLING BIDDING—(1) *In General*.—The general rules governing auction sales apply to judicial sales, and any device, trickery, agreement, conspiracy, or fraudulent contrivance calculated to stifle competition and chill bidding will vitiate the sale.³

(2) *Collusion*.—Any agreement among the parties in interest or prospective purchasers, the intent and purport of which is to stifle competition and prevent bidding, will vitiate the sale.⁴ Further, an agreement not to bid against each other is void as contrary to public policy, and a contract of that kind based upon promised consideration cannot be enforced.⁵

1. *Hooper v. Castetter*, 45 Neb. 67; *Norton v. Nebraska L. & T. Co.*, 35 Neb. 466.

2. *Clark, etc., Invest. Co. v. Way*, (Neb. 1897) 71 N. W. Rep. 1021.

3. *Compelled to Pay a Second Time*.—In *Woods v. Ellis*, 85 Va. 471, it was held that where a receiver collects the money from the purchaser at a judicial sale before giving the required bond, and fails to account for it, though he may afterwards give the bond, the purchaser may be compelled to pay the money a second time.

3. *Ingalls v. Rowell*, 149 Ill. 163; *Barling v. Peters*, 134 Ill. 606; *Garrett v. Moss*, 20 Ill. 549; *Massey v. Young*, 73 Mo. 260; *Abbey v. Dewey*, 25 Pa. St. 413.

4. *California*.—*Packard v. Bird*, 40 Cal. 378.

District of Columbia.—*Horse v. Beveridge*, 4 Mackey (D. C.) 291.

Kansas.—*Benz v. Hines*, 3 Kan. 390; *White-Crow v. White-Wing*, 3 Kan. 276.

Illinois.—*Loyd v. Malone*, 23 Ill. 43.

Iowa.—*Fleming v. Hutchinson*, 36 Iowa 519; *Kerwer v. Allen*, 31 Iowa 578.

Kentucky.—*Myers v. Sanders*, 7 Dana (Ky.) 507.

Michigan.—*Aldrich v. Maitland*, 4 Mich. 205.

Missouri.—In *Beedle v. Mead*, 81 Mo. 297, the court said: "Superadded to what has been developed, it is most pertinent to observe that these parties occupy official positions which should have at once suggested to them the gross impropriety of the adventure. One was the trusted custodian of the

record of judgments and the fee books of the Circuit Court. The other was the custodian of the recorded titles and filed deeds of the recorder's office. As such public, trusted servants, it very justly tends to breed distrust and uneasiness in the public mind when such officers are found taking advantage of their position to speculate on matters within their trust. The courts should scan such transactions narrowly, and search them through and through. *Massey v. Young*, 73 Mo. 260." *Stewart v. Severance*, 43 Mo. 322; *Miltenerberger v. Morrison*, 39 Mo. 72.

New Jersey.—*Hamburgh Mfg. Co. v. Edsall*, 5 N. J. Eq. 249.

New York.—*Myers v. Dorman*, 34 Hun (N. Y.) 115; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Thompson v. Davies*, 13 Johns. (N. Y.) 112; *Troup v. Wood*, 4 Johns. Ch. (N. Y.) 228.

North Carolina.—*Burton v. Spiers*, 92 N. Car. 503; *Currie v. Clark*, 90 N. Car. 355.

Ohio.—*Seymour v. Milford, etc.*, Turnpike Co., 10 Ohio 477; *Dudley v. Little*, 2 Ohio 504.

South Carolina.—*Barrett v. Bath Paper Co.*, 13 S. Car. 128.

Texas.—*Hudson v. Morriss*, 55 Tex. 606.

Virginia.—*Underwood v. McVeigh*, 23 Gratt. (Va.) 409.

Wisconsin.—*Cleveland v. Southard*, 25 Wis. 479.

5. *Packard v. Bird*, 40 Cal. 378; *Goldman v. Oppenheimer*, 118 Ind. 95; *Hook v. Turner*, 22 Mo. 333; *Doolin v. Ward*, 6 Johns. (N. Y.) 195; *Barton v. Benson*, 126 Pa. St. 431.

(3) *Preventing Competition* — In *General*. — Any interference, chicanery, or trickery employed, the natural result of which would be to prevent competition and render a fair sale impossible, is contrary to the law governing judicial sales, and furnishes ground for avoiding the same.¹ But where the plaintiff is guilty of the offense which stifles competition, he will not be heard to complain.² And a notice by a purchaser, made in good faith, that he has a claim upon the property, has been held not to avoid the sale.³ It is also held that prejudice must be shown to avoid a

1. *Devices to Depress* — *Connecticut*. — In *Spencer v. Champion*, 13 Conn. 11, in a sale of personal property, an interference by the creditor in such a manner as to prevent competition among the bidders was held ground for avoiding the sale.

Georgia. — *O'Kelley v. Gholston*, 89 Ga. 1.

Illinois. — In *Coffey v. Coffey*, 16 Ill. 141, the public assertion, by a purchaser at a judicial sale under a decree for partition, that he had a claim on the premises which he threatened to litigate, was held ground for setting aside the sale.

Indiana. — *Lynch v. Reese*, 97 Ind. 360; *Arnold v. Cord*, 16 Ind. 177.

Kentucky. — In *Mills v. Rogers*, 2 Litt. (Ky.) 217, the purchaser bribed other persons to refrain from bidding by offering to sell to such persons such parts of the property as they wished at a low price. The sale was set aside.

Mississippi. — In *Pattison v. Josselyn*, 43 Miss. 373, a collusion to bring about a sale without the knowledge of the party in interest was held ground for refusing confirmation.

Nebraska. — In *Taylor v. Courtney*, 15 Neb. 190, it was held that where the holder in possession under a tax deed proclaimed, at a sale of the premises upon an execution against the owner, that he had a deed from such owner for the same, and thereby prevented competition, and the purchaser, knowing these facts, purchased the property for very much less than its actual value, and then commenced an action to restrain the payment of the money, he was not a *bona fide* purchaser, and that the owner was entitled to have the sale set aside. See also *Goble v. O'Connor*, 43 Neb. 49, wherein a sale was avoided because the successful bidder induced a rival to cease bidding by promising to pay him a sum

of money; *Aldrich v. Lewis*, 28 Neb. 502; *La Flume v. Jones*, 5 Neb. 256.

New Hampshire. — *Jones v. Portsmouth, etc.*, R. Co., 32 N. H. 544.

North Carolina. — *Black v. Baylees*, 86 N. Car. 527.

Ohio. — In *Saxon v. Seiberling*, 48 Ohio St. 554, an agreement to abstain from bidding was held to be a fraud upon the creditors.

Pennsylvania. — In *Phelps v. Benson*, 161 Pa. St. 418, in an Orphans' Court sale wherein the purchaser agreed to pay the judgment of another person if the latter would refrain from bidding, such agreement was held to avoid the sale.

Rhode Island. — In *Fenner v. Tucker*, 6 R. I. 551, an expostulation of the purchaser with a rival, inducing him to withdraw, was held to vitiate the sale.

South Carolina. — *Hamilton v. Hamilton*, 2 Rich. Eq. (S. Car.) 355; *Carson v. Law*, 2 Rich. Eq. (S. Car.) 296. In *Herndon v. Gibson*, 38 S. Car. 357, a widow desired the bystanders not to bid against her, she being dependent upon the premises for support, and thereby deterred another person from bidding. The sale was vacated.

Texas. — In *Ward v. Duer*, 70 Tex. 231, a sale was made in violation of an agreement between all the parties in interest that the sale should not take place unless all were present. The property sold for an inadequate price, and the sale was set aside.

England. — *Fuller v. Abrahams*, 6 Moo. 316.

2. *O'Kelley v. Gholston*, 89 Ga. 1; *Collins v. Smith*, 75 Wis. 392.

3. *Reagan v. Bishop*, 25 S. Car. 585; *Costillo v. Thompson*, 9 Ala. 937, wherein a notice given by the purchaser of the existence of certain deeds, made with the intention of purchasing the property below its actual value, was held not to render the sale void, but impeachable in equity.

sale on the ground of competition being stifled.¹

Fraudulent or False Representations which prevent bidding or the attendance of bidders constitute sufficient ground for setting aside a sale.² But where the plaintiff is equally guilty of the fraud he cannot obtain relief.³ A mere unfulfilled promise, however, to notify a party in interest of the time of the sale, does not furnish sufficient ground for setting the same aside.⁴ And the alleged misrepresentation must in fact exist,⁵ and prejudice must be shown.⁶

Whether Sale Is Void or Voidable.—While violation of the rules against chilling bidding renders a sale voidable,⁷ it is only in

1. *Lynch v. Reese*, 97 Ind. 360.

2. *Indiana*.—In *Forelander v. Hicks*, 6 Ind. 448, the plaintiff fraudulently represented that he was buying in the interest of the defendant and would permit him to redeem, and thus prevented competition. *Vantrees v. Hyatt*, 5 Ind. 488.

Kentucky.—*Martin v. Blight*, 4 J. J. Marsh. (Ky.) 491.

Missouri.—In *Stewart v. Nelson*, 25 Mo. 309, a false representation was made which prevented the attendance of a party in interest.

New York.—*Mutual L. Ins. Co. v. O'Donnell*, 146 N. Y. 275. In *Laight v. Pell*, 1 Edw. Ch. (N. Y.) 577, a false representation as to the size of the dwelling house, made at the time of the sale, was held sufficient ground for avoiding the sale.

Pennsylvania.—*Barton v. Hunter*, 101 Pa. St. 406; *Oram v. Rothermel*, 98 Pa. St. 300; *Hogg v. Wilkins*, 1 Grant's Cas. (Pa.) 67. In *Auwerter v. Mathiot*, 9 S. & R. (Pa.) 397, misrepresentations as to the terms of sale, occasioned by an act of the sheriff, were held ground for setting aside the sale.

South Carolina.—In *Johnston v. La-Motte*, 6 Rich. Eq. (S. Car.) 347, fraudulent representation of purchasing for the benefit of another, thereby preventing competition, avoided the sale.

United States.—*Cocks v. Izard*, 7 Wall. (U. S.) 559, wherein a tenant represented that he was purchasing for his landlord, who was absent, and thus prevented others from bidding.

3. In *Harrell v. Wilson*, 108 N. Car. 97.

4. *Mathison v. Prescott*, 86 Ill. 493; *Bailey v. Smock*, 61 Mo. 213.

5. *Ledyard v. Phillips*, 32 Mich. 14.

6. *Johnson v. Bemis*, 7 Neb. 224.

7. *Alabama*.—*Costillo v. Thompson*,

9 Ala. 937. *Quare*, whether void or voidable.

District of Columbia.—*Horse v. Beveridge*, 4 Mackey (D. C.) 291.

Georgia.—*Barnes v. Mays*, 88 Ga. 696.

Illinois.—*Loyd v. Malone*, 23 Ill. 43; *Mathison v. Prescott*, 86 Ill. 493; *Coffey v. Coffey*, 16 Ill. 142; *Barling v. Peters*, 134 Ill. 606; *Ingalls v. Rowell*, 149 Ill. 163; *Garrett v. Moss*, 20 Ill. 549.

Indiana.—*Forelander v. Hicks*, 6 Ind. 448; *Arnold v. Cord*, 16 Ind. 177.

Iowa.—*Fleming v. Hutchinson*, 36 Iowa 519.

Kansas.—*White-Crow v. White-Wing*, 3 Kan. 276; *Benz v. Hines*, 3 Kan. 390.

Kentucky.—*Mills v. Rogers*, 2 Litt. (Ky.) 217; *Myers v. Sanders*, 7 Dana (Ky.) 506; *Martin v. Blight*, 4 J. J. Marsh. (Ky.) 491.

Mississippi.—*Pattison v. Josselyn*, 43 Miss. 373.

Missouri.—*Massey v. Young*, 73 Mo. 260; *Miltenerberger v. Morrison*, 39 Mo. 72; *Stewart v. Severance*, 43 Mo. 322; *Stewart v. Nelson*, 25 Mo. 309; *Beedle v. Mead*, 81 Mo. 297; *Bailey v. Smock*, 61 Mo. 213.

Nebraska.—*Taylor v. Courtney*, 15 Neb. 190.

New Hampshire.—*Jones v. Portsmouth, etc.*, R. Co., 32 N. H. 544.

New Jersey.—*Hamburgh Mfg. Co. v. Edsall*, 5 N. J. Eq. 249.

North Carolina.—*Hill v. Whitfield*, 3 Jones L. (N. Car.) 120; *Crews v. Charlotte First Nat. Bank*, 77 N. Car. 110.

Ohio.—*Dudley v. Little*, 2 Ohio 504; *Saxton v. Seiberling*, 48 Ohio St. 554.

Pennsylvania.—*Barton v. Hunter*, 101 Pa. St. 406.

Rhode Island.—*Fenner v. Tucker*, 6 R. I. 551.

extreme cases, amounting to fraud, that the sale will be held void.¹

i. PUFFING BIDDING.—In general auction sales, the employment of puffers and other means of enhancing the bidding by creating a fictitious demand and value is regarded by the great weight of authority as a fraud upon the purchaser, as the converse, the unlawful combining among purchasers to prevent competition, is regarded as fraud upon the vendor.² But where the price obtained is not exorbitant,³ or the employment of puffers is declared,⁴ or a reserved bid is announced,⁵ or a *bona fide* rivalry takes place after the puffer has ceased bidding,⁶ or sham bidding is only made to prevent sacrifice of the property,⁷ it appears that the sale is not vitiated. The decisions are conflicting as to whether a puffer may be employed⁸ to bid up to the "reserve" or not,⁹ and it is questioned whether the employment of one puffer may not be proper.¹⁰ In any event the purchaser should act promptly as soon as he discovers the fraud.¹¹

- South Carolina.*—Barrett v. Bath Paper Co., 13 S. Car. 128; Johnston v. La Motte, 6 Rich. Eq. (S. Car.) 347; Herndon v. Gibson, 38 S. Car. 357.
- Texas.*—Ward v. Duer, 70 Tex. 231.
- Wisconsin.*—Cleveland v. Southard, 25 Wis. 479.
- United States.*—Cocks v. Izard, 7 Wall. (U. S.) 559.
1. *Indiana.*—Vantrees v. Hyatt, 5 Ind. 488.
- Iowa.*—Kerwer v. Allen, 31 Iowa 578, a tax sale.
- Michigan.*—Aldrich v. Maitland, 4 Mich. 205. Held void as against creditors.
- Nebraska.*—Goble v. O'Connor, 43 Neb. 49.
- North Carolina.*—Burton v. Splers, 92 N. Car. 503.
- Pennsylvania.*—Abbey v. Dewey, 25 Pa. St. 413; Oram v. Rothermel, 98 Pa. St. 300; Hogg v. Wilkins, 1 Grant's Cas. (Pa.) 67.
- Virginia.*—Underwood v. McVeigh, 23 Gratt. (Va.) 409.
- England.*—Fuller v. Abrahams, 6 Moo. 316.
2. *Kentucky.*—Latham v. Morrow, 6 B. Mon. (Ky.) 630.
- Louisiana.*—Baham v. Bach, 13 La. 287.
- Maryland.*—Moncrieff v. Goldsborough, 4 Har. & M. (Md.) 281.
- North Carolina.*—McDowell v. Simms, 6 Ired. Eq. (N. Car.) 278; Tomlinson v. Savage, 6 Ired. Eq. (N. Car.) 430; Morehead v. Hunt, 1 Dev. Eq. (N. Car.) 35; Woods v. Hall, 1 Dev. Eq. (N. Car.) 415.
- Pennsylvania.*—Staines v. Shore, 16 Pa. St. 200.
- Texas.*—Reynolds v. Dechaums, 24 Tex. 174.
- United States.*—Veazie v. Williams, 8 How. (U. S.) 134.
- England.*—Bexwell v. Christie, 1 Cowp. 395; Crowder v. Austin, 2 C. & P. 208, 12 E. C. L. 92, 3 Bing. 368, 13 E. C. L. 11; Rex v. Marsh, 3 Y. & J. 331; Walker v. Nightingale, 3 Bro. P. C. 263; Bramley v. Alt, 3 Ves. Jr. 620; Meadows v. Tanner, 5 Madd. 34; Green v. Baverstock, 14 C. B. N. S. 204, 108 E. C. L. 204; Thornett v. Haines, 15 M. & W. 367; Gilliat v. Gilliat, L. R. 9 Eq. 60; Mortimer v. Bell, L. R. 1 Ch. 10; Howard v. Castle, 6 T. R. 642.
3. Compare Reynolds v. Dechaums, 24 Tex. 174; Latham v. Morrow, 6 B. Mon. (Ky.) 630.
4. Moncrieff v. Goldsborough, 4 Har. & M. (Md.) 281; Howard v. Castle, 6 T. R. 642.
5. Bexwell v. Christie, 1 Cowp. 395.
6. Woodward v. Miller, 2 Coll. 279; Gilliat v. Gilliat, L. R. 9 Eq. 60.
7. Smith v. Clarke, 12 Ves. Jr. 477; Lee v. Lee, 19 Mo. 420.
8. Flint v. Woodin, 9 Hare 618.
9. Gilliat v. Gilliat, L. R. 9 Eq. 60.
10. Mortimer v. Bell, L. R. 1 Ch. 10. But see Veazie v. Williams, 8 How. (U. S.) 134.
11. McDowell v. Simms, 6 Ired. Eq.

Rules governing auction sales are adhered to in sheriffs' sales,¹ in strict judicial sales,² in partition sales,³ and in sales made by order of the Orphans' Court.⁴

Valid Agreement for Bidding. — Again, following the rule of auction sales in general, agreements or combinations for bidding, the purport and intent of which are not to prevent competition, may lawfully be made.⁵

(N. Car.) 278; *Tomlinson v. Savage*, 6 Ired. Eq. (N. Car.) 430.

1. *Lee v. Lee*, 19 Mo. 420, wherein it was held that a person who employs another to buy in his property for him at a sheriff's sale with no other view than to prevent a sacrifice of it is not guilty of fraud. *Donaldson v. M'Roy*, 1 Browne (Pa.) 346.

2. *National Bank v. Sprague*, 20 N. J. Eq. 159, where the court said: "At a sale by auction, puffers employed by the owner are a fraud upon the buyers, and they will be relieved from any purchase affected by these false bids. How far the rules of law will extend this avoidance is not settled by the decisions and authorities. I am much inclined to adopt, as the result of the authorities, the view taken by Mr. W. W. Story in his treatise on Sales, section 482; that the fact of a puffer having bid at a sale will not avoid the sale if after the bid of the puffer there is a bid by a real purchaser before the bid at which the property is knocked down; but that in all cases where the bid next preceding is that of a puffer who is bidding to run up the price without any intention to pay, the sale is void." *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431.

3. *Fisher v. Hersey*, 17 Hun (N. Y.) 370.

4. *Backenstoss v. Stahler*, 33 Pa. St. 251; *Pennock's Appeal*, 14 Pa. St. 446, *overruling Steel v. Ellmaker*, 11 S. & R. (Pa.) 86.

5. *California*. — *Jenkins v. Frink*, 30 Cal. 586.

Georgia. — *Buckner v. Chambliss*, 30 Ga. 652.

Illinois. — *Switzer v. Skiles*, 8 Ill. 529.

Kansas. — *Capital Bank v. Huntoon*, 35 Kan. 577.

Kentucky. — *Young v. Smith*, 10 B. Mon. (Ky.) 293.

Maine. — *Gardiner v. Morse*, 25 Me. 143, where the court said: "We must take care, nevertheless, not to confound such cases with those which have their

origin in pure motives, and are of no evil tendency; as where articles are set up at auction of great magnitude and value, to purchase which would be beyond the means of many classes of buyers. The formation of reasonable companies, and the joining together of two or more individuals, with a view to a division of the article between them, or to hold it in common, might, in many cases, become necessary, and tend greatly to the promotion of an advantageous sale. The true rule, upon the summing up of all the authorities, seems to be satisfactorily deduced by Mr. Justice Dewey, in delivering the opinion of the court in *Phippen v. Stickney*, 3 Met. (Mass.) 384. It is that all 'fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property,' are unlawful."

Michigan. — *Norman v. Olney*, 64 Mich. 553.

Missouri. — *Stewart v. Severance*, 43 Mo. 322.

Nebraska. — *Gulick v. Webb*, 41 Neb. 706.

New Jersey. — *National Bank v. Sprague*, 20 N. J. Eq. 159, where it was held that the fact that an agreement to make a joint purchase may indirectly operate to prevent the parties from competing is not enough to render the transaction unlawful; to have that effect it must appear that the object of making the agreement was to avoid competition.

New York. — *Bradley v. Kingsley*, 43 N. Y. 534; *Myers v. Dorman*, 34 Hun (N. Y.) 115; *Brisbane v. Adams*, 3 N. Y. 129.

North Carolina. — *Smith v. Greenlee*, 2 Dev. L. (N. Car.) 126.

Pennsylvania. — *Slingluff v. Eckel*, 24 Pa. St. 472; *Smull v. Jones*, 1 W. & S. (Pa.) 128; *Young v. Snyder*, 3 Grant's Cas. (Pa.) 151.

South Carolina. — *Barrett v. Bath Paper Co.*, 13 S. Car. 128.

XI. RETURN — 1. Definition. — The return is the report by the officer charged with the execution or order of sale, of his proceeding thereunder, and the filing of the same with the proper officer of the court from which it issued.¹

2. Necessity. — From the necessity of an order of confirmation² before a judicial sale becomes absolute, it follows logically that a return upon which such order of confirmation may be based is imperative.³ But this rule is subject to some relaxation.⁴ Under execution sales which do not require confirmation, the rule does not require the sheriff's return in order to perfect the purchaser's title,⁵ but this rule, again, is subject to exceptions.⁶

Texas. — James v. Fulcrod, 5 Tex. 512.
United States. — Kearney v. Taylor, 15 How. (U. S.) 494; Oliver v. Piatt, 3 How. (U. S.) 333.

1. Nelson v. Cook, 19 Ill. 440; Beall v. Shattuck, 53 Miss. 358; Welsh v. Joy, 13 Pick. (Mass.) 477; State v. Melton, 8 Mo. 417; Garlick v. Sangster, 9 Bing. 46, 23 E. C. L. 259; Nelson v. Brown, 23 Mo. 13, wherein the filing of the writ of execution without indorsement was held not a return. See generally article RETURNS.

2. See *infra*, XII. 1. *Necessity of Confirmation.*

3. Dennis v. Winter, 63 Cal. 16; Moore v. Titman, 33 Ill. 357.

4. In McNitt v. Turner, 16 Wall. (U. S.) 352, a sale by an administrator designated by the court as a judicial sale, the court, by Mr. Justice Swayne, adopted the decision in Wheaton v. Sexton, 4 Wheat. (U. S.) 503, an execution sale, as applicable to the case at bar.

5. *Georgia.* — Brooks v. Rooney, 11 Ga. 423.

Illinois. — Holman v. Gill, 107 Ill. 467; York v. Briscoe, 67 Ill. 533; Jackson v. Spink, 59 Ill. 404; Stribling v. Prettyman, 57 Ill. 371; Phillips v. Coffee, 17 Ill. 154.

Indiana. — State v. Salyers, 19 Ind. 432; Doe v. Heath, 7 Blackf. (Ind.) 154.

Iowa. — Hopping v. Burnam, 2 Greene (Iowa) 39.

Kentucky. — Evans v. Davis, 3 B. Mon. (Ky.) 344.

Maine. — Caldwell v. Blake, 60 Me. 458.

Missouri. — Bray v. Marshall, 75 Mo. 327.

New York. — Jackson v. Young, 5 Cow. (N. Y.) 269.

North Carolina. — McEntire v. Durham, 7 Ired. L. (N. Car.) 151.

Vermont. — Barnes v. Barnes, 6 Vt. 388.

United States. — Wheaton v. Sexton, 4 Wheat. (U. S.) 503, wherein the court said: "At the trial two bills of exception were taken, the first of which brings up the question whether a sale by the marshal after the return day of the writ was legal. The court charged that it was, provided the levy was made before the return day. And on this point the court can only express its surprise that any doubt could be entertained. The court below were unquestionably right in this instruction. The purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return."

6. In Wilcox v. Emerson, 10 R. I. 270, Potter, J., in a dissenting opinion, said: "In Wheaton v. Sexton, 4 Wheat. (U. S.) 506, the United States Supreme Court say it is enough to show a judgment, a levy, and a deed, and that if the officer makes no return at all, it is immaterial to the purchaser. This was a case from the District of Columbia, and this assertion was entirely unnecessary to the decision of the case. But it is quoted, and seems to be approved, in Voorhees v. U. S. Bank, 10 Pet. (U. S.) 477. But if a return is required, what weight is to be attached to it? Is it the sole evidence, or not? In order to judge of the weight of authority it is necessary to distinguish the cases and to see whether they relate to returns upon a writ, or upon an execution; whether in the same or another suit; whether after the sale the plaintiff or a third party is purchaser; and whether

3. By Whom. — A return may properly be made by a legally appointed and qualified deputy sheriff, but it must be made in the name of his principal.¹ Thus upon the death of the sheriff his deputy may not amend a defective return.² When the officer is unable to write he may procure another to make the entry, and may sign with his mark.³

4. Amendment. — See article RETURNS.

5. Contents. — The return should contain a complete history of the entire proceedings, from the time the order of sale or decree was received by the master or other officer until the final disposition of the same.⁴ When so required by

it is against the defendant or a third party. The general doctrine, that an officer's return is evidence against him; that it is *prima facie* evidence for him, and that, as to third parties, it is only *prima facie*, may be considered as settled, although there is some conflict as to who are to stand in the light of third parties."

In *Walsh v. Anderson*, 135 Mass. 68, the court said: "The General Statutes, c. 103, §§ 39, 43, in force at the time the executions in this case were issued, which regulated the sale on execution of an equity of redemption in land, have not the same explicit provisions requiring a return upon the execution as those which regulated the levy upon land by extent; but the decisions already cited must be taken, we think, to establish the necessity of a return upon the execution in order to render a levy of execution valid, in whichever form it is made. Such return need not be made on the day required by the writ, but it must be made at some time, Gen. Stat., c. 133, § 22, and as it appears in this case that no returns have ever been made upon the executions, the judgment of the Superior Court is affirmed."

1. California. — *Rowley v. Howard*, 23 Cal. 402; *Joyce v. Joyce*, 5 Cal. 449. *Illinois.* — *Ditch v. Edwards*, 2 Ill. 127; *Ryan v. Eads*, 1 Ill. 217.

Michigan. — See *Wheeler v. Wilkins*, 19 Mich. 78, wherein it was held that a return to a writ may be signed by a deputy sheriff in his own name, *affirming* *Calender v. Olcott*, 1 Mich. 344, where the same holding obtained with reference to a deputy county clerk.

New York. — *Boardman v. Halliday*, 10 Paige (N. Y.) 223; *Paddock v. Cameron*, 8 Cow. (N. Y.) 212; *Simonds v. Catlin*, 2 Cal. (N. Y.) 61.

North Carolina. — *State v. Johnston*, 1 Hayw. (N. Car.) 293.

Pennsylvania. — *Emley v. Drum*, 36 Pa. St. 123.

South Carolina. — *Mathewson v. Moore*, 2 McCord L. (S. Car.) 315; *De Villers v. Ford*, 2 McCord L. (S. Car.) 145.

Texas. — *Jordan v. Terry*, 33 Tex. 680. See, however, *Arnold v. Scott*, 39 Tex. 379, wherein a return of A B, deputy sheriff, Hunt county, Texas, was held bad in a collateral proceeding as not disclosing for whom he acted. But in *Miller v. Alexander*, 13 Tex. 498, and *Towns v. Harris*, 13 Tex. 508, a return by a deputy under his proper official designation, without disclosing the name of his principal, was held sufficient.

2. Hudspeth v. Scarborough, 69 Ga. 777.

3. Cox v. Montford, 66 Ga. 62.

4. In Remington v. Linthicum, 14 Pet. (U. S.) 84, the following form of a return under a *fi. fa.* is found, approved as to form except so far as reference is made to the private memorandum book copied by the marshal, to wit:

"Otho M. Linthicum v. Zachariah M. Offut. No. 66 Judicials, November Term, 1837.

"By virtue of the said writ of fieri facias, to me directed, I hereby return to the said court that, in pursuance of said writ, returnable to November term, 1837, and under the levy by me made as per schedule returned with the said writ, I did, after due advertisement thereof, sell the real property mentioned in said schedule and appraisement. That said sale was made, according to law, on the 13th January, 1838; and at said sale, Otho M. Linthicum, being the highest bidder, became

statute, the return must be made under oath.¹

6. Conclusiveness. — A return is conclusive against the officer who makes it² and between the parties when it relates to matters pertaining to the official duties of such officer,³ and is *prima facie* evidence in his favor.⁴

XII. CONFIRMATION — **1. Necessity of Confirmation.** — A judicial sale must of necessity be confirmed by the court before it becomes absolute,⁵ but this rule is subject to the construction placed by

the purchaser of the first of said described pieces of property, viz., the part of lot No. 153, in Beatty & Hawkins' addition to Georgetown, described in said levy and schedule, for the sum of seven hundred dollars; and the other piece of property mentioned in said schedule and levy, viz., that part of lot No. 153, in Beatty & Hawkins' addition to Georgetown, therein described, for the sum of two hundred dollars; and having, in all respects, fulfilled and complied with the conditions of sale and paid the purchase money to me, he became the purchaser thereof. All which I certify and return, this 19th day of April, in the year 1839. A. Hunter, Marshal."

See also as to the sufficiency of returns in particular cases, *Exp. Worley*, 19 Fed. Rep. 586; *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Moore v. Titman*, 33 Ill. 357; *Cooper v. Sunderland*, 3 Iowa 114; *Haney v. McClure*, 88 Ky. 146; *Riley v. Wiley*, 3 Dana (Ky.) 76; *Millett v. Blake*, 81 Me. 531; *Rand v. Cutler*, 155 Mass. 451.

1. In *Dennis v. Winter*, 63 Cal. 18, the court said: "The next point is that the return of sale was not verified, as required by section 1517 of the Code of Civil Procedure. That section declares that 'no sale of any property of an estate of a decedent is valid unless made under order of the Superior Court, except as otherwise provided in this chapter. All sales must be, under oath, reported to and confirmed by the court before the title to the property sold passes.' It is not necessary for us to determine whether a failure to make a return of the sale under oath would affect the validity of the title in a *collateral* attack upon the judgment, because we have in this case a recital in the order confirming the sale that *the return of the sale was duly verified by affidavit*. This recital is conclusive in the present case, and a finding of fact to the contrary does not in any manner affect the

conclusiveness of the recital in the decree. The fact was not a jurisdictional one, and the principle applicable to the inconclusiveness of statements or recitals in judgments *conferring jurisdiction* does not apply. *McKinlay v. Tuttle*, 42 Cal. 570."

2. *Splahn v. Gillespie*, 48 Ind. 397.

3. *Lindley v. Kelley*, 42 Ind. 294.

In *Brown v. Butters*, 40 Iowa 544, the court said: "The only ground upon which it is sought to invalidate the sheriff's sales is because the land was sold on each execution for less than two-thirds the appraised value thereof. If the property of the judgment debtor is sold on execution for less than two-thirds of the appraised value thereof at the time of sale, exclusive of all liens, mortgages, or incumbrances thereon, the sale will be void. *Maple v. Nelson*, 31 Iowa 322. In the record before us this is not shown. It is not averred in the petition that the land was sold for less than two-thirds of the appraisement, *exclusive of all prior liens*, nor does it so appear in the exhibits to the petition. On the contrary the returns of the sheriff on his executions recite that the bid on each execution upon which the land was sold was in each case more than two-thirds the appraised value of the property, after deducting prior liens and incumbrances. In the absence of an averment in the petition of the fact that the sales were made for less than two-thirds of the appraised value of the land, and in face of the recitals in the return of the sheriff that each sale was made for over that amount, it will not be presumed that the sales were made in violation of the statute in this respect." *Hutchins v. Carver County*, 16 Minn. 13; *Shannon v. McMullin*, 25 Gratt. (Va.) 211.

4. *Splahn v. Gillespie*, 48 Ind. 397.

5. See authorities cited *supra*, I. *Definition*; II. *Nature*; III. *What Are Judicial Sales*.

some courts upon the kind of sale and upon the necessity of confirmation under special statutes.¹ No property rights are acquired before confirmation,² and the issuance of a deed upon

1. In *Kimple v. Conway*, 75 Cal. 414, the court said: "Section 147 of the Civil Code authorizes the court granting a divorce to order a sale of the community property, and a division or other disposition of the proceeds. Section 684 of the Code of Civil Procedure provides that 'when the judgment requires the sale of property, the same may be enforced by a writ reciting the judgment or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith.' The power conferred is ample, and the sheriff appears to have followed the directions contained in the judgment by making the sale in conformity therewith. The judgment did not direct the sheriff to report the sale to the court for confirmation, and the court does not require the confirmation of such sales. In the absence of such requirement we are not prepared to hold that the sale and conveyance are void because the sale was not confirmed. Some judicial sales become complete and valid upon being confirmed, and not before, but the code expressly requires confirmation in such cases. * * * In this case neither the code nor the order of the court required that the sale should be confirmed before becoming complete, and we are of the opinion that the court erred in holding that the sale in this case was void for want of such confirmation, and for that error the motion for a new trial should be granted."

In *Baxter v. O'Leary*, (S. Dak. 1897) 72 N. W. Rep. 91, *construing* Comp. Laws S. Dak., §§ 5149, 5160, the court said: "Giving the statute this construction, it seems to follow that the failure to have a sale on a judgment in an action at law confirmed is a mere irregularity, which will not defeat the purchaser's title where the proceedings are shown, as in this case, to be in all respects regular and in conformity with the statute. A sheriff's sale may be confirmed at any time after the sheriff has made his return, on motion of any person interested therein, or on the court's own motion and without the consent of the sheriff. *Ferguson v. Tutt*, 8 Kan. 370. In this state the

practice is to confirm without notice. The proceeding is purely *ex parte*, and we think the only effect that should be given it is to preclude inquiry concerning the regularity of the sale as shown by the officer's return. If such return, when introduced in evidence, shows that the sale was made in conformity with law, it is unreasonable to hold that the failure of the court to make a formal *ex parte* order which merely approves what appears on the face of the papers should invalidate a purchaser's title. It should be observed that we are considering a sale in an action at law, wherein the officer acts, not under the direction of the court, as in cases of judicial sales, but under the naked authority of the execution and the express direction of the statute. Indeed, there is no substantial reason for requiring the confirmation of such sales. It is required in but few states. Our law would be more consistent and consonant with the trend of modern legislation if the section quoted above were repealed. In construing a similar provision, the Supreme Court of Ohio at an early day reached a different conclusion. *Curtis v. Norton*, 1 Ohio 278; *McBain v. McBain*, 15 Ohio St. 337. It is suggested that our statute came from that state burdened with the construction there given it. It may, or it may have come from Kansas. In any event, this court cannot infer that the legislature intended to make the title to real property dependent upon such idle technicalities."

2. *Arkansas*.—*Apel v. Kelsey*, 47 Ark. 413, a probate sale; *Trotter v. Neal*, 50 Ark. 340; *Wells v. Rice*, 34 Ark. 346; *Sessions v. Peay*, 23 Ark. 41; *Bell v. Green*, 38 Ark. 78; *Ambleton v. Dyer*, 53 Ark. 224; *Lumpkins v. Johnson*, 61 Ark. 80; *Greer v. Anderson*, 62 Ark. 213.

California.—*Horton v. Jack*, 115 Cal. 29.

Iowa.—*Central Trust Co. v. Gate City Electric St. R. Co.*, 96 Iowa 646.

Kentucky.—*Taylor v. Gilpin*, 3 Metc. (Ky.) 544.

Mississippi.—*Mitchell v. Harris*, 43 Miss. 314.

New Jersey.—*Titman v. Riker*, 43 N. J. Eq. 122.

an unconfirmed sale is inoperative.¹

Long Acquiescence Has Been Held Equivalent to a Formal Confirmation by the court, and of the same force and effect.²

The Consent of the Parties has also been held a binding confirmation.³

Presumptions.—In general, the fact of confirmation must be proved, and will not be presumed.⁴

2. Motion and Notice.—The proceedings in confirmation of sales, including the notice required, are governed by court rules, and vary in different jurisdictions.⁵ In general the parties in interest are entitled to a notice of the hearing,⁶ but on the other hand it has been held that no notice is required.⁷ The length of time of notice is governed entirely by court rule⁸

New York.—*Requa v. Rea*, 2 Paige (N. Y.) 339.

Pennsylvania.—*Greenough v. Small*, 137 Pa. St. 132.

Tennessee.—*Eakin v. Herbert*, 4 Coldw. (Tenn.) 116.

United States.—In *Young v. De Putron*, 37 Fed. Rep. 46, it is held that the vendee acquires no title under a confirmation effected at the same term, no transfer of property having taken place.

England.—*Ex p. Minor*, 11 Ves. Jr. 559.

1. *Alabama.*—*Wallace v. Hall*, 19 Ala. 367; *Bonner v. Greenlee*, 6 Ala. 411.

Illinois.—*Rawlings v. Bailey*, 15 Ill. 178; *Ayers v. Baumgarten*, 15 Ill. 444; *Wade v. Carpenter*, 4 Iowa 361; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 60.

Mississippi.—*Gowan v. Jones*, 10 Smed. & M. (Miss.) 164.

Missouri.—*State v. Towl*, 48 Mo. 148; *Castleman v. Relfe*, 50 Mo. 583; *Valle v. Fleming*, 19 Mo. 454.

New York.—*Battell v. Torrey*, 65 N. Y. 299; *Rea v. M'Eachron*, 13 Wend. (N. Y.) 465.

North Carolina.—*Mason v. Osgood*, 64 N. Car. 467.

Tennessee.—*Jones v. Hollingsworth*, 10 Heisk. (Tenn.) 653. See also *Blair v. Blair*, (Tenn. 1896) 41 S. W. Rep. 1078.

West Virginia.—*Kable v. Mitchell*, 9 W. Va. 492.

United States.—*Williamson v. Berry*, 8 How. (U. S.) 496.

2. *Penn v. Heisey*, 19 Ill. 295; *Redus v. Hayden*, 43 Miss. 614.

3. *Tooley v. Gridley*, 3 Smed. & M. (Miss.) 493.

4. *Apel v. Kelsey*, 47 Ark. 413, a probate sale.

In *Swenson v. Seale*, (Tex. Civ. App. 1894) 28 S. W. Rep. 143, it was held

that in the absence of evidence of confirmation of a sale of minors' land the court will not presume its validity, although the order of sale is shown and proof is given that the records were loosely kept.

In *Pace v. Fishback*, 10 Tex. Civ. App. 450, it is held that the court will not presume an administrator's sale confirmed unless it first appears that the record of confirmation cannot be produced. See also *Baker v. Coe*, 20 Tex. 430.

Objection on Appeal.—In *Monk v. Horne*, 38 Miss. 100, it is held that the objection that the sale was not confirmed will not be allowed for the first time upon appeal from the Probate Court.

5. In *Galbreath v. Drought*, 29 Kan. 711, it was held that the sale may be confirmed on the motion of any person interested, or on the court's own motion.

6. *Dugger v. Tayloe*, 60 Ala. 504; *Edwards v. Maupin*, 18 D. C. 39; *Perkins v. Gridley*, 50 Cal. 97; *Nugent v. Nugent*, 54 Mich. 557; *Speck v. Wohlien*, 22 Mo. 310.

In *Patterson v. Eakin*, 87 Va. 49, it was held that the purchaser becomes a party to the suit, and as such, under the Code, § 3426, is entitled to notice of the confirmation of the sale made in vacation, but that the confirmation will not be set aside unless he was prejudiced by want of such notice.

7. *Galbreath v. Drought*, 29 Kan. 711; *Baxter v. O'Leary*, (S. Dak. 1897) 72 N. W. Rep. 91.

8. In *Pewabic Min. Co. v. Mason*, 145 U. S. 349, the court said: "Another matter complained of is that the sale was prematurely confirmed. It took place on the 24th of January, 1891, and the report of sale was filed

or, as is sometimes the case, by statute.¹

3. Who May and Who May Not Confirm — Who May Confirm. — Under statutory provision a sale may be confirmed by a district judge sitting in chambers.²

Who May Not Confirm. — A probate judge who has an interest in the subject-matter of the sale cannot confirm the same.³ A confirmation made by a person acting as a special judge, without other authority than the consent of the parties, is void.⁴

4. Discretion. — A large discretionary power is given to the trial court, and in the exercise of such discretion the court may reject or confirm.⁵ But the court must confirm or reject, and cannot

February 4. On the 7th of February an order *nisi* was entered that, unless cause to the contrary was shown within eight days, the sale would be confirmed. On February 13 reasons why the sale should not be confirmed were filed by the defendant, and on the same day, exceptions to the report of sale. On the 2d day of March, upon notice, the objections and exceptions of the defendant were heard by the court and overruled and the sale confirmed. In support of this complaint reliance is placed on general equity rule number 83: 'The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired.' It is worthy of note, however, that exceptions were filed, were heard and determined by the court, and no objection was made by the appellant to the time of hearing, or any suggestion of a right to longer time in which to file exceptions. It would seem that if there were error in this respect, the appellant was not in a position to avail itself thereof. But there was no error. Rule 83 has no reference to a report by a master of a mere ministerial matter like a sale, but only to his report upon matters heard and determined by him. In *McMicken v. Perin*, 18 How. (U. S.) 510, it was observed: 'In *Story v. Livingston*, 13 Pet. (U. S.) 359, this court decided that no objections to a master's report can be made which were not taken before the master, the object being to save time and to give

him an opportunity to correct his errors and reconsider his opinion.' But surely in the matter of a sale there is no opportunity for objections before the master, or any correction by him of his errors, or any reconsideration of his opinion. The course pursued in this case in reference to the confirmation was the correct practice; an order *nisi* followed if no objections were taken in time by an order of confirmation." See also *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281, where it was held that confirmation may be at an adjourned time and at any reasonable time after the return of the order of sale; *Galbreath v. Drought*, 29 Kan. 711, wherein it was held that the sale may be confirmed at any time after the return.

1. *Armstrong v. Middlestadt*, 22 Neb. 711.

2. *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *McMurtry v. Tuttle*, 13 Neb. 232.

3. *Satcher v. Satcher*, 41 Ala. 26; *Wilson v. Wilson*, 36 Ala. 655; *Heydenfeldt v. Towns*, 27 Ala. 423.

4. *Trotter v. Neal*, 50 Ark. 340; *Dansby v. Beard*, 39 Ark. 254; *Gaither v. Wasson*, 42 Ark. 126; *Hyllis v. State*, 45 Ark. 480.

5. *Alabama*. — *Eatman v. Eatman*, 83 Ala. 478, an administrator's sale.

Illinois. — *Sowards v. Pritchett*, 37 Ill. 518.

Iowa. — *Central Trust Co. v. Gate City Electric St. R. Co.*, 96 Iowa 646.

Kentucky. — *Taylor v. Gilpin*, 3 Metc. (Ky.) 544.

Michigan. — *Nugent v. Nugent*, 54 Mich. 557.

Virginia. — *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586; *Brock v. Rice*, 27 Gratt. (Va.) 816; *Coles v. Coles*, 83 Va. 525.

make a conditional order,¹ although the right to impose terms has been recognized.²

5. Effect of Confirmation — Cures Irregularities. — All mere irregularities are cured by the order of confirmation.³

Collateral Attack. — And such order is not subject to collateral attack.⁴

Appealability of Order. — The order of confirmation⁵ or the order of refusal is a final order, and may be appealed from.⁶

Matters Concluded. — In general all parties are concluded by the order of confirmation as to all questions not jurisdictional.⁷

1. *Kinnear v. Lee*, 28 Md. 488; *Fitch v. Minshall*, 15 Neb. 328; *Green v. State Bank*, 9 Neb. 165.

2. *State Nat. Bank v. Neel*, 53 Ark. 110.

3. In *Blair v. Blair*, (Tenn. 1896) 41 S. W. Rep. 1078, the order of confirmation provided for payment of the purchase price.

In *May v. Logan County*, 30 Fed. Rep. 250, it was held that a ratification of the sale by the court has the same legal effect as though the court had previously directed the sale.

In *Pewabic Min. Co. v. Mason*, 145 U. S. 349, and in *Evans v. Maury*, 112 Pa. St. 300, it was held that after confirmation the rights of the purchaser are vested.

In *Cates v. Johnson*, 109 Ala. 126, it was held not error to confirm a partition sale, no objection having been made, although the price was inadequate.

In *Rome, etc., R. Co. v. Sibert*, 97 Ala. 393, it is held that where a sale of a railroad then in the hands of a receiver had been directed by the court to be made by the receiver, and the sale is so made by him and confirmed by the court, the sale is valid; the provisions of Alabama Code, § 3600, that when any property is ordered to be sold by the decree of a chancery court such sale shall always be made by the register of the court ordering the same, being directory and not mandatory. See also:

Kansas. — *Keene Five Cent Sav. Bank v. Marsh*, 31 Kan. 771.

Nebraska. — *Miller v. Lanham*, 35 Neb. 886; *Watson v. Tromble*, 33 Neb. 450; *Link v. Connell*, 48 Neb. 574; *Neligh v. Keene*, 16 Neb. 407; *O'Brien v. Gaslin*, 20 Neb. 347; *Wilcox v. Raben*, 24 Neb. 368; *McKeighan v. Hopkins*, 19 Neb. 33; *Trumble v. Williams*, 18 Neb. 144; *Day v. Thompson*,

11 Neb. 123; *Crowell v. Johnson*, 2 Neb. 146.

In *Wyant v. Tuthill*, 17 Neb. 495, confirmation was held to cure failure to advertise full thirty days.

New York. — *Embury v. Conner*, 3 N. Y. 511.

Oregon. — *Leinenweber v. Brown*, 24 Oregon 548; *Patterson v. Eakin*, 87 Va. 49; *Karn v. Rorer Iron Co.*, 86 Va. 754; *Utterbach v. Mehler*, 86 Va. 62; *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857; *Berlin v. Melhorn*, 75 Va. 639.

4. *May v. Logan County*, 30 Fed. Rep. 250; *Sturdy v. Jackoway*, 19 Ark. 499; *Osman v. Traphagen*, 23 Mich. 80; *Noland v. Barrett*, 122 Mo. 181; *Taylor v. Coots*, 32 Neb. 30; *McKeighan v. Hopkins*, 14 Neb. 361; *Phillips v. Dawley*, 1 Neb. 320.

In *Rawls v. Carter*, 119 N. Car. 596, it was held that a judgment directing the sale by an administrator of the land of a decedent, and confirming the sale, can be set aside only in a direct proceeding for that purpose, and the court said: "It has been decided many times in this court that when an action proceeds to final judgment, and in a proceeding like the present, the judgment can only be set aside in a direct proceeding for that purpose; that is, by an independent action. Nor has a creditor in a case like this a right to be made a party before judgment. *Dickey v. Dickey*, 118 N. Car. 956; *Smith v. Gray*, 116 N. Car. 311; *Carter v. Roundtree*, 109 N. Car. 29; *Uzzle v. Vinson*, 111 N. Car. 138." See also *McGlawhorn v. Worthington*, 98 N. Car. 199; *Mathews v. Eddy*, 4 Oregon 235; *Brown v. Christie*, 27 Tex. 73.

5. *Edwards v. Maupin*, 18 D. C. 39; *State Nat. Bank v. Neel*, 53 Ark. 110; *Hammond v. Cailleaud*, 111 Cal. 206.

6. *Hirshfield v. Davis*, 43 Tex. 155; *Yerby v. Hill*, 16 Tex. 377.

7. In *Hammond v. Cailleaud*, 111

Matters Not Concluded.—Jurisdictional questions are, however, undetermined by the order of confirmation.¹

Relation Back.—In general the order of confirmation relates back to the time of the sale, and the rights acquired date from such time.²

6. Objections to Confirmation—In General.—The grounds for setting aside a sale are applicable as objections to confirmation.³ In particular circumstances the grounds of objection are prescribed by statute.⁴

Objections Held Not Good.—The ripening of a tax lien into a tax deed pending delay in asking for a confirmation will not afford

Cal. 206, it is held that an order of confirmation in a partition sale concludes a purchaser not appealing from objecting to comply with his bid.

For other decisions in support of the text see *Cooper v. Holmes*, 71 Md. 26; *Gulf Coast Canning Co. v. Foster*, (Miss. 1895) 17 So. Rep. 683; *Bland v. Muncaster*, 24 Miss. 62; *Price v. Springfield Real Estate Assoc.*, 101 Mo. 107; *Agan v. Shannon*, 103 Mo. 668; *Hollister v. Mann*, 40 Neb. 572; *Schribar v. Platt*, 19 Neb. 620; *Thompson v. Cox*, 8 Jones L. (53 N. Car.) 311; *Ashbee v. Cowell*, Busb. Eq. (45 N. Car.) 158; *Armstrong's Appeal*, 68 Pa. St. 409; *Andrews v. Goff*, 17 R. I. 205; *Berry v. Young*, 15 Tex. 369; *Gale v. Shaw*, 33 W. Va. 299.

1. *Embury v. Conner*, 3 N. Y. 511, holding that the order of confirmation is conclusive only in respect to the regularity of the proceedings, and not as to their effect in transferring title; *Gue v. Jones*, 25 Neb. 634; *McHugh v. Smiley*, 17 Neb. 620; *Burrell v. Chicago, etc., R. Co.*, 43 Minn. 363, holding that the approval and confirmation of the Probate Court, indorsed upon or annexed to a conveyance by a purported guardian to a railway company, pursuant to Minn. Gen. Stat. 1878, c. 57, § 36, was no proof that the person who executed the conveyance was such guardian; following *Dawson v. Helmes*, 30 Minn. 107. See also *Culver v. Hardenbergh*, 37 Minn. 225; *Burrell v. Chicago, etc., R. Co.*, 43 Minn. 363.

In *Best v. Zutavern*, (Neb. 1898) 74 N. W. Rep. 81, it is held that the only matter settled and adjudicated in the proceedings and order of confirmation is as to the proceedings of the sheriff and those acting under and with him in the levy, appraisal, advertising, making, and returning of said sale. In

so far as the principle thus stated in *Schribar v. Platt*, 19 Neb. 625, is in conflict with the reasoning in *Berkley v. Lamb*, 8 Neb. 392, the later case considered is held in effect to have overruled the earlier.

In *State v. Mercantile Bank*, 95 Tenn. 212, it was held that under a decree directing a sale of the "rights and privileges" of a corporation the order of confirmation of the sale of the "powers, privileges, and franchises" was void so far as it related to franchises.

2. *Evans v. Spurgin*, 6 Gratt. (Va.) 107; *Wagner v. Cohen*, 6 Gill (Md.) 97; *Galbreath v. Drought*, 29 Kan. 711; *Cale v. Shaw*, 33 W. Va. 299; *Clark, etc., Invest. Co. v. Way*, (Neb. 1897) 71 N. W. Rep. 1021.

3. See *infra*, XIII. *Objections and Setting Aside*.

4. *Meadows v. Meadows*, 81 Ala. 451, wherein, in an administrator's sale, the court said: "Some of the objections urged, such, for example, as the want of sufficient advertisement and the failure to sell in subdivisions as ordered by the court, may or may not have affected the fairness of the sale, or may have been relevant to the question of adequacy of price or the probable market value of the land. But of themselves, separate and alone, they constituted no sufficient reason for refusing to confirm the sale. It is shown that the court fully tried the issues as to the fairness of the sale and the adequacy of the price, and the record raises no question as to the sufficiency of the sureties. The court did not err in refusing to go outside of the three grounds of objection prescribed by the statute. The case of *Rice v. Drennen*, 75 Ala. 335, cited by appellant's counsel, is readily distinguishable from the present case."

the purchaser valid ground for complaint that the property sold was not the property of the defendant.¹ Nor will the fact that credit was given otherwise than as provided in the decree, it appearing that no injury resulted,² nor the fact that homestead rights may have been sold, afford such ground.³ Nor will objections be heard which are simply intended to cure negligence of the party complaining.⁴

Objections Held Good.—Fraud and misconduct are sufficient grounds of objection.⁵

XIII. OBJECTIONS AND SETTING ASIDE — 1. Who May and Who May Not Object — Who May Object.—The general rule is that any person whose interests are injuriously affected by the sale may move to set the same aside.⁶ This rule has been extended to include all persons interested in the subject-matter, whether parties to the suit or not.⁷ Thus, a judgment creditor,⁸ or a purchaser,⁹ or the highest bidder,¹⁰ or the owner of the prop-

1. *Galbreath v. Drought*, 29 Kan. 711.

2. In *Johnson v. Campbell*, 52 Ark. 316, it was held not error to confirm a sale although a credit of three months was given instead of four, as provided in the decree.

3. In *Burgett v. Apperson*, 52 Ark. 213, the court said: "That the Probate Court had no jurisdiction to sell the homestead during the minority of any of the decedent's children is the settled law of this state. *McCloy v. Arnett*, 47 Ark. 445; *Nichols v. Shearon*, 49 Ark. 75; *Stayton v. Halpern*, 50 Ark. 329. But as that fact did not avoid the sale of the lands, which the court had jurisdiction to sell, and as the Circuit Court had no guide in this proceeding to separate the one from the other, it was not error to decline to interfere upon that ground and leave the petitioner to her action at law for the possession of the homestead tract."

In *Best v. Zutavern*, (Neb. 1898) 74 N. W. Rep. 81, it is held that the homestead right of exemption under the laws of *Nebraska* is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution.

4. *Barling v. Peters*, 134 Ill. 606.

5. *Barling v. Peters*, 134 Ill. 606.

6. *Mobile Cotton Press, etc., Co. v. Moore*, 9 Port. (Ala.) 679; *Aderholt v. Henry*, 82 Ala. 541; *Cohen v. Menard*, 136 Ill. 130; *Galbreath v. Drought*, 29 Kan. 712; *Gould v. Mortimer*, 26 How. Pr. (N. Y. Supreme Ct.) 167; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259.

7. *Adams v. Devalley*, 40 Kan. 486;

Harrison v. Andrews, 18 Kan. 535; *Green v. McMurtry*, 20 Kan. 193; *Wilson County v. McIntosh*, 30 Kan. 234; *Treptow v. Buse*, 10 Kan. 170; *Cowdin v. Cowdin*, 31 Kan. 528; *Rice v. Poynter*, 15 Kan. 264; *Cohen v. Menard*, 136 Ill. 130; *Gould v. Mortimer*, 26 How. Pr. (N. Y. Supreme Ct.) 167; *Cravens v. Wilson*, 48 Tex. 340; *Flanagan v. Pearson*, 50 Tex. 383. But see the next paragraph in the text.

8. *Beckwith v. King's Mountain Min. Co.*, 87 N. Car. 155; *Cravens v. Wilson*, 48 Tex. 324.

9. *Clayton v. Glover*, 3 Jones Eq. (N. Car.) 371; *Cowdin v. Cowdin*, 31 Kan. 528.

10. *U. S. v. Vestal*, 4 Hughes (U. S.) 467, 12 Fed. Rep. 60, where the court said: "Every debtor has a right at any time before the sale is completed to prevent a sale by the payment of the money mentioned in the execution to the officer. In this case a satisfactory proposition of payment was made to the officer by the father of the defendant, and at his request, and the same was accepted and the offer of sale was withdrawn. It was insisted in the argument that the policy of the law in requiring execution sales to be made at public auction to the highest bidder is to encourage competition, and that it will not tolerate any conduct of the officer or any other influence which is calculated to discourage or prevent such fair competition among bidders. This general proposition is correct; but the object of competition among bidders is to secure a fair price for the

erty,¹ or a partner on behalf of the partnership,² may object to the sale.

Who May Not Object.—A party not in interest will not be heard to object to the sale,³ and it is further held that parties in interest who are not parties to the suit cannot be heard to object,⁴ nor can one insist upon the invalidity of a judicial sale and claim the fruits of the sale in one and the same action.⁵ It has been held that a judgment creditor cannot avail himself of a mere irregularity.⁶

2. Proceedings to Vacate — Motion. — Proceedings to vacate a sale

property for the benefit of the parties interested in the sale. After a sufficient sum has been obtained to secure the debt of the plaintiff, the debtor is the only one who can be benefited by a higher bid. If he offers to pay the debt of the plaintiff, and the officer of the law accepts such offer, there is no necessity for the encouragement of further competition, and the sale may be stopped, as the purposes of the writ of execution have been accomplished, and the debtor does not desire to part with his property. In this case the affiant Teague has in no way been damaged, and the execution has been satisfied without the sale of the lands of the defendant. If there had been a sale to a lower bidder and the officer had acted fraudulently or irregularly, we have already stated what would have been the right and remedy of the highest bidder. There is inherent in every court a power to supervise the conduct of its officers and the execution of its judgments and processes. The court can set aside a sale and order a resale, but cannot declare a bidder to be a purchaser — the contract of sale must be made by its ministerial officer." See also *Penn Mut. L. Ins. Co. v. Creighton Theater Bldg. Co.*, (Neb. 1897) 71 N. W. Rep. 279, wherein it was held that an accepted bidder may appeal from an order setting aside the sale, or if there is a fair contention that the bid was accepted.

1. *Clayton v. Glover*, 3 Jones Eq. (56 N. Car.) 371.

2. **Partner.**—In *Smith v. Bryan*, 60 Ga. 630, the court said: "First, he says that Bryan had no right to contest the validity of the *fi. fas.* proceeding against him alone, but must do so in the firm name. Bryan's affidavit is in his name as of the firm of Bell & Bryan, and it may be questioned whether he did not swear for the firm. But if

he did not, inasmuch as it appears that his own private property was levied upon, and not that of the firm, we do not see why he might not legally show that it was proceeding illegally against him individually, and contest it alone by affidavit of illegality, and if decided against him, then by writ of certiorari."

3. *McLaughlin v. Bradford*, 82 Ala. 431; *Johnson's Monition*, 3 La. Ann. 656; *Stocton v. Downey*, 6 La. Ann. 581; *Fortier v. Zimpel*, 6 La. Ann. 53; *Gilmer v. Nicholson*, 21 La. Ann. 589; *Frink v. Morrison*, 13 Abb. Pr. (N. Y. Supreme Ct.) 80; *Bachle v. Webb*, 11 Neb. 429.

4. In *Glassell v. Wilson*, 4 Wash. (U. S.) 60, the court said: "It is not sufficient to point out errors in these proceedings, unless it is done by a person who can introduce himself regularly into the case as a party authorized to question their regularity. Now, in this case, the counsel who obtained this rule do not appear for Mr. Bird Wilson, or for the purchasers at the sale, but they claim title in themselves to the land which was levied on and sold. At present, however, they appear before the court as entire strangers to this transaction, and can in no other way connect themselves with it but by showing their title to the land, and that it is better than that of Mr. Wilson. But is this an inquiry proper for the court to enter upon under this rule? Is it competent to this court to decide such a question? We think not. In cases like the present, or where they are complicated, and particularly if there be contradictory evidence, we should think it most proper to leave the parties to contest their rights in a more regular course of proceeding, on the law or equity side of the court."

5. *Tarleton v. Kennedy*, 21 La. Ann. 500.

6. *Johnson v. Murray*, 112 Ind. 154.

are usually commenced by a motion entitled in the original action.¹

Petition in Equity.—The remedy by motion is not in all cases exclusive, as the action may be by an original proceeding in equity.²

Notice.—Notice of proceedings to vacate a sale must in general be given to all parties in interest.³ Thus, notice is required to be given to the plaintiff,⁴ defendant,⁵ and the purchaser.⁶ But persons acquiring rights subsequent to the sale are not entitled to notice.⁷

3. Objections in General.—While the policy of the law is to uphold judicial sales,⁸ and the presumption is that an officer charged with a duty⁹ or a discretion¹⁰ has been faithful to his trust, it is equally true that courts will jealously guard the interests of parties concerned and refuse to ratify a sale if prejudice is shown.¹¹ Much is left to the discretion of the trial court, and

1. *Beach v. Dennis*, 47 Ala. 262; *Jenkins v. Merriweather*, 109 Ill. 647; *McKee v. Logan*, 82 Mo. 524.

In *White-Crow v. White-Wing*, 3 Kan. 276, it was held that no formal motion in writing to set aside a sale is required, and further that the court having set aside the sale, it will be presumed that there was in effect a motion.

In *Bent v. Maupin*, 86 Ky. 271, it was held that after the notice is served the motion may be made in open court or in writing at the option of the moving party.

2. **In Equity.**—*Hausling v. Hausman*, 73 Cal. 276; *Jenkins v. Merriweather*, 109 Ill. 647, holding that after the deed for real estate sold under execution has been made the court has no power on motion to set aside the deed or set aside the sale, which can only be impeached in equity; *Lackey v. Steere*, 121 Ill. 598; *Stapleton v. Butterfield*, 34 La. Ann. 822; *Bledsoe v. Erwin*, 33 La. Ann. 615; *Jackson v. Roberts*, 7 Wend. (N. Y.) 83; *Good v. Coombs*, 28 Tex. 35; *Phelps v. Laird*, 51 Vt. 285; *Parker v. Parker*, 54 Vt. 341; *Beach v. Dennis*, 47 Ala. 262; *State Bank v. Marsh*, 10 Ark. 129; *Baker v. Hall*, 29 Kan. 618; *McKee v. Logan*, 82 Mo. 524.

3. For notice required under a motion to confirm, see *supra*, XII. *Confirmation*.

4. *Lyster v. Brewer*, 13 Iowa 461; *McKinney v. Jones*, 7 Tex. 598.

5. *Cline v. Green*, 1 Blackf. (Ind.) 53; *Sears v. Low*, 7 Ill. 281; *Bent v. Maupin*, 86 Ky. 271; *Chambers v. Hays*, 6 B. Mon. (Ky.) 115.

6. *Eckstein v. Calderwood*, 34 Cal. 658; *Day v. Graham*, 6 Ill. 435; *Osborn v. Cloud*, 21 Iowa 238; *Jewitt v. Marshall*, 3 A. K. Marsh. (Ky.) 154; *Butts v. Chinn*, 4 J. J. Marsh. (Ky.) 641; *Toler v. Ayres*, 1 Tex. 398; *McKinney v. Jones*, 7 Tex. 598.

7. In *Kirby v. McCook County*, (S. Dak. 1897) 71 N. W. Rep. 140, it was held that where the plaintiff in foreclosure purchases the property and the day after the sale conveys the certificate to a third person, notice to said third person is not necessary to confer jurisdiction upon the court to set aside the sale for irregularities therein.

8. *Brown v. Butters*, 40 Iowa 544.

9. *Scott v. Scott*, 85 Ky. 385.

10. *Nix v. Williams*, 110 Ind. 234.

11. In *Andrews v. Scotton*, 2 Bland (Md.) 644, the court said: "As to sales under the authority of this court, it has long been well established that any circumstance showing that the sale was injurious to the parties concerned, or that a better sale might reasonably and probably have been made, is sufficient to prevent a ratification. It is not incumbent on the party objecting to show favoritism, or an improper motive, although such proof would furnish conclusive inducement for rejecting the proposed sale. But where the property of infants was to be sold, even a strong doubt of the propriety of the sale has been deemed sufficient to prevent its ratification. And if, in any case, the trustee reports that there was an error, mistake, misunderstanding, or misrepresentation as to the terms or manner of the sale, it

in some jurisdictions this discretion will not be interfered with,¹ while in others a strong showing is required to overturn a decision under such discretion.² Objections unsupported by any evidence will not be entertained,³ nor will irregularities not shown to be prejudicial be considered.⁴ In *Nebraska* objections to the appraisalment must be made prior to the sale, and to the trial court.⁵

4. Irregularities—*a. IN GENERAL.*—As a general rule, technical irregularities do not afford sufficient ground for avoiding judicial sales, and more especially if such irregularities have not resulted in prejudice to the party complaining.⁶ Thus, error in spelling a proper name is not sufficient ground⁷—but a total change of name may be⁸—nor proceeding with all legal dispatch to complete execution and sale,⁹ nor the failure to give the defendant notice of the issuance of the order of sale when no notice is required by statute;¹⁰ nor is a sale void though made by an officer other than the one named in the order of sale,¹¹ or as required by statute.¹² But misconduct on the part of the pur-

may be at once rejected and a resale ordered without further inquiry. Objections are seldom or ever made by any others than those directly interested. But the court, in acting as proprietor, or as if the property were its own, and in deciding on the merits of a sale, will avail itself of information from every quarter from which it may be derived; that is, from the original parties to the suit, or the creditors for whose satisfaction the sale is to be made, or from any other person. In such cases, however, much more attention will be paid to objections coming from those who are interested than from volunteers."

In *Russell v. Dyer*, 40 N. H. 183, the court says: "No doctrine, perhaps, has received more universal assent than that, in disposing of a debtor's lands by compulsory proceedings under a statute for the payment of his debts, the course prescribed is to be strictly followed. A failure to comply with any of the substantial requirements of the statute renders the proceedings void and leaves his title to the land unaffected. *Whittier v. Varney*, 10 N. H. 296; *Williams v. Amory*, 14 Mass. 20; *Benson v. Smith*, 42 Me. 414."

1. *Niles v. Parks*, 49 Ohio St. 370.

2. *Davis v. Stewart*, 4 Tex. 224; *Johnson v. Thorpe*, 45 Neb. 347.

3. *Roberts v. Loyata Perpetual Bldg. Assoc.*, 74 Md. 1; *Hooper v. Castetter*, 45 Neb. 67; *Smith v. Spaulding*, 40 Neb. 339; *Ecklund v. Willis*, 44 Neb. 129; *Johnson v. Bemis*, 7 Neb. 224.

4. In *Lloyd v. Frank*, 30 Wis. 306, in the absence of a showing of injury, the fact that a homestead was sold with other mortgaged premises was held not sufficient to reverse the confirmation.

5. *Nebraska Land, etc., Co. v. McKinley-Lanning L. & T. Co.*, (Neb. 1897) 72 N. W. Rep. 357.

6. *McGeorge v. Sease*, 32 Kan. 387; *Norman v. Olney*, 64 Mich. 553; *Miller v. Lanham*, 35 Neb. 886; *Carter v. Rountree*, 109 N. Car. 29; *Whitlock v. Johnson*, 87 Va. 323; *Warren v. Foreman*, 19 Wis. 35.

7. In *Kuhn v. Kilmer*, 16 Neb. 700, execution against Rosina Coons, instead of Kuhn, was held not fatal.

8. In *Morris v. Balkham*, 75 Tex. 111, judgment was rendered against H. W. Van Hagen, the defendant's name being Hiram Watkins Van Hagen, and a sale on execution issued against Wm. Van Hagen was held an invalidity so far as it affected the first named Van Hagen's interest.

9. *Smith v. Foxworthy*, 39 Neb. 214; *Hazlett's Estate*, 137 Pa. St. 587.

10. *Smith v. Foxworthy*, 39 Neb. 214.

11. In *Link v. Connell*, 48 Neb. 574, a sale made by the sheriff under a decree directing that the mortgaged property should be sold by a master therein named was held to be an irregularity voidable at most and cured by an order of confirmation.

12. In *Dickinson v. Dickey*, 14 Hun (N. Y.) 617, a sale by a referee directed in the decree to conduct the sale, instead of by the sheriff as required by

chaser¹ and sales made at a place or time not warranted by law,² or prejudicial irregularities of which the purchaser had notice, may be ground for avoiding the sale.³ The execution of a sheriff's deed cures irregularities.⁴

b. OF OFFICER. — The general rule, as stated in the foregoing section, applies to irregularities committed by the officer in the discharge of his duty.⁵

c. IN PROCESS. — It is no ground for avoiding a sale that the writ was issued for a larger amount than was due;⁶ nor will the fact that the decree designated the officer appointed to conduct the sale as "commissioner" instead of "master" avoid the sale.⁷ An execution from the Supreme Court upon a judgment of

the laws then in force, was held a mere irregularity, and the sale passed a good title to the purchaser.

1. *Aderholt v. Henry*, 82 Ala. 541.

2. *Dula v. Seagle*, 98 N. Car. 458.

3. *Perry v. Peterson*, 98 N. Car. 63; *Dula v. Seagle*, 98 N. Car. 458.

4. *Cooper v. Wilson*, 96 Pa. St. 409. See also *supra*, XII. *Confirmation*.

5. *The Ruby*, 38 Fed. Rep. 622, where the fact that the officer conducting a sale advertised to take place at the front entrance of the custom house stood in the open door of the front entrance part of the time, and part of the time the front door was closed, was held not sufficient irregularity to avoid the sale, it appearing that ample opportunity was given for bidding and that a number of persons were in attendance.

In *White v. Farley*, 81 Ala. 565, the court said: "The same is true as to the alleged failure of the sheriff to give personal notice of the levy to the defendant in execution, who is the complainant in the present bill, as required of him by section 3195 of the Code (1876). It can stand upon no higher ground than a failure of the sheriff to advertise the sale of lands levied on, and this, as often held, is a mere irregularity not vitiating the validity of the sale. A judgment against the owner, an execution thereon, a levy, and a sheriff's deed is all that is requisite. *Ware v. Bradford*, 2 Ala. 676; *Ray v. Womble*, 56 Ala. 32. The precise point was so decided in *Love v. Powell*, 5 Ala. 58, more than forty years ago, and may now be regarded as a rule of property not to be unsettled."

Illustrations. — In *Brown v. Butters*, 40 Iowa 544, it was held that provided it was the duty of the appraiser to

ascertain the liens, the fact that they were ascertained by the sheriff would not invalidate the sale.

In *Davis v. Spaulding*, 36 Iowa 610, the selection of one of the appraisers by the deputy sheriff was held not to affect the validity of the sale.

In *Hill v. Baker*, 32 Iowa 302, the appointment of an appraiser who was not a householder as provided by Rev. Stat., § 3362, was held not to vitiate the sale.

In *Cavender v. Smith*, 1 Iowa 306, an execution sale, it was held that the failure of the sheriff to comply with a directory statute did not invalidate the sale.

In *Rodgers v. Rodgers*, (Ky. 1895) 31 S. W. Rep. 139, a commissioner making the sale allowed two purchasers to divide it between themselves and give separate purchase bonds, and it was held that such act did not invalidate the sale if each bond was proportioned to the value of the land.

In *Gusman v. Le Blanc*, 27 La. Ann. 280, it was held that there is no law which requires the sheriff to announce at the sale under a writ of fieri facias the amount of taxes due on the property offered. The court said: "The doing so was mere surplusage on his part, and as it invaded no one's rights it could cause no injury."

6. *Amato v. Ermann*, 47 La. Ann. 967; *Hinton v. Roach*, 95 N. Car. 106; *Buice v. Lowman Gold, etc.*, Min. Co., 64 Ga. 769. But see *Davie v. Long*, 4 Bush (Ky.) 574, wherein a motion by the execution defendant to quash the execution, levy, and sale because a payment made upon the judgment was not noted upon the execution was sustained.

7. *Mann v. Jennings*, 25 Fla. 730.

affirmance will not render the sale void.¹ And errors in designation may be cured by amendment.² But where the execution is made returnable beyond the statutory limit, a sale thereunder is voidable;³ and a failure to indorse an execution has been held ground for avoiding the sale.⁴ Process issued under a void decree,⁵ or a sale without an order, or under an order materially defective, is a nullity.⁶

1. In *Block v. Morrison*, 112 Mo. 360, the court said: "And it follows that regularly an execution should not be issued out of this court to enforce that part of a judgment which is simply and solely a judgment of affirmance. But it does not follow that this sale should be held void. The practice was unsettled at that early day. In one case a sale under an execution issued out of this court on a judgment of affirmance was held regular. In another case three like sales were held valid, though voidable by a timely motion to quash, and, at a subsequent date, the court clearly stated that it would not disturb that ruling; and that, too, in a case where this deed was brought in question. More than fifty years have lapsed since this sale was made. Under these circumstances we are asked to hold this sale void, and this we decline to do."

2. In *Dewey v. Peeler*, 161 Mass. 135, an amendment was allowed substituting in an execution "administrator with the will annexed" for "special administrators" to conform to the facts. And this was permitted in a subsequent action brought in the same court.

3. In *Youngblood v. Cunningham*, 38 Ark. 571, it was held that where an execution is returnable more than sixty days from its date, a sale of land under it within the sixty days is within its legal life and is not void. The execution is only voidable, and may be quashed or amended at the discretion of the court issuing it upon the application of either party to the judgment.

4. In *Allen v. Clark*, 36 Wis. 101, the failure of the plaintiff therein to indorse the execution, coupled with other facts, was held ground for vacating the sale.

5. In *Symms v. Noxon*, 29 Neb. 404, a sale was held under an unauthorized modified decree, and it was held that the modified decree, so far as it changed the original, was invalid, and the sale thereunder must be set aside.

In *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627, it was held that a sale upon execution issued on a judgment confessed in the County Court, not in compliance with the provisions of the statute, was void.

6. In *Aetna Ins. Co. v. Hallock*, 6 Wall. (U. S.) 561, the court, by Justice Miller, said: "It is therefore to all intents and purposes an execution, and the statute expressly requires that it must issue under the seal of the court. Without the seal it is void. We cannot distinguish it from any other writ or process in this particular."

In *Lawless v. Barger*, 9 Bush (Ky.) 665, the court said: "A judgment should be so certain and specific in its directions to the commissioner, in the description of the property to be sold by him, as well as the other duties to be performed in its execution, as would enable that officer to discharge these duties without reference to any other paper or pleading in the cause; and the commissioner should be equally as definite in making his report."

In *Rhonemus v. Corwin*, 9 Ohio St. 368, the court said: "By the terms of the decree of the Supreme Court, the sheriff was authorized to make sale only 'upon receiving an order for that purpose.' An order from whom? From the Common Pleas, obviously, for to that court the decree was sent by mandate for execution; and it was for that court to pass upon the regularity of the sale. But no order of sale was issued from the Common Pleas. There was a certified copy merely of the decree of the Supreme Court, made out by the clerk of the Common Pleas. It was directed to nobody; it ordered nothing; it did not even describe the premises to be sold. It had none of the requisites of a writ as prescribed by law; and had the sheriff neglected to sell, he would not have been liable either to amercement or to the attachment for contempt. For aught that appears in the record, it may have been made out merely to be used in evidence or as a

5. **Fraud** — *a. IN GENERAL.* — Fraud, whether actual or constructive, is always ground for avoiding a sale.¹ Thus undue concealment,² or an unconscionable advantage taken of one who is known to be *non compos mentis*, will vitiate a sale,³ but allegations of fraud in connection with judicial sales are subject to the general rule of positive proof and strict construction.⁴

b. OF PLAINTIFF. — False representations⁵ or undue oppression by the plaintiff will vitiate the sale.⁶

c. OF OFFICER. — Courts jealously review the conduct of the officer charged with the conduct of the sale, and will avoid the same upon proof of fraud, collusion, or any unfair advantage taken by him.⁷

muniment of title. We think the sale was irregular and was properly set aside."

1. *Hoitt v. Holcomb*, 23 N. H. 535; *Concord Bank v. Gregg*, 14 N. H. 331; *Anderson v. Foulke*, 2 Har. & G. (Md.) 346; *Hall v. Moore*, 68 Miss. 527; *Turnbull v. Endicott*, 3 Smed. & M. (Miss.) 302; *Grindrod's Estate*, 140 Pa. St. 161; *Allison v. Allison*, 88 Va. 328; *Brock v. Rice*, 27 Gratt. (Va.) 812.

2. *Watt v. McGalliard*, 67 Ill. 518, where the court said: "To found any claim for relief under this head of undue concealment, there must have been something partaking of the character of constructive fraud—a nondisclosure of facts which one party was under some legal or equitable obligation to communicate to the other. 1 Story Eq. Jur., §§ 204, 207. If McGalliard did keep silent, so far as appears, he was innocently silent. All the parties to the case were presumed to know their rights and understand their liabilities, and it was not incumbent upon either party to advise or remind the other of them."

3. *Encking v. Simmons*, 28 Wis. 272.

4. **Must Be Clearly Shown.** — *Wallace v. Berger*, 25 Iowa 456; *Robinson Notion Co. v. Foot*, 42 Neb. 156; *Egan v. Grece*, 79 Mich. 629; *Moscowitz v. Homberger*, 19 Misc. Rep. (N. Y. City Ct.) 429, a sale of infants' lands solely for the purpose of giving third persons a clear title, and the confirmation was held invalid; *Briant v. Jackson*, 99 Mo. 585.

In *Williams v. Pollard*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1020, it is held that statements of third persons to the purchaser, in a sale by a guardian, that the title to the lands was not good, are inadmissible to show notice to the purchaser of fraud in the sale.

In *Wick v. Dawson*, 42 W. Va. 43,

the fact that the purchaser agreed with the creditor to hold him harmless if he would consent to the setting aside of the sale was held not such a contract as to be *per se* a fraud upon the due administration of justice.

5. In *Paulett v. Peabody*, 3 Neb. 196, the plaintiff represented to the purchaser that the proceeds of the sale would be applied to the payment of a prior lien, and such false representations were held sufficient to justify the setting aside of the sale.

6. *King v. Platt*, 37 N. Y. 157, the court saying: "The propriety of a forced judicial sale of a large and valuable property on an election day, when public attention would necessarily, to a great extent, be turned to other objects, after a written notice from the person who was to be most affected by it that he would consider it 'unjust and oppressive,' was, at least, very questionable, and although not of itself, perhaps, sufficient to warrant the court in setting aside the sale, yet, in connection with the other facts disclosed in this case, cannot fail to create in the mind an influence unfavorable to the plaintiffs."

7. In *Jennings v. Carter*, 53 Ark. 242, collusion between the officer and the creditor to levy upon the debtor's homestead during his absence, and to publish the advertisement in an obscure place, was held to make the sale fraudulent and void.

In *Hamilton v. Burch*, 28 Ind. 233, the officer sold a number of acres from the centre of a tract of land and thereby destroyed the value of the remainder. The sale was set aside. See also *Sioux City, etc., Town Lot, etc., Co. v. Walker*, 78 Iowa 476; *Benz v. Hines*, 3 Kan. 390; *Stone v. Cromie*, 87 Ky. 173; *Silver v. McNeil*, 52 Mo. 518.

d. OF PURCHASER. — Fraud participated in by the purchaser is sufficient ground for avoiding the sale.¹ The purchaser is bound by the knowledge of his attorney.² And where great inadequacy of price is shown, slight circumstances of unfairness will raise the presumption of fraud, and throw the burden of proving good faith upon the purchaser or other person benefited by the sale.³

e. Surprise and Mistake — **a. GENERAL RULE.** — Courts will, in the exercise of their discretion, set aside sales upon the ground of surprise, mistake, misrepresentation, or other undue hardship,⁴ and relief is more readily granted on that ground when the mortgagee is the purchaser.⁵ And such ground may be sufficient to avoid a sale after ratification by the court.⁶ A mere belief as to the invalidity of the sale will not avoid the same.⁷

b. MISTAKE OF OFFICER, OF DEFENDANT, OR OF PURCHASER — **Of Officer.** — The sale will be set aside for the mistake of the officer in making it when prejudice is shown.⁸

Of Defendant. — A sale will be set aside where the defendant has been misled as to the date of the sale and thereby fails to attend and protect his interests.⁹ And for the same reason relief may be granted even after ratification.¹⁰

Of Purchaser. — While the rule of *caveat emptor* applies generally to judicial sales, yet the purchaser may be relieved from a bid made upon an entire misapprehension of the facts.¹¹

1. *Jennings v. Carter*, 53 Ark. 242; *Neal v. Stone*, 20 Mo. 295; *Able v. Chandler*, 12 Tex. 88.

In *Coffey v. Coffey*, 16 Ill. 141, the purchaser, before the sale, publicly asserted a claim to the premises which he threatened to litigate, and it was held, in connection with other acts of fraud, sufficient ground for avoiding the sale.

In *May v. May*, 11 Paige (N. Y.) 201, it was held that the purchaser must be presumed to know that a court of equity would not sanction a sale where it was apparent that the master was in collusion with other parties to perpetrate a fraud.

In *Billington v. Forbes*, 10 Paige (N. Y.) 487, a codefendant took advantage of the illness of the mortgagor, interfered to prevent the postponement of a sale, and himself became the purchaser. A resale was ordered upon terms.

2. *Jennings v. Carter*, 53 Ark. 242.

3. *Fletcher v. McGill*, 110 Ind. 395.

See also *infra*, XIII. 13. *Inadequacy of Price.*

4. *Kirkpatrick v. Corning*, 48 N. J. Eq. 302; *Howlett v. Central Carolina Land, etc., Co.*, (S. Car. 1897) 27 S. E. Rep. 533.

5. *Kirkpatrick v. Corning*, 48 N. J. Eq. 302.

6. *Brown v. Gilmer*, 8 Md. 322; *Barker v. Richardson*, 41 N. J. Eq. 656.

7. *International Trust Co. v. Keokuk Electric St. R. Co.*, 90 Iowa 90.

8. *McKee v. Logan*, 82 Mo. 524; *Neiman v. Early*, 28 Mo. 475; *Beach v. Dennis*, 47 Ala. 262.

9. *Demaray v. Little*, 19 Mich. 244; *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *Griffith v. Hadley*, 10 Bosw. (N. Y.) 587; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *Strong v. Catton*, 1 Wis. 471.

10. *Yowell v. Gaines*, 2 Bush (Ky.) 211; *United Security L. Ins., etc., Co. v. Safford*, 3 Lack. Leg. N. (Pa.) 51.

11. *Mount Pleasant First Nat. Bank v. Conger*, 37 Iowa 474.

Instances. — In *Frasher v. Ingham*, 4 Neb. 531, the purchaser was relieved, it appearing that the property sold was worthless land instead of valuable timber, the purchaser having relied upon the sheriff's statement to the contrary.

In *Shakespeare v. Delany*, 86 Pa. St. 108, and also in *Cumming's Appeal*, 23 Pa. St. 509, the sale was set aside, it appearing that the purchaser was under the erroneous belief that the liens of

c. PROTECTION OF INFANTS. — Where the guardian of an infant or infants has, through mistake or otherwise, failed to protect the rights of his wards in the sale of property, the courts will protect them by setting aside the sale.¹

7. Scarcity of Bidders. — The fact that but few bidders were in attendance is not a sufficient cause for setting aside a sale.² But where the nonattendance of bidders is due to the inclemency of the weather, it has been held sufficient ground for avoiding the sale.³ So, too, where the sale is held at an unusual hour, and the judgment creditor is thereby prevented, without laches on his part, from being present to protect his interests.⁴

8. Inoperative Decree or Judgment — *a.* VOID DECREE OR JUDGMENT. — A sale under a void decree or judgment is invalid, and conveys no title to the purchaser.⁵

b. PENDENCY OF STAY — *In General.* — A sale is erroneous if made before the expiration of a valid stay of proceedings,⁶ and the purchaser at such a sale acquires no rights as against the owner.⁷ Conversely, a sale may properly be made under a vacated judgment if such order of vacation is superseded.⁸

the mortgage would be discharged by the sale.

In *Herbement v. Sharp*, 2 McCord L. (S. Car.) 264, the purchaser was relieved at an execution sale, it appearing that the defendant had no title to the property, but falsely represented to the sheriff that the land was his, and induced him to sell it as such.

In *Veeder v. Fonda*, 3 Paige (N. Y.) 94, the master's notice of sale described the property as containing twenty acres when in fact it contained but thirteen acres, and one of the complainants, who was present at the sale, knew of the deficiency but concealed the fact. It was held sufficient ground to avoid the sale.

1. *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 635; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

2. *Pate v. Hinson*, 104 Ala. 599; *Equitable Trust Co. v. Shrope*, 73 Iowa 297; *Learned v. Geer*, 139 Mass. 31; *Power v. Larabee*, 3 N. Dak. 502; *Swires v. Brotherline*, 41 Pa. St. 135; *Hudgins v. Lanier*, 23 Gratt. (Va.) 494.

3. *Johnson v. Crawl*, 55 Tex. 571; *Roberts v. Roberts*, 13 Gratt. (Va.) 639.

4. *Johnson v. Crawl*, 55 Tex. 571, where the sale was held between 11 and 11:30 o'clock A. M., whereas the custom was to hold sales between 1 and 2 o'clock in the afternoon.

5. *Alabama.* — *Johnson v. Johnson*, 40 Ala. 247.

Illinois. — *Botsford v. O'Conner*, 57 Ill. 72; *Miller v. Handy*, 40 Ill. 448.

Indiana. — *Ferrier v. Deutchman*, 111 Ind. 330; *Marsh v. Sherman*, 12 Ind. 358.

Iowa. — *Harshey v. Blackmarr*, 20 Iowa 161; *Thornton v. Mulquinne*, 12 Iowa 549.

Kentucky. — *Dorsey v. Kendall*, 8 Bush (Ky.) 294.

Massachusetts. — *Albee v. Ward*, 8 Mass. 79.

Michigan. — *Millar v. Babcock*, 29 Mich. 526.

Mississippi. — *Bias v. Vance*, 32 Miss. 198; *Hamilton v. Lockhart*, 41 Miss. 460.

Missouri. — *Latimer v. Union Pac. R. Co.*, 43 Mo. 105; *Abbott v. Sheppard*, 44 Mo. 273.

Ohio. — *Wood v. Stanberry*, 21 Ohio St. 142.

Texas. — *Hollingsworth v. Bagley*, 35 Tex. 345; *Miller v. Miller*, 10 Tex. 320.

United States. — *Smith v. Cockrill*, 6 Wall. (U. S.) 756; *Morton v. Smith*, 2 Dill. (U. S.) 316; *Webster v. Reid*, 11 How. (U. S.) 437.

6. *Gray v. Federal Bank*, 83 Mich. 365; *Burt v. Thomas*, 49 Mich. 462; *Canfield v. Shear*, 49 Mich. 313; *State Bank v. Green*, 10 Neb. 130; *Jones v. Dow*, 15 Wis. 582; *Baasen v. Eilers*, 11 Wis. 277; *Spaulding v. Milwaukee, etc., R. Co.*, 11 Wis. 157; *Campbell v. Smith*, 9 Wis. 305.

7. *State Bank v. Green*, 10 Neb. 130.

8. *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265.

Computation of Time. — Under a statutory redemption period the time must be computed from the date of final proceedings.¹

c. SATISFIED DECREE OR JUDGMENT. — A sale under a decree or judgment that has been paid and discharged prior to the sale is fraudulent and void.² But a payment of a less amount than the judgment, including interest and costs, is not sufficient.³ So, too, a tender of the amount due is sufficient, but a mere offer to pay is not.⁴

9. Departure from Decree or Statute. — Directions contained in the decree⁵ or prescribed by statute⁶ must be strictly followed. And the parties interested cannot even stipulate for a different order.⁷ A material variance from the directing order or statute will render the sale void,⁸ but irregularities not prejudicial will not avoid the sale.⁹

10. Effect of Reversal of Decree. — All the authorities declare that a third person purchasing in good faith is not affected by a subsequent reversal of the decree.¹⁰ But where the complain-

1. *Burt v. Thomas*, 49 Mich. 462.

In *Canfield v. Shear*, 49 Mich. 313, it was held that the year allowed for redemption should run from the date of the filing of the amended bill.

In *Gray v. Federal Bank*, 83 Mich. 365, it was held that a sale could not be decreed until one year after the filing of the last amendment by which new parties were made defendants.

2. *Ives v. Rice*, 84 Ala. 282; *New England Mortg. Security Co. v. Robson*, 79 Ga. 757; *Boggs v. Douglass*, 89 Iowa 150; *Babcock v. Perry*, 8 Wis. 277.

3. *Boggs v. Douglass*, 89 Iowa 150.

4. *Babcock v. Perry*, 8 Wis. 277.

5. *Walker v. Schum*, 42 Ill. 462; *Welch v. Louis*, 31 Ill. 446; *Meeker v. Evans*, 25 Ill. 322; *Vanbussum v. Maloney*, 2 Metc. (Ky.) 550; *Blakey v. Abert*, 1 Dana (Ky.) 185; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *Hooper v. Castetter*, 45 Neb. 67; *Babcock v. Perry*, 8 Wis. 277.

6. *Wiley v. White*, 3 Stew. & P. (Ala.) 355; *Meeker v. Evans*, 25 Ill. 322; *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 715; *Hooper v. Castetter*, 45 Neb. 67.

7. *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *Babcock v. Perry*, 8 Wis. 277.

8. *Welch v. Louis*, 31 Ill. 446; *Blakey v. Abert*, 1 Dana (Ky.) 185; *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 715.

In *Franklin v. Thurston*, 8 Blackf. (Ind.) 161, it was held that a sale should

be made in conformity with the statute in force when the mortgage was executed.

In *Vanbussum v. Maloney*, 2 Metc. (Ky.) 552, the court said: "The commissioner was directed to advertise the sale at the court-house door and two other public places in the county of Henderson. It was advertised by posting up a notice at the court-house door and at two other places in the city of Henderson. As the city of Henderson is in the county of Henderson, that was a literal compliance with the directions given to the commissioner, but it was not a compliance with their spirit and meaning. The word 'county' was evidently used to distinguish the place thus designated from that of the city. If this was not the purpose for which it was used, it would have only been necessary to have directed the commissioner to advertise the sale at the court-house door and at two other public places in the city."

9. *Meeker v. Evans*, 25 Ill. 322.

10. *Alabama*. — *Phillips v. Benson*, 82 Ala. 500.

Arkansas. — *Estes v. Boothe*, 20 Ark. 583.

Florida. — *Ponder v. Moseley*, 2 Fla. 207.

Illinois. — *Fergus v. Woodworth*, 44 Ill. 374; *Goudy v. Hall*, 36 Ill. 318 [*disapproving* *Wambaugh v. Gates*, 8 N. Y. 13]; *Hobson v. Ewan*, 62 Ill. 146.

Indiana. — *Doe v. Crocker*, 2 Ind. 575, where the following statutory provision was construed: "The reversal

ant,¹ or his attorney,² or assignee,³ becomes the purchaser, a subsequent reversal will avoid his title thus acquired. But this doctrine has been disputed in an early case,⁴ and modified in others.⁵

of any judgment or decree, under or by virtue of which any real estate shall have been sold or transferred, or the title thereto decreed or confirmed, shall not have the effect to avoid any such sale, transfer, or title decreed or confirmed, if the person to be affected thereby shall be, or shall claim under, a *bona fide* innocent purchaser without notice and not a party to the record, or attorney or solicitor of any party thereto." The court said: "We think it is clearly the meaning of these provisions that in every case where real estate has been sold under a judgment afterwards reversed, the judgment defendant shall have restitution; or, in other words, the sale shall be inoperative, unless the purchaser at the execution sale shall have had no notice of the errors or of the pendency of the proceedings to obtain a reversal of the judgment, such as the parties to the judgment or their attorneys are supposed to have. The notice here spoken of cannot mean notice of the reversal, as the judgment of reversal itself would be notice to everybody."

Kentucky. — *Coleman v. Trabue*, 2 Bibb (Ky.) 518; *Sneed v. Reardon*, 1 A. K. Marsh. (Ky.) 218; *Campbell v. Johnston*, 4 Dana (Ky.) 178; *Williams v. Cummins*, 4 J. J. Marsh. (Ky.) 637.

Louisiana. — *Frost v. McLeod*, 19 La. Ann. 69.

Maine. — *Stinson v. Ross*, 51 Me. 556.

Maryland. — *Wampler v. Wolfinger*, 13 Md. 337; *Ward v. Hollins*, 14 Md. 158; *Barney v. Patterson*, 6 Har. & J. (Md.) 182.

Minnesota. — *Branley v. Dambly*, (Minn. 1897) 71 N. W. Rep. 1026.

Ohio. — *McBride v. Longworth*, 14 Ohio St. 349; *Irwin v. Jeffers*, 3 Ohio St. 389.

Wisconsin. — *Herrick v. Graves*, 16 Wis. 157; *Jesup v. City Bank*, 15 Wis. 604.

United States. — *Gray v. Brignardello*, 1 Wall. (U. S.) 627; *Voorhees v. U. S. Bank*, 10 Pet. (U. S.) 449; *Grignon v. Astor*, 2 How. (U. S.) 319; *U. S. Bank v. Washington Bank*, 6 Pet. (U. S.) 8.

1. *Phillips v. Benson*, 82 Ala. 500; *McDonald v. Mobile L. Ins. Co.*, 65 Ala. 358; *Hays v. Cassell*, 70 Ill. 669;

Fergus v. Woodworth, 44 Ill. 374; *M'Lagan v. Brown*, 11 Ill. 519; *Doe v. Crocker*, 2 Ind. 575; *Hutchens v. Doe*, 3 Ind. 529; *Twogood v. Franklin*, 27 Iowa 239; *Coleman v. Trabue*, 2 Bibb (Ky.) 518; *Hubbell v. Broadwell*, 8 Ohio 120; *Buchanan v. Clark*, 10 Gratt. (Va.) 164.

2. *Phillips v. Benson*, 82 Ala. 500; *Galpin v. Page*, 18 Wall. (U. S.) 350; *Doe v. Crocker*, 2 Ind. 575.

3. *McDonald v. Mobile L. Ins. Co.*, 65 Ala. 358.

4. *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102.

5. In *McBride v. Longworth*, 14 Ohio St. 349, the court said: "It is true that it was held, in the case of *Hubbell v. Broadwell*, 8 Ohio 120, that where a mortgagee purchases the mortgaged premises under judicial proceedings had on the mortgage, and continues to hold them until the judicial proceedings are reversed, the mortgagor may redeem the premises, no new rights having intervened. The court held in that case that the mortgagee was to be regarded as a party merely, and not as a purchaser, within the meaning of the statute. But that was a case in which the sale was ordered at the suit of the mortgagee alone, and for the sole purpose of satisfying his debt. There were no other parties in interest but the mortgagor and mortgagee; and, as between them, full justice could be done after reversal. But the case here stands otherwise. These premises were sold under proceedings instituted for that purpose by lienholders other than Longworth; in fact, by the complainants themselves. The sale was ordered at their suit, and on the cross-petition of other parties as well as that of Longworth. Large portions of the proceeds of sale have been distributed under the order of the court to other parties who may now be insolvent. Under these circumstances, we think Longworth is to be regarded as a purchaser, and entitled to the protection which it was the policy of the statute to afford to purchasers at judicial sales."

In *Jesup v. City Bank*, 15 Wis. 604, the court, after stating the rule that a stranger at a judicial sale will be pro-

11. Assailing Decree.—No objections tending to impeach the validity of a decree or the regularity of the proceedings prior to the order of sale can be heard on a motion to set aside the sale, or on objections to the confirmation thereof.¹

12. Sale for Less than Two-thirds of the Appraised Value.—Under a statute requiring an appraisement and a sale for not less than two-thirds of the appraised value, a sale for a less amount is invalid.² But such statutes are construed as permitting the deduction of prior liens,³ and again as prohibiting such deduction.⁴ In *Arkansas* it was held that the appraisement laws governing sales under a power do not apply to sales made under a decree of court.⁵

13. Inadequacy of Price.—The decisions on the subject of inadequacy of price as a ground for setting aside judicial sales are numerous and somewhat conflicting.⁶ The authorities, of

rected, although the decree be subsequently reversed, but that the plaintiff purchaser will not be, said: "But the same reason does not exist in the case of a judgment of foreclosure where the reversal, as in this case, did not defeat the entire claim, but only reduced the amount. There a claim is still left. The mortgage itself creates a lien upon the land, and a liability to sale. If the sale in such a case is set aside, the only result is that it must be sold over again. Upon these grounds, we think the principle adopted in the case of *Corwith v. The State Bank*, 15 Wis. 289, should not be applied to a sale upon a mortgage foreclosure, where the reversal does not defeat the entire mortgage debt, even though the mortgagee be the purchaser. In such a case it should be shown that there was some unfairness in the sale, or that the property would, on a resale, bring a larger amount than the bid at the first sale."

1. *Cox v. Cox*, 18 D. C. 1; *Mann v. Jennings*, 25 Fla. 730; *McGeorge v. Sease*, 32 Kan. 387; *Farmers' Bank v. Quick*, 71 Mich. 534; *Curran v. Kuby*, 37 Minn. 330; *Carter v. Rountree*, 109 N. Car. 32; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *Stratton v. Reisdorph*, 35 Neb. 314; *Kimbrow v. Clark*, 17 Neb. 403; *State Nat. Bank v. Scofield*, 9 Neb. 499.

2. *Ellenbogen v. Griffey*, 55 Ark. 268; *Harrison v. Doe*, 2 Blackf. (Ind.) 1; *Brown v. Butters*, 40 Iowa 544; *Maple v. Nelson*, 31 Iowa 322; *Sargent v. Pittman*, 16 Iowa 469; *De Jarnette v. Verner*, 40 Kan. 224; *Capital Bank v.*

Huntoon, 35 Kan. 577; *American Invest. Co. v. McGregor*, 48 Neb. 779.

3. *American Invest. Co. v. McGregor*, 48 Neb. 779, where the court said: "From this it is clear that each portion of the property sold brought at the sale more than two-thirds of the appraised valuation thereof. It was not prejudicial to the rights of appellant that the appraisers added the valuation of the pieces of property together, and from that sum deducted the incumbrances, since, as we have seen, each piece sold for a sum in excess of two-thirds of its real value as ascertained by the appraisers." *Rosenfield v. Chada*, 10 Neb. 421; *Sessions v. Irwin*, 8 Neb. 7.

4. *De Jarnette v. Verner*, 40 Kan. 224, where the court said: "Where a sheriff holds an execution against property, and for want of sufficient personal property attempts to make the money to satisfy the judgment out of real estate, he must levy upon the land itself, and not upon a mere interest therein, and he must have the land itself appraised, and sell the same without reference to any lien or incumbrance which may be upon the land. It is not for him to inquire whether the land is subject to a mortgage or not." *Ellenbogen v. Griffey*, 55 Ark. 268, a decision under a power of sale mortgage, construing sections 4759 and 4761 of Mansf. Ark. Digest.

5. *Southwestern Arkansas, etc., R. Co. v. Hays*, 63 Ark. 355.

6. In *Alabama* inadequacy of price, in the absence of fraud or other special circumstances, is not a sufficient ground

course, agree that fraud is always a sufficient ground, and further there is a general agreement upon the following propositions: First, that mere inadequacy of price is not in itself sufficient

for setting aside a sale, and the decisions are inclined to sustain sales, although the facts indicate a considerable sacrifice of the property. *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140; *O'Bryan v. Davis*, 103 Ala. 429; *Bolling v. Gantt*, 93 Ala. 89; *Mahone v. Williams*, 39 Ala. 202; *Lankford v. Jackson*, 21 Ala. 650; *Henderson v. Sublett*, 21 Ala. 626; *Lee v. Davis*, 16 Ala. 516; *Littell v. Zuntz*, 2 Ala. 256; *Holly v. Bass*, 68 Ala. 206.

In **Arkansas** inadequacy of price, in the absence of other circumstances showing fraud or unfairness, is not sufficient ground for avoiding the sale. *Nix v. Draughon*, 56 Ark. 240; *Hudgins v. Morrow*, 47 Ark. 515; *Fry v. Street*, 44 Ark. 502; *Littell v. Grady*, 38 Ark. 584; *Brittin v. Handy*, 20 Ark. 391; *Hardy v. Heard*, 15 Ark. 184; *Carden v. Lane*, 48 Ark. 216; *Apperson v. Burgett*, 33 Ark. 338.

In **California** inadequacy of price is admissible only in evidence to establish fraud, and is never of itself sufficient to annul a sale under execution. *Smith v. Randall*, 6 Cal. 47; *Matter of Burton*, 105 Cal. 353; *Clark v. Chapman*, 98 Cal. 110.

In **Colorado** inadequacy of price alone is not ordinarily sufficient cause for setting aside a judicial sale. *Conway v. John*, 14 Colo. 30.

In **Delaware** a sacrifice of the property, together with unusual attendants, is sufficient ground. In *Cowgill v. Cahoon*, 3 Harr. (Del.) 23, a sale of land was set aside because made at an improper place and the property sacrificed, although the sheriff had a discretion as to the place of sale.

In **Florida** gross inadequacy of price, or mere inadequacy, coupled with mistake, misconduct, fraud, or irregularity, will avoid the sale. See also *Loring v. Dunning*, 16 Fla. 119; *Lawyers' Co-operative Pub. Co. v. Bennett*, 34 Fla. 302, where the court said: "Authority is abundant and uniform to the effect that where the inadequacy of price at a judicial sale is the result of some mistake or misunderstanding especially if such mistake or misunderstanding be that of the officer selling, and where the party interested has been thereby prevented from attending the sale, it will

be set aside." It was further held that \$15 was a grossly inadequate price for land worth from \$350 to \$400.

In **Georgia** inadequacy is not *per se* sufficient ground for setting aside a sale, unless so gross as, when combined with other circumstances, to amount to a fraud. *Parker v. Glenn*, 72 Ga. 637.

In **Illinois** inadequacy of price so gross as to amount to fraud will be good ground for setting aside a judicial sale.

Sales Sustained. — *Kerfoot v. Billings*, 160 Ill. 563; *Connely v. Rue*, 148 Ill. 207; *Magnusson v. Williams*, 111 Ill. 450; *Cleaver v. Green*, 107 Ill. 67; *Jenkins v. Pierce*, 98 Ill. 646; *O'Callaghan v. O'Callaghan*, 91 Ill. 228, where a house and lot worth \$4,000 were sold for \$10, and the court refused to set the sale aside, no fraudulent conduct having been shown; *McHany v. Schenk*, 88 Ill. 357; *Allen v. Shepard*, 87 Ill. 314; *Watt v. McGalliard*, 67 Ill. 513; *Heberer v. Heberer*, 67 Ill. 253; *Davis v. Dresback*, 81 Ill. 393; *Gibbons v. Bressler*, 61 Ill. 110; *Kinney v. Knoebel*, 51 Ill. 112; *Comstock v. Purple*, 49 Ill. 158; *Weld v. Rees*, 48 Ill. 428; *McMullen v. Gable*, 47 Ill. 67; *Booker v. Anderson*, 35 Ill. 66; *Noyes v. True*, 23 Ill. 503; *Ayers v. Baumgarten*, 15 Ill. 444; *Greenup v. Stoker*, 12 Ill. 25; *Garrett v. Moss*, 20 Ill. 549.

Sales Set Aside. — *Lurton v. Rodgers*, 139 Ill. 554, where a sale of \$2,000 worth of property for \$60 was held grossly inadequate; *Berry v. Lovi*, 107 Ill. 612, where a sale of \$8,000 worth of property for \$65.38 was held grossly inadequate; *Thomas v. Hebenstreit*, 68 Ill. 115; *Parker v. Shannon*, 137 Ill. 376, where property worth \$5,000 was sold for \$20.

Inadequacy Coupled with Irregularities will suffice to set aside a sale. *Parker v. Shannon*, 137 Ill. 376; *Hobson v. McCambridge*, 130 Ill. 367; *Bradley v. Luce*, 99 Ill. 234; *Emmons v. Moore*, 85 Ill. 304, where inadequacy of price was coupled with the fact that in the sale under an attachment a relative and business partner became the purchaser and fraudulently concealed facts from the owner. *Morris v. Robey*, 73 Ill. 462.

In *Mixer v. Sibley*, 53 Ill. 61, and

ground; secondly, that gross inadequacy of price, such as to shock the conscience and raise a presumption of fraud, is sufficient

Davis v. Pickett, 72 Ill. 483, it was stated that where the right of redemption exists inadequacy is not a sufficient ground unless there are indications of fraudulent practice. In *Pickering v. Driggers*, 59 Ill. 65, an unexplained delay of seventeen years in asking relief was held to prevent the action of the court. See further on the subject, *Dutcher v. Leake*, 44 Ill. 398; *Fergus v. Woodsworth*, 44 Ill. 374; *Sowards v. Pritchett*, 37 Ill. 517.

In *Indiana* the decisions have been somewhat conflicting. The later decisions, however, hold that inadequacy of price alone is not sufficient unless it be so great as to shock the sense of justice and right, or unless other circumstances exist showing fraud, irregularity, or unfairness. *Branch v. Foust*, 130 Ind. 538; *Fletcher v. McGill*, 110 Ind. 395; *Swope v. Ardery*, 5 Ind. 213; *Kerr v. Haverstick*, 94 Ind. 178; *Sherry v. Nick of the Woods*, 1 Ind. 576; *Stuart v. Brown*, 135 Ind. 232; *Tyler v. Wilkerson*, 27 Ind. 450; *Reed v. Carter*, 1 Blackf. (Ind.) 410; *Sowles v. Harvey*, 20 Ind. 217; *Roe v. Ross*, 2 Ind. 99; *Wright v. Dick*, 116 Ind. 538.

In *Benton v. Shreeve*, 4 Ind. 66, gross inadequacy was held not sufficient to set aside a judicial sale unless coupled with other circumstances.

In *Ross v. Banta*, 140 Ind. 120, it was held that where an execution was levied on two lots, one appraised at \$400 and the other at \$1,100, with a joint incumbrance of \$1,100, a sale of the latter lot for \$80 was for two-thirds of its appraised value, exclusive of incumbrance, as required by Rev. Stat. 1894, § 744 (Rev. Stat. 1881, § 732).

In *Iowa* gross inadequacy of price alone is not sufficient ground for avoiding a judicial sale, the period of redemption after sale allowed under the Iowa statutes being held sufficient protection for the debtor. But gross inadequacy of price is regarded as a badge of fraud, and taken in connection with other circumstances, may be conclusive against the validity of the sale. *Fitzgerald v. Kelso*, 71 Iowa 731; *Herron v. Herron*, 71 Iowa 428; *Wood v. Young*, 38 Iowa 103; *Wallace v. Berger*, 25 Iowa 456; *Boyd v. Ellis*, 11 Iowa 97; *Cavender v. Smith*, 1 Iowa 355; *Peterson v. Little*, 74 Iowa 223; *Lehner v. Loomis*, 83 Iowa 416; *Griffith*

v. Milwaukee Harvester Co., 92 Iowa 634; *Sioux City, etc., Town Lot, etc., Co. v. Walker*, 78 Iowa 476.

In *Kansas* the decisions are somewhat conflicting. In 1893 an act was passed known as the Redemption Law, and the authorities refer to this as changing the rule with reference to inadequacy of price. Prior to the passage of this act, the general rule seems to have been that gross inadequacy of price was not in itself sufficient ground for avoiding the sale, but that other slight additional circumstances would be sufficient. *Iona Sav. Bank v. Blair*, 56 Kan. 430; *Means v. Rosevear*, 42 Kan. 377; *Capital Bank v. Huntoon*, 35 Kan. 577; *McGeorge v. Sease*, 32 Kan. 387; *Weir v. Travelers' Ins. Co.*, 32 Kan. 325; *Pickett v. Pickett*, 31 Kan. 727; *Keene Five-Cent Sav. Bank v. Marsh*, 31 Kan. 771; *Northrop v. Cooper*, 23 Kan. 432; *Dewey v. Linscott*, 20 Kan. 684; *Moore v. Pye*, 10 Kan. 246.

In *Kentucky* inadequacy alone is not a sufficient ground for avoiding a sale, but coupled with other circumstances may be, and is always proper evidence to be submitted. *Terry v. Swinford*, (Ky. 1897) 41 S. W. Rep. 553; *Muir v. Pettit*, (Ky. 1896) 35 S. W. Rep. 907; *Alms, etc., Co. v. Gates*, (Ky. 1895) 32 S. W. Rep. 1088; *Vanbussum v. Maloney*, 2 Metc. (Ky.) 550; *Gist v. Frazier*, 2 Litt. (Ky.) 118; *Reed v. Brooks*, 3 Litt. (Ky.) 127.

In *Louisiana* it is held that objections to the appraisement are not grounds for avoiding the sale; that the remedy must be in attacking the appraisement. *Amato v. Ermann*, 47 La. Ann. 967.

In *Maryland* inadequacy of price, unaccompanied by other circumstances, is not sufficient ground for avoiding the sale unless the inadequacy of price is so gross as to indicate fraud or misconduct on the part of the officer or purchaser. *Mahoney v. Mackubin*, 52 Md. 357; *Conroy v. Carroll*, 82 Md. 127; *Bank of Commerce v. Lanan*, 45 Md. 396; *Nesbitt v. Dallam*, 7 Gill & J. (Md.) 494; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Hughes v. Riggs*, 84 Md. 502; *Garrittee v. Popplein*, 73 Md. 322; *Chilton v. Brooks*, 69 Md. 584; *House v. Walker*, 4 Md. Ch. 63; *Condon v. Maynard*, 71 Md. 601; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Horsley v. Hough*, 38 Md. 130; *Cohen v. Wagner*,

ground; thirdly, that where inadequacy of price is shown the courts will be quick to seize upon other irregularities in the

6 Gill (Md.) 236; Hubbard v. Jarrell, 23 Md. 66; Johnson v. Dorsey, 7 Gill (Md.) 269.

In *Massachusetts* inadequacy of price is not a ground for avoiding the sale. King v. Bronson, 122 Mass. 122; Drinan v. Nichols, 115 Mass. 353.

In *Michigan* a sale will not be set aside for inadequacy of price unless some peculiar exigency is shown, and especially if the property is sold to third persons. Page v. Kress, 80 Mich. 85; Farmers' Bank v. Quick, 71 Mich. 534; Demaray v. Little, 19 Mich. 244; Bulard v. Green, 10 Mich. 268.

In *Minnesota* inadequacy of price so gross as to raise an inference of unfairness is sufficient to avoid the sale.

In Johnson v. Avery, 60 Minn. 262, real estate valued at not less than \$8,000 was sold at a partition sale for the sum of \$1,500, and it was held that the sale for such a grossly inadequate price raised the inference of unfairness, and should be set aside. In Lalor v. McCarthy, 24 Minn. 417, the property was improperly sold separately for a grossly inadequate price, although one parcel was fairly sold. Upon all the facts in the case it was held that the entire sale was properly set aside. See also Coolbaugh v. Roemer, 32 Minn. 445.

In *Mississippi* inadequacy of price is considered in connection with other circumstances, Busick v. Watson, 72 Miss. 244; but a sale under an execution, subject to a mortgage, will not be vacated for inadequacy of price in the absence of a showing of the value of the equity of redemption. Baldwin v. McGee, (Miss. 1893) 14 So. Rep. 451.

In *Missouri* inadequacy of price is regarded as a badge of fraud, and, connected with other circumstances, may be sufficient to avoid a sale. Donham v. Hoover, 135 Mo. 210; Briant v. Jackson, 99 Mo. 585; Gordon v. O'Neil, 96 Mo. 350; Rogers, etc., Hardware Co. v. Cleveland Bldg. Co., (Mo. 1895) 32 S. W. Rep. 1; Warder-Bushnell-Glesser Co. v. Allen, 63 Mo. App. 456; Cabbage v. Franklin, 62 Mo. 364; Ames v. Gilmore, 59 Mo. 537; American Wine Co. v. Scholer, 85 Mo. 496; Wagner v. Phillips, 51 Mo. 117; Parker v. Hannibal, etc., R. Co., 44 Mo. 415; Mechanics' Bank v. Pitt, 44 Mo. 364; Nelson v. Brown, 23 Mo. 13; Kline v. Vogel, 11 Mo. App. 211; Sheehan v. Stackhouse,

10 Mo. App. 469; Meyer v. Jefferson Ins. Co., 5 Mo. App. 245. And in exceptional cases, where the inadequacy is so gross as to amount to a flagrant abuse of judicial process, relief is granted on this ground alone. Knoop v. Kelsey, 121 Mo. 642; Walters v. Hermann, 99 Mo. 529; Mitchell v. Jones, 50 Mo. 438; Vail v. Jacobs, 62 Mo. 130; Hannibal, etc., R. Co. v. Brown, 43 Mo. 294.

In *Nebraska* the property must be appraised prior to the publication of notice of sale, and objections to the appraisement must be made and filed before the sale takes place. Appraisers are held to act judicially, and after sale the appraisement can only be attacked on the ground of fraud. And to justify the setting aside of the sale on the ground that the appraisement was too low, the actual value of the property must so greatly exceed its appraised value, as advertised, as to raise the presumption of fraud in the making of the appraisement. Overall v. McShane, 49 Neb. 64; Kearney Land, etc., Co. v. Aspinwall, 45 Neb. 601; Burkett v. Clark, 46 Neb. 466; Ecklund v. Willis, 44 Neb. 129; Smith v. Foxworthy, 39 Neb. 214; Vought v. Foxworthy, 38 Neb. 790; Miller v. Latham, 35 Neb. 886; Drew v. Kirkham, 8 Neb. 477; McKeighan v. Hopkins, 19 Neb. 33.

In *Nevada*, in the absence of fraud, a sale will not be set aside for inadequacy of price. Dazet v. Landry, 21 Nev. 291.

In *New Jersey* the decisions are somewhat conflicting. The general rule is, however, that inadequacy of price must be accompanied by some other circumstance to justify the setting aside of a sale. Bethlehem Iron Co. v. Philadelphia, etc., R. Co., 49 N. J. Eq. 356; Morrisse v. Inglis, 46 N. J. Eq. 306; Delaware, etc., R. Co. v. Scranton, 34 N. J. Eq. 429; Boyd v. Hudson City Academical Soc., 24 N. J. Eq. 349; Marlatt v. Warwick, 18 N. J. Eq. 108; Smith v. Duncan, 16 N. J. Eq. 240; Campbell v. Gardner, 11 N. J. Eq. 423; Howell v. Hester, 4 N. J. Eq. 266; Metcerea v. Prest, 3 N. J. Eq. 460; Simmons v. Vandergrift, 1 N. J. Eq. 55; Seaman v. Riggins, 2 N. J. Eq. 214; Mount v. Manhattan Co., 43 N. J. Eq. 25; Pell v. Vreeland, 35 N. J. Eq. 22;

conduct of the sale, and such irregularities, coupled with inadequacy of price, may be sufficient grounds for avoiding the sale.

Kloepping v. Stellmacher, 21 N. J. Eq. 328.

In New York the policy is to uphold judicial sales, but inadequacy of price coupled with circumstances appealing for equitable relief may be sufficient ground for avoiding sales. *O'Donnell v. Lindsay*, 39 N. Y. Super. Ct. 523, where the authorities are collated and discussed; *Matter of Rider*, 23 Hun (N. Y.) 91; *Whitbeck v. Rowe*, 25 How. Pr. (N. Y. Supreme Ct.) 403; *Murdock v. Empie*, 19 How. Pr. (N. Y. Supreme Ct.) 79; *Mott v. Walkley*, 3 Edw. Ch. (N. Y.) 590; *May v. May*, 11 Paige (N. Y.) 201; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Brown v. Frost*, 10 Paige (N. Y.) 243; *Billington v. Forbes*, 10 Paige (N. Y.) 487; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *Requa v. Rea*, 2 Paige (N. Y.) 340; *Duncan v. Dodd*, 2 Paige (N. Y.) 100; *Hoppock v. Conklin*, 4 Sandf. Ch. (N. Y.) 582; *Howell v. Mills*, 53 N. Y. 323; *McCotter v. Jay*, 30 N. Y. 80; *Griffith v. Hadley*, 10 Bosw. (N. Y.) 589; *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *Kellogg v. Howell*, 62 Barb. (N. Y.) 280; *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Francis v. Church*, Clarke Ch. (N. Y.) 475; *Gardiner v. Schermerhorn*, Clarke Ch. (N. Y.) 102; *Groff v. Jones*, 6 Wend. (N. Y.) 523; *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Livingston v. Byrne*, 11 Johns. (N. Y.) 555; *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 411; *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 118; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Commercial Bank v. Catto*, 13 N. Y. App. Div. 608; *Wesson v. Chapman*, 76 Hun (N. Y.) 592.

In North Carolina inadequacy must be accompanied by other circumstances suggesting undue advantage, fraud, or mistake, to constitute sufficient ground. *Beckwith v. Kings' Mountain Min. Co.*, 87 N. Car. 155.

In Oregon inadequacy of price is not sufficient ground unless it be so gross as to shock the conscience, where there are no confidential relations existing between the parties and no proofs of fraud. *Farmers' Loan Co. v. Oregon Pac. R. Co.*, 28 Oregon 44.

In Pennsylvania mere inadequacy of price alone is not sufficient ground for setting aside a sheriff's sale. *Carson v. Ambrose*, 183 Pa. St. 88; *Hollister*

v. Vanderlin, 165 Pa. St. 248; *Felton v. Felton*, 175 Pa. St. 44; *Cake v. Cake*, 156 Pa. St. 47; *Swires v. Brotherline*, 41 Pa. St. 135; *Carson's Sale*, 6 Watts (Pa.) 140. But an offer of an increased bid is addressed to the discretion of the court, and such discretion, reasonably exercised, will not be interfered with. *Phillips v. Wilson*, 164 Pa. St. 350; *Fidelity Ins. Trust, etc., Co. v. Byrnes*, 166 Pa. St. 496. It is held, however, that when the price is grossly inadequate the court is at liberty to seize upon any other circumstances in order to give relief. *Ritter v. Getz*, 161 Pa. St. 648.

In South Carolina, in the absence of fraud or concealment by the selling officer or the purchaser, or mistake, a sale will not be set aside for inadequacy of price. *Ex p. Alexander*, 35 S. Car. 409; *Coleman v. Hamburg Bank*, 2 Strobb. Eq. (S. Car.) 285; *Young v. Teague*, Bailey Eq. (S. Car.) 13.

In South Dakota inadequacy of price unaccompanied by other circumstances is not sufficient to justify the setting aside of a judicial sale. *Deadwood First Nat. Bank v. Black Hills Fair Assoc.*, 2 S. Dak. 145, the court saying: "Inadequacy of price is not such an irregularity as will warrant a judicial or execution sale to be set aside, unless accompanied by other facts showing or tending to show that such inadequate price was brought about by other acts or irregularities that were unlawful, or resulting from mistake, accident, surprise, misconduct, or fraud."

In Tennessee gross inadequacy of price and slight additional circumstances are sufficient grounds. *Smith v. Miller*, (Tenn. 1897) 42 S. W. Rep. 182; *Meath v. Porter*, 9 Heisk. (Tenn.) 224; *Henderson v. Lowry*, 5 Yerg. (Tenn.) 240.

In Texas gross inadequacy of price, in connection with slight additional facts showing fraud, irregularity, or other circumstances which were conducive to the inadequacy, will be sufficient to avoid the sale. *House v. Robertson*, (Tex. Civ. App. 1896) 34 S. W. Rep. 640; *Vernon v. Montgomery*, (Tex. Civ. App. 1895) 33 S. W. Rep. 606; *Jackson v. Steffens*, (Tex. Civ. App. 1895) 32 S. W. Rep.

14. Death of Parties.—It is not sufficient objection to a sale that the mortgagor died subsequently to the entering of the decree of foreclosure but prior to the sale,¹ nor that a second master is substituted for the one originally named but since deceased.² But the foregoing rule does not apply where the mortgagor died before the entering of the decree, and his heirs were not made parties.³

862; *Cameron v. Owens*, (Tex. Civ. App. 1894) 25 S. W. Rep. 986; *Brackenridge v. Cobb*, 85 Tex. 448; *Irvin v. Ferguson*, 83 Tex. 491; *Jones v. Pratt*, 77 Tex. 210; *Blum v. Rogers*, 71 Tex. 668; *Allen v. Pierson*, 60 Tex. 604; *Kauffman v. Morriss*, 60 Tex. 119; *Klein v. Glass*, 53 Tex. 37; *Pearson v. Flanagan*, 52 Tex. 266; *Chamblee v. Tarbox*, 27 Tex. 140; *Allen v. Stephanes*, 18 Tex. 658; *Capt v. Stubbs*, 68 Tex. 222; *Johnson v. Crawl*, 55 Tex. 571; *Pearson v. Hudson*, 52 Tex. 352; *McLaury v. Miller*, 64 Tex. 381.

In **Utah** sales will be set aside for gross inadequacy and irregularities such as have a direct tendency to prevent the realizing of a fair price for the property sold. *Young v. Schroeder*, 10 Utah 155.

In **Vermont**, in the absence of a showing of fraud, or that a higher price could be obtained on another sale, inadequacy of price is not sufficient. *Carver v. Spence*, 67 Vt. 563; *In re Worcester*, 60 Vt. 420.

In **Virginia** it seems that some special ground, such as fraud, accident, or mistake, must accompany inadequacy of price to justify setting aside a sale. *Harman v. Copenhaver*, 89 Va. 836; *Lawson v. Morman*, 85 Va. 880; *Tucker v. Tucker*, 86 Va. 679; *Hazlewood v. Forrer*, (Va. 1897) 27 S. E. Rep. 507; but it is suggested that perhaps inadequacy alone might be sufficient. *Allison v. Allison*, 88 Va. 328.

In **West Virginia** inadequacy of price alone may be sufficient ground for avoiding a sale. *Connell v. Wilhelm*, 36 W. Va. 598; *Moran v. Clark*, 30 W. Va. 358; *Dryden v. Stephens*, 19 W. Va. 1; *Kable v. Mitchell*, 9 W. Va. 492.

In **Wisconsin** mere inadequacy of price is not a sufficient ground for setting aside a sale. *Meehan v. Blodgett*, 86 Wis. 511; *Fisher v. Shelver*, 53 Wis. 498; *Strong v. Catton*, 1 Wis. 471; *Allis v. Sabin*, 17 Wis. 626; *Kneeland v. Smith*, 13 Wis. 591. The period of redemption after sale allowed under the statutes being held fully to protect

the debtor. *Collins v. Smith*, 75 Wis. 392. It is, however, held that the court is vested with a discretion, *Adams v. Haskell*, 10 Wis. 123; and that other circumstances accompanied by inadequacy, *Cleveland v. Southard*, 25 Wis. 479; *Strong v. Catton*, 1 Wis. 471; or the offer of a reasonable advance bid, may be sufficient ground. *Warren v. Foreman*, 19 Wis. 35. And it is suggested that gross inadequacy of price may alone be sufficient ground. *Pierce v. Kneeland*, 7 Wis. 224.

In the **Federal Courts** the decisions hold fraud and gross inadequacy as sufficient ground, but not mere inadequacy. *Graffam v. Burgess*, 117 U. S. 180; *Byers v. Surget*, 19 How. (U. S.) 303; *Schroeder v. Young*, 161 U. S. 334; *Lake Superior Iron Co. v. Brown*, 44 Fed. Rep. 539; *West v. Davis*, 4 McLean (U. S.) 241; *Surget v. Byers*, Hempst. (U. S.) 715; *Mason v. Bennett*, 52 Fed. Rep. 343; *Fidelity Trust, etc., Vault Co. v. Mobile St. R. Co.*, 54 Fed. Rep. 26; *Hunt v. Fisher*, 29 Fed. Rep. 801; *Stockmeyer v. Tobin*, 139 U. S. 176; *Central Trust Co. v. Sheffield, etc., Coal, etc., R. Co.*, 60 Fed. Rep. 9; *The Ruby*, 38 Fed. Rep. 622; *Blackburn v. Selma R. Co.*, 3 Fed. Rep. 689; *In re Palmer*, 13 Fed. Rep. 870.

In **Canada** it is held to be the settled rule of equity that a mortgagee in exercising the power of sale must take reasonable means of preventing the sacrifice of the property. *Latch v. Furlong*, 12 Grant's Ch. (U. C.) 303.

In **England** the practice is to open the biddings upon the offer of ten per cent. advance before confirmation, but not after confirmation, in the absence of fraud. *Morice v. Durham*, 11 Ves. Jr. 57; *White v. Wilson*, 14 Ves. Jr. 152.

1. *Nagle v. Macy*, 9 Cal. 426; *Hochgraef v. Hendrie*, 66 Mich. 556, wherein judgment below was affirmed by an equal division of the court and nothing was decided.

2. *Merritt v. Daffin*, 24 Fla. 320.

3. *Shiveley v. Jones*, 6 B. Mon. (Ky.) 274.

15. Estoppel—*a.* BY LAPSE OF TIME.—Defects and irregularities in the proceedings connected with a judicial sale, which might be forceful ground of objection if made in due time, may become impotent after the lapse of years. No rule can be laid down as to the number of years after which the courts will refuse to take cognizance of irregularities, the question being largely dependent upon the circumstances of each case.¹

b. BY LACHES — *In General.* — In analogy to the rule just considered under lapse of time, a judicial sale will not be interfered with when the party seeking relief has been guilty of laches in the pursuit of his remedy.²

1. Various Instances.—In *Slicer v. Pittsburg Bank*, 16 How. (U. S.) 571, mortgaged property was sold under a judgment in 1820, and in a decision rendered in 1853 it was held that the defects in the proceeding could not be taken advantage of after the property had been held adversely and quietly for so long a time.

In *Moore v. Greene*, 19 How. (U. S.) 69, a decision rendered in 1856 upon alleged frauds committed in 1767, it was held that the presumption was in favor of the correctness and validity of an administrator's sale, and that the burden of proof was upon the party attempting to impeach the sale.

In *Dunnington v. Evans*, 79 Md. 83, it was held that twenty-seven years after the filing of a bill for a sale under a trust deed, and thirteen years after the sale was ratified, was too late to bring an action to set aside the sale on the ground that the trust deed did not authorize the sale.

In *Redus v. Hayden*, 43 Miss. 614, possession for several years was held to estop an objection as to inadequacy of price. See also *Conger v. Robinson*, 4 Smed. & M. (Miss.) 210.

In *Laughman v. Thompson*, 6 Smed. & M. (Miss.) 259, it was held that in the absence of the record the proceedings will be presumed to have been regular, but when the record is produced all jurisdictional requisites must be affirmatively shown.

In *Nebraska* objections to the appraisalment must be made and filed before the sale. *Best v. Zutavern*, (Neb. 1898) 74 N. W. Rep. 81. See also *supra*, VIII. *Appraisalment*.

In *Coffin v. Cook*, 106 N. Car. 376, it was held that the lapse of years will cure defects that otherwise might have been valid as objections.

In *Newsom v. Wells*, 5 McLean (U.

S.) 21, it was held that the rights of innocent purchasers will not be disturbed after the lapse of thirty years.

In *Grindrod's Estate*, 140 Pa. St. 161, ten years was held to exclude relief. See also *Watt v. Scott*, 3 Watts (Pa.) 79, wherein the court refused to interfere after a lapse of fifteen years.

In *Ingram v. Belk*, 2 Strobb. L. (S. Car.) 207, a motion to set aside a judicial sale made after the lapse of forty years was overruled.

See further *Evans v. Spurgin*, 11 Gratt. (Va.) 615; *Harteaux v. Eastman*, 6 Wis. 410; *Eastman v. Harteaux*, 12 Wis. 267.

2. Laches.—In *McBride v. Gwynn*, 33 Fed. Rep. 402, an objection made two years after the sale, that the published notice was short one day of the time required by law, was overruled because of the failure to make the objection promptly.

In *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, it was held that equity will not set aside a sale although the judgment be barred by the statute of limitations, unless seasonable application is made.

In *Ponder v. Cheeves*, 90 Ala. 117, it was held that the facts of the particular case will determine the length of time in which acquiescence constitutes a waiver and redress is lost by laches. In the case just cited thirteen years was held to constitute a waiver. See also *Cowan v. Sapp*, 81 Ala. 525.

In *Daniel v. Modawell*, 22 Ala. 365, it was held that a sale to a deputy sheriff will be set aside if application is made in proper time, but four years from the time of sale is too late. See also *Abercrombie v. Conner*, 10 Ala. 293.

In *Cunningham v. Felker*, 26 Iowa 117, a delay of six years in objecting to a sale *en masse* was held fatal to re-

Equity of Redemption. — Where the statute provides for a period of redemption after sale, it is uniformly held that proceedings to vacate the sale must be begun within such redemption period,¹ except under peculiar circumstances of unfairness.²

c. WAIVER — In General. — Errors and irregularities in the conduct of a judicial sale may be waived by the parties in interest, either expressly³ or by acts that will constitute a waiver.⁴ But such acts of waiver do not cure a void sale.⁵

Exemptions. — Where homestead rights have not been waived by the mortgagor, a failure to set up such claim as a defense in foreclosure proceedings, or the permitting of a sale and confirmation without objection, is held not to be a waiver of such homestead rights.⁶ Nor is the right to a homestead exemption waived because not claimed before a sale of the property on execution, or because no objections were made to such sale.⁷ But con-

lied. In *Stewart v. Marshall*, 4 Greene (Iowa) 75, a delay of fifteen months after the sale was held too late.

In *Gray v. Gardner*, 3 Mass. 399, an acquiescence of twenty years by the heirs in a sale by the administrator will raise the presumption that the administrator took the oath and posted the notices according to law.

In *Lyon v. Brunson*, 48 Mich. 194, it was held that prompt action must be taken as soon as the facts are known to justify the setting aside of a sale. See also *Goodwin v. Burns*, 21 Mich. 211. In *Bullard v. Green*, 10 Mich. 268, an objection as to adequacy of price made six months after the sale was held too late.

In *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, ten years after the sale, wards, aged respectively twenty and twelve years, objected to a sale of property wherein their guardian was the purchaser. It was held that their laches precluded them from the relief sought.

In *Bostwick v. Atkins*, 3 N. Y. 53, a sale beneficial to the ward was sustained after eighteen years had elapsed, and the rights of innocent purchasers had intervened, although the guardian became the purchaser contrary to law.

In *Foster v. Hall*, 44 Wis. 568, it was held that twenty months after a sale an order vacating such sale for a mere irregularity was an abuse of the discretion of the court. See also *Babcock v. Perry*, 8 Wis. 277.

1. *Love v. Cherry*, 24 Iowa 204; *Abbott v. Peck*, 35 Minn. 499; *Power v. Larabee*, 3 N. Dak. 502; *Raymond v. Holborn*, 23 Wis. 57.

2. *Abbott v. Peck*, 35 Minn. 499.

In *Fletcher v. McGill*, 110 Ind. 395, want of actual knowledge of the sale and circumstances presumptive that the purchaser knew of such want of actual knowledge, a gross unfairness, were held sufficient ground for affording relief after the redemption period.

3. *Jouet v. Mortimer*, 29 La. Ann. 206.

4. **Constructive Waiver.** — *Pate v. Hinson*, 104 Ala. 599, a bill to vacate; *Chase v. New Orleans Gas Light Co.*, 45 La. Ann. 300.

In *Dexter v. Strobach*, 56 Ala. 233, failure of the defendant to take steps to vacate a sale to the sheriff's wife was held to estop him from resisting the right of such wife as a purchaser.

In *Central Pac. R. Co. v. Creed*, 70 Cal. 497, the receipt and retention by the plaintiff of the purchase money for five months was held to estop him from objecting to the sale on the ground of surprise.

In *Allen v. Brown*, 83 Ga. 161, acquiescence by the defendant in the sale of property and his active assistance therein were held to estop him from raising the question of the officer's authority to sell.

In *Fender v. Powers*, 62 Mich. 324, retention of the proceeds by wards under a guardian's sale was held to be an affirmation and waiver.

In *Hooper v. Castetter*, 45 Neb. 67, a purchaser who accepted a conveyance and obtained a right of possession for the property was held to waive all errors and irregularities.

5. *De Jarnette v. Verner*, 40 Kan. 224.

6. *Hoskins v. Litchfield*, 31 Ill. 137.

7. *Zander v. Scott*, 165 Ill. 51.

versely it is held that exemption is a personal right which the debtor may waive, and that if he fails to assert his claim he will be deemed to have waived it.¹ In some jurisdictions it is the duty of the officer holding the execution to apprise the execution defendant of his right of exemption.²

16. Miscellaneous — *a.* CANCELLATION AND NOTICE OF PRIORITY. — A prior mortgagee is not a necessary party in a foreclosure suit brought by a junior lienholder, and whether such prior mortgage was in fact canceled or not, and the fact that the marshal was notified of a prior incumbrance and the amount thereof and warned not to sell the property for a less amount, are not to be considered in objections to a sale.³

b. VACATION APPOINTMENTS. — It is not irregular for a court of chancery to appoint a commissioner to sell the premises in vacation in case of the nonpayment of the money mentioned in the decree.⁴

c. LEGISLATIVE CURATIVE ACTS. — The legislature cannot, by a retroactive statute, make valid a sale inherently void, nor validate a sale made in a manner which it had no power to authorize, but it may properly legalize a sale made in violation of conditions which might properly have been dispensed with in the original act.⁵

XIV. THE DEED — 1. **Necessity of Deed.** — Under a judicial sale a deed is held not to be an essential muniment of title,⁶ but that rule is subject to statutory provisions⁷ and conflicting decisions.⁸ A deed would seem to be an essential requisite of title under a technical execution sale.⁹

1. *Sears v. Hanks*, 14 Ohio St. 298; *State v. Melogue*, 9 Ind. 196.

2. In *Finke v. Craig*, 57 Mo. App. 393, in construing Rev. Stat. Mo. (1889), § 4943, which provided for notice of exemption to be given to the execution debtor where land is situated in a different county from that in which the judgment was rendered, it was held that the officer must serve such notice if he knows the residence of the defendant, although in an adjoining county, when he can be reached by the exercise of reasonable diligence.

3. *Nalle v. Young*, 160 U. S. 624.

4. *Grubb v. Crane*, 5 Ill. 153.

5. *Mitchell v. Campbell*, 19 Oregon 198.

6. *Remington v. Linthicum*, 14 Pet. (U. S.) 84; *Monroe v. Stephens*, 80 Ky. 155; *Jouet v. Mortimer*, 29 La. Ann. 206; *Boring v. Lemmon*, 5 Har. & J. (Md.) 223; *Stevens v. Ferry*, 48 Fed. Rep. 7, wherein it was held that when the defendant fails to redeem within the time required by law he cannot re-

cover the property because no valid deed was ever made.

7. See *Nebraska Code*, § 500.

8. *Doe v. Hardy*, 52 Ala. 292; *Doe v. Jackson*, 51 Ala. 514.

In *Sypert v. McCowen*, 28 Tex. 636, it was held that to pass a perfect legal title to land of an estate, sold by an administrator under order of the County Court, a conveyance by the administrator executed according to the statute is necessary; but it seems that without a conveyance from the administrator, a purchaser, upon complying with the terms of sale as confirmed by the County Court, would have in the land an equitable interest sufficient to maintain a suit against a stranger to the estate. See *Pas. Dig.*, art. 1328.

9. *Barclay v. Plant*, 50 Ala. 509; *People v. Mayhew*, 26 Cal. 656; *Hayes v. New York Gold Min. Co.*, 2 Colo. 273; *Goss v. Meadors*, 78 Ind. 528; *Strain v. Murphy*, 49 Mo. 337; *Smith v. Colvin*, 17 Barb. (N. Y.) 157; *Farmers' Bank v. Merchant*, 13 How. Pr.

2. By Whom Executed — Deputy. — A duly authorized and qualified deputy may execute a deed in the name of his principal.¹ And it has been held that the defendant in execution cannot object to the execution of the deed by a deputy.² But a deed executed by a mere agent is invalid.³

After Term of Office Expires. — The officer conducting the sale is the proper person to execute the deed although his term of office may have expired prior to its execution,⁴ and in case of death the court has jurisdiction to appoint some one to make the deed.⁵

(N. Y. Supreme Ct.) 10; *McMillan v. Edwards*, 75 N. Car. 81; *Holmes v. McMaster*, 1 Rich. Eq. (S. Car.) 340; *Edwards v. Miller*, 4 Heisk. (Tenn.) 314; *Leland v. Wilson*, 34 Tex. 79.

1. *Alabama*. — *McGee v. Eastis*, 3 Stew. (Ala.) 307.

California. — *Lewes v. Thompson*, 3 Cal. 266.

Iowa. — *Carr v. Hunt*, 14 Iowa 206.

Kentucky. — *Young v. Smith*, 10 B. Mon. (Ky.) 293.

Louisiana. — *Kellar v. Blanchard*, 21 La. Ann. 38.

Missouri. — *Samuels v. Shelton*, 48 Mo. 444; *Evans v. Wilder*, 7 Mo. 359.

New York. — *Jackson v. Davis*, 18 Johns. (N. Y.) 8; *Jackson v. Bush*, 10 Johns. (N. Y.) 223.

Ohio. — *Anderson v. Brown*, 9 Ohio 151; *Haines v. Lindsey*, 4 Ohio 88.

Tennessee. — *Glasgow v. Smith*, 1 Overt. (Tenn.) 144.

Texas. — *Terrell v. Martin*, 64 Tex. 121.

England. — *Parker v. Kett*, 1 Salk. 95;

In *Ansley v. Hart*, 77 Ga. 42, the following signature was approved: "James Longstreet, United States Marshal, Southern Dist. of Ga., by A. R. Wright, deputy."

2. In *Carr v. Hunt*, 14 Iowa 207, the court said: "That the sheriff's deed was executed by the deputy of the sheriff is no cause for setting it aside at the instance of the defendant in execution. And then, if the deed was set aside, the judgment or decree and sale would remain. If the sale was valid, to set aside the deed would accomplish no practical good." But see *Samuels v. Shelton*, 48 Mo. 449, wherein the court said: "The defendant then offered in evidence a deed dated October 20, 1859, purporting to be from J. G. Oldum sheriff, and conveying the title of John Roberts in the property to them. This was objected to by the plaintiff on the ground that it was not

properly acknowledged. The objection was sustained. There can be no doubt as to the propriety of the ruling of the court in this matter. The deed was acknowledged by the deputy sheriff in his own name as deputy, and therefore was no acknowledgment at all. The deputy can only act in the name of his principal. *Atwood v. Reyburn*, 5 Mo. 555; *Evans v. Wilder*, 7 Mo. 362; *McClure v. Wells*, 46 Mo. 311."

3. *Gridley v. Phillips*, 5 Kan. 349.

4. *Anthony v. Wessel*, 9 Cal. 103, relying upon *People v. Boring*, 8 Cal. 406, wherein the authority of an ex-sheriff to execute deeds was based upon statutory construction; *Lemon v. Craddock*, 5 Litt. Sel. Cas. (Ky.) 252, holding as a settled principle of the common law that the sheriff who made the sale ought to make the conveyance, and that for this purpose he is still in office although his successor may have entered upon the duties of the same office. See also *Head v. Daniels*, 38 Kan. 1; *Warren v. Carter*, 92 Mo. 288.

5. *People v. Boring*, 8 Cal. 406, where the court said: "The law vests the authority in the old sheriff, who made the sale, and has failed to provide for the completion of the execution in case of his death. The only remedy left, therefore, to the purchaser is by application to the court for the appointment of some suitable person as master or commissioner to execute the conveyance. Such application should be made upon petition, stating, generally, the recovery of the judgment, the execution or order of sale issued thereon, the sale thereunder, the purchase, and such other particulars as may be necessary to show the party is entitled to his deed, and notice of the application should be given to the defendant whose property was sold. The deed executed by a master or commissioner appointed under such circumstances should recite or refer to the proceedings under which

Successor in Office. — By statutory enactments a successor in office may properly execute a deed in order to complete a sale made by his predecessor.¹

3. When Executed — *a. IN GENERAL.* — The logical conduct of the judicial sale requires that the execution of the deed should follow the sale, report, and payment of the purchase money. It therefore follows that the deed is void if the sale takes place after the filing of the report,² or if made prior to the payment of the purchase money.³ A deed ordered prior to the death of the plaintiff⁴ or defendant⁵ may properly be executed afterward, but otherwise the action must be revived before a deed can issue.⁶

b. LAPSE OF TIME. — Statutory limitations in some instances control the time in which a conveyance can lawfully be made,⁷

the appointment is made. In several of the states the proceedings upon such applications are regulated by statute; but independent of statute, the court, by virtue of its original jurisdiction, has authority to appoint any suitable person to make and deliver the deed, in the enforcement of its judgment, and that its final process may be completely executed. *Sickles v. Hogeboom*, 10 Wend. (N. Y.) 562; *Wilson v. Roach*, 4 Cal. 362."

1. In *Lone Jack Min. Co. v. Megginson*, 82 Fed. Rep. 92, the court said: "It is next contended that the appellee failed to prove title in himself, for the reason that the sheriff's deed purporting to convey to him the property which was sold at the mortgage foreclosure sale was void. Its invalidity is said to consist in the fact that the sale was made by one Winchell, who was sheriff at the date of the sale, whereas the deed which followed was made by one Hilbert, his successor in office. To support this contention, reference is made to *Anthony v. Wessel*, 9 Cal. 103, where it was held that the proper person to execute the sheriff's deed was he who held the office at the date of the sale, notwithstanding the fact that at the date of making the deed his term of office had expired. Very soon after that decision was made, and evidently for the purpose of correcting the evil to which it directed attention, the legislature of California enacted that a sheriff should have the authority to make a deed of property which had been sold by his predecessor. Stat. 1858, pp. 95, 96." See also *Thomas v. Thomas*, 87 Ky. 343; *Kruse v. Wilson*, 79 Ill. 233; *Fortune v. Fife*, 105 Mo. 433, *construing*, in

a partition sale, R. S. 1855, § 37; *Porter v. Mariner*, 50 Mo. 364; *In re Guenzler*, 70 Mo. 39; *Phillips v. Dawley*, 1 Neb. 320; *Faull v. Cooke*, 19 Oregon 455; *Moore v. Willamette Transp., etc., Co.*, 7 Oregon 359; *McElmurray v. Ardis*, 3 Strobb. L. (S. Car.) 215; *Wortham v. Cherry*, 3 Head (Tenn.) 469; *Woods v. Lane*, 2 S. & R. (Pa.) 53; *Prescott v. Everts*, 4 Wis. 314; *Conger v. Converse*, 9 Iowa 554; *Thornton v. Boyd*, 25 Miss. 598; *Phillips v. Jamison*, 14 B. Mon. (Ky.) 466.

2. *McBride v. Gwynn*, 33 Fed. Rep. 402.

3. In *Corbitt v. Clenny*, 52 Ala. 480, a sale of decedent's lands, it was held that an order to convey title to any portion of the property sold before the entire purchase money has been paid is a nullity. See also *Chapman v. Harwood*, 8 Blackf. (Ind.) 83; *Barnes v. Morris*, 4 Ired. Eq. (39 N. Car.) 22.

4. *McMurtry v. Montgomery Masonic Temple Co.*, 86 Ky. 206.

5. *U. S. v. Insley*, 54 Fed. Rep. 221.

6. *U. S. v. Insley*, 49 Fed. Rep. 776; *Forst v. Davis*, (Ky. 1897) 41 S. W. Rep. 27.

7. In *Mason v. Ham*, 36 Me. 573, *construing* the statute of 1821, c. 52, § 12, it was held that no license granted to an administrator to convey lands of his intestate could be enforced after one year, and that under such statute no conveyance could transfer the title unless executed and delivered within the year. *Macy v. Raymond*, 9 Pick. (Mass.) 285, sustains this holding under a similar statute. But see *Osman v. Traphagen*, 23 Mich. 80, where it was held that a failure to execute a deed within a year from the granting of the license cannot be urged against

and furthermore the courts will refuse to order the execution of a deed after a great lapse of time,¹ or require notice of the application.²

c. REDEMPTION PERIOD.—Where a period of redemption is allowed after the sale, a deed executed prior to the expiration of such period conveys no title.³ But the execution of a deed prior to the expiration of the redemption period will not invalidate the sale.⁴

4. To Whom Executed.—As a general rule, the deed should be executed to the purchaser⁵ or his assignee.⁶ Only a bidder, however, can object that the deed was made to some other person.⁷ Where the purchaser dies entitled to a deed the same should

the title, following *Howard v. Moore*, 2 Mich. 235.

1. In *School Trustees v. Love*, 34 Ill. App. 420, construing *Starr & Curt. Anno. Stat.*, c. 77, § 30, the court said: "Appellants having neglected to take out such deed within the period limited by section 30 are now barred by that limitation. *Ryhiner v. Frank*, 105 Ill. 326. Thus, by negligence, no excuse for which is shown, appellants lost the benefit of the decrees, sales thereunder, and of the certificates of purchase, and are not in a position to entitle them to equitable interference in their behalf, to enable them indirectly to avoid the consequences of their negligence, by vacating the sales and ordering a resale of said land, that they may be permitted to purchase it again, and be given another opportunity to avail themselves of the benefit of the provisions of the statute."

In *Schrader v. Peach*, 77 Ill. 615, it was held that after the lapse of thirty years, and without any new order of the court, a conveyance under a decree so directing will not pass a legal title; that the proper course was by application to the court for a new order upon a proper notice to persons in interest.

2. *Rucker v. Dooley*, 49 Ill. 377; *Harmon v. Larned*, 58 Ill. 167; *Cottingham v. Springer*, 88 Ill. 90, distinguishing *Rucker v. Dooley*, 49 Ill. 377, and *Harmon v. Larned*, 58 Ill. 167, and holding that the execution of a deed without notice after the expiration of eight years and three months (statute of limitations five years, and equity of redemption fifteen months), was not void as against the judgment debtor. *Applegate v. Kingman*, 17 Neb. 338.

3. *Perham v. Kuper*, 61 Cal. 331; *Bernal v. Gleim*, 33 Cal. 668; *Gross v.*

Fowler, 21 Cal. 393; *Delahay v. McConnel*, 5 Ill. 157; *Conner v. Long*, 63 Iowa 295; *Gorham v. Wing*, 10 Mich. 486.

4. *Rucker v. Steelman*, 73 Ind. 396.
5. *Carpenter v. Sherfy*, 71 Ill. 427; *Davis v. M'Vickers*, 11 Ill. 327; *Johnson v. Adleman*, 35 Ill. 265; *Kinney v. Knoebel*, 47 Ill. 417; *Kingman v. Appleget*, 20 Neb. 605; *Banta v. School Dist. No. 3*, 39 N. J. Eq. 123; *Matter of Opening Eleventh Ave.*, 81 N. Y. 436; *Chautauqua County Bank v. Risley*, 4 Den. (N. Y.) 480.

Joint Purchasers.—In *Montross v. Jamison*, 30 La. Ann. 172, it was held that where property sold at a public sale was bought by three persons without division, each being entitled, by agreement among themselves, to a certain undivided portion of the property, any one of the common owners who had paid his share of the adjudicated price had a right to demand from the sheriff a deed of sale for his undivided portion; and no one of the co-proprietors was entitled to oppose the demand on the ground that the taxes on the property had not been paid.

In *Rice v. Smith*, 18 N. H. 369, it is held that the officer has no authority to execute a deed to one of several joint purchasers.

6. *Parler v. Johnson*, 81 Ga. 254; *Carpenter v. Sherfy*, 71 Ill. 427; *Johnson v. Adleman*, 35 Ill. 265; *Davis v. M'Vickers*, 11 Ill. 327; *Turner v. Madison First Nat. Bank*, 78 Ind. 19; *In re Guenzler*, 70 Mo. 39; *Proctor v. Farnam*, 5 Paige (N. Y.) 614; *Campbell v. Baker*, 6 Jones L. (51 N. Car.) 255; *Williams v. Harrington*, 11 Ired. L. (33 N. Car.) 616; *Den v. Kelly*, 3 Murph. (7 N. Car.) 507; *Morgan v. Hannah*, 11 Humph. (Tenn.) 122.

7. In *Gibbs v. Davies*, 168 Ill. 205,

be executed to his heirs.¹ Under special statute the deed should be deposited with the clerk issuing the execution.²

5. Compelling Execution. — The purchaser at a judicial sale, upon the completion of the essential requisites, is entitled to a deed, and the court will in a proper case compel the issuance of the same.³ And such right may be enforced by mandamus.⁴

6. Takes Effect When. — In an execution sale the title relates back to the date of the judgment lien,⁵ and under a decree of foreclosure of a mortgage to the date of the mortgage lien.⁶

7. Contents — *a. IN GENERAL.* — The deed should show upon its face the authority of the maker⁷ and contain apt words of

the court said: "It seems clear argument is unnecessary to demonstrate that the only persons who have a right to complain as to that are the persons who made the bids at the sale. Nor is authority lacking in support of that position. In *Hobson v. Ewan*, 62 Ill. 146, it was objected that a deed made by an administrator was not executed to one Duhme, the purchaser at a sale by the administrator, but to one Love; and it was ruled that it was wholly immaterial to the persons whose title was divested by the sale to whom the deed was executed, and as to that the court say: 'They have no interest in the question. If there can be a question raised on this point, it must be between the purchaser and his assignee.' It is within common observation and knowledge that bidders at a sale are frequently the representatives of other persons, and no reason is perceived why an administrator, master in chancery, or sheriff making a sale should not issue the certificate of purchase, or execute the deed, as the case may be, to any one indicated by the bidder as the purchaser at the sale. At all events, it being clear the plaintiffs in error were in no wise prejudiced by the report of the master, and by the conveyance to Davies in pursuance of such report, they have no standing in a court of equity to object to it." See also *Voorhees v. U. S. Bank*, 10 Pet. (U. S.) 479.

1. *Swink v. Thompson*, 31 Mo. 336.

2. *McCall v. Irion*, 41 La. Ann. 1126.

3. *People v. Haskins*, 7 Wend. (N. Y.) 464; *Witham v. Smith*, 5 Grant's Ch. (U. C.) 203.

In *Lamb v. Sherman*, 19 Neb. 681, it was held that the power of the court to compel the issuing of the proper deed to the purchaser is a continuing one

and is not exhausted by the issuing of a defective deed.

4. In *People v. Irwin*, 14 Cal. 428, it was held that in a mandamus proceeding to compel execution of a deed the right to the deed is the only matter in controversy, and the question whether the certificate of sale is not merged in a deed made to the purchaser by the debtor after the sale cannot be tried.

In *People v. Fleming*, 2 N. Y. 484, it was held that mandamus cannot be resisted on the ground that a deed has already been executed to another person.

5. *California*. — *Hibbard v. Smith*, 67 Cal. 547.

Illinois. — *Ferguson v. Miles*, 8 Ill. 358.

Indiana. — *Wilhelm v. Humphries*, 97 Ind. 520; *Smith v. Allen*, 1 Blackf. (Ind.) 23.

Kentucky. — *Chalfin v. Malone*, 9 B. Mon. (Ky.) 496.

Maine. — *Clement v. Garland*, 53 Me. 427.

Missouri. — *Porter v. Mariner*, 50 Mo. 364; *Leach v. Koenig*, 55 Mo. 451.

Nebraska. — *Lamb v. Sherman*, 19 Neb. 681.

New Jersey. — *Hackensack Sav. Bank v. Morse*, 46 N. J. Eq. 161; *Morse v. Hackensack Sav. Bank*, 47 N. J. Eq. 279.

New York. — *Jackson v. Ramsay*, 3 Cow. (N. Y.) 75.

6. *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Robinson v. Thornton*, 102 Cal. 680.

7. *Watson v. Watson*, 10 Conn. 77, citing and limiting *Lockwood v. Sturdevant*, 6 Conn. 386, wherein the court, by Hosmer, C. J., said: "It is an established principle, that the authority by virtue of which an administrator is empowered to sell and convey estate must appear on the deed of

grant.¹ A complete recital of the entire proceeding is not held essential² unless required by statute.³

b. ACKNOWLEDGMENT. — While custom,⁴ and the necessity arising from the recording acts, require the acknowledgment of a

conveyance, and with such certainty that the act done shall visibly be warranted by the power conferred. *Rex v. Austrey*, K. B. East. Term 1817; 3 Stark. Evid. 1198; *Rex v. Croke*, 1 Cowp. 29; 2 Swift's Dig. 789; *Oliv. Conv.* 178. And although in some cases it has been held that the authority need not be referred to when the act done is of such a nature that it can have no operation unless by virtue of the power,⁴ *Cruise's Dig.* 249; *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 551; *Clere's Case*, 6 Coke 17*b*; *Andrews v. Emmet*, 2 Bro. C. C. 300; *Ex p. Frith*, 8 Ves. Jr. 609; *Com. Dig.*, tit. *Poiar*, c. 4, yet this principle has never been supposed applicable to the conveyances made by executors and administrators. *Griswold v. Bigelow*, 6 Conn. 258."

An administrator's deed reciting his power under an order of probate, and naming himself as administrator, and signed with that addition to his name, but simply conveying his right and title to the premises, and not conveying by virtue of the power vested in him as such administrator, was held inoperative in *Griswold v. Bigelow*, 6 Conn. 258.

In *Menage v. Jones*, 40 Minn. 254, in construing the form of a guardian's deed it was held that the deed must show that the person who signs it is acting in an official capacity and not merely conveying his own title to the property.

1. In *Johnson v. Bantock*, 38 Ill. 112, a deed which recited that "the said [grantees] are entitled to a deed for the premises so sold" was held insufficient as a deed of conveyance.

2. In *Watson v. Watson*, 10 Conn. 87, the court said: "This grantor, in the deed in question, declares herself to be executrix of the last will and testament of Ebenezer Bliss, and that she sells this land in conformity to an order of the Court of Probate, dated the 24th of March, 1786. Reference is made in the deed directly to the order; and by this order it appears that the Court of Probate, upon the exhibition of her account as executrix, found that there was due from the estate of the deceased £60. 11s. 2*d*.; and that there

was no movable estate to pay the same; and it therefore authorizes her to sell so much of the real estate as would raise that sum, with charges of sale. All admit that this is a state of things in which it is the duty of the judge of probate to order a sale of real estate; and the record shows that he made the order accordingly. See the statute then in force. Stat. 269, tit. 60, § 22 (ed. 1808). Why, then, is not this deed valid? It is objected, because it should set forth the reasons why the Court of Probate ordered the sale.

* * * The executor or administrator states the character in which he acts; the order he receives; and when that order is seen, it appears that the Court of Probate was fully authorized to make it by the statute. This, it is believed, has been the practice generally; and if the principle advanced in *Lockwood v. Sturdevant*, 6 Conn. 373, were to prevail, many titles under executors' and administrators' sales would be shaken. I cannot, therefore, give my sanction to the principle in its extent." See also *Brown v. Redwyne*, 16 Ga. 67; *Ogden v. Walters*, 12 Kan. 283; *Menage v. Jones*, 40 Minn. 254; *Evans v. Robberson*, 92 Mo. 192; *Buchanan v. Tracy*, 45 Mo. 437; *Jones v. Taylor*, 7 Tex. 240; *Blum v. Rogers*, 71 Tex. 668.

In *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241, it was held in a sale under a surrogate's order that such order need not be literally recited, but that every substantial part should be set forth.

3. In *Smith v. Hileman*, 2 Ill. 323, under a statute requiring the administrator's deed to set forth at large the order of the Circuit Court directing the sale, a recital of the substance of the order was held not a compliance with the act. In *Bobb v. Barnum*, 59 Mo. 394, under a similar statute, a deed which failed to make such recitals was held defective, but not necessarily void.

4. *Benninghoff v. Stephenson*, 161 Pa. St. 440.

In *Grover v. Fox*, 36 Mich. 467, the court said: "The statute contemplates that the deed when placed on file is finished and in shape to be recorded in case redemption is not made, and

deed, yet it is not essential to the validity thereof,¹ except as required by statute.² A statutory requirement must, however, be strictly followed,³ but in the absence of such requirement technicalities are not considered.⁴ An acknowledgment by a deputy sheriff in his own name is invalid,⁵ but sufficient if in the name of his principal⁶ or in the name of the deputy

although no acknowledgment of execution is in terms required by the chapter regulating foreclosures, still the profession have always considered that the general statute applied and rendered it necessary that the execution should be regularly authenticated to complete the deed for record. So universal has been the opinion that there has never been any deviation in practice. Even in this very case, the necessity was recognized."

1. *Not Necessary*.—Clark v. Akers, 16 Kan. 166; Gray v. Ulrich, 8 Kan. 112; Doe v. Naylor, 2 Blackf. (Ind.) 32; Dixon v. Doe, 5 Blackf. (Ind.) 107; Grover v. Fox, 36 Mich. 461; Matter of Smith, 4 Nev. 254.

In Hutchinson v. Kelly, 10 Ark. 178, it is held that a certificate of acknowledgment may be appended at any time.

2. *Bray v. Marshall*, 75 Mo. 327; *Lincoln v. Thompson*, 75 Mo. 613; *Adams v. Buchanan*, 49 Mo. 64; *Ryan v. Carr*, 46 Mo. 483.

In *Oviatt's Estate*, 3 Pa. Dist. Rep. 620, 14 Pa. Co. Ct. Rep. 611, it was held that a sheriff's deed under a levam facias to enforce the payment of owelty in partition passes no title where the deed has not been acknowledged and the sale confirmed.

3. *Ryan v. Carr*, 46 Mo. 483.

In *Bray v. Marshall*, 75 Mo. 327, the certificate was as follows: "I, B. Appleby, clerk of the Circuit Court in and for Dade county, do hereby certify that on the 2d of November, 1866, Samuel E. Shaw, sheriff of Dade county, appeared in open court at the October term, 1866, and acknowledged the execution of the foregoing deed, which was duly entered of record in book 4, on page 221. Witness, B. Appleby, clerk, etc." The court said: "The certificate of the acknowledgment by the sheriff, though not as full as it might have been, implies all that the law requires and is in substantial compliance therewith, and we therefore hold that the sheriff's deed read in evidence conferred upon the plaintiff a good title."

In *Agan v. Shannon*, 103 Mo. 661,

the following certificate of acknowledgment was approved in face of the apparent inconsistency, *overruling Lincoln v. Thompson*, 75 Mo. 613:

"State of Missouri, } In the Probate
County of Barry, } Court of Barry
County, May 3, } County, May 3,
1859.

Be it remembered that W. L. H. Frazier, administrator *de bonis non* of the estate of Andrew J. Miller, deceased, this day personally came into open court and acknowledged the execution of the foregoing deed for the use and purposes therein contained, which acknowledgment is entered on the records of said court of said date.

In testimony whereof I, W. L. H. Frazier, judge of said court, have hereunto set my hand and affixing my private seal.

(SEAL) (there being no seal of office yet provided) at office in Cassville, the day and the year above written.

M. L. Wyrick,
Probate Judge."

4. In *Ogden v. Walters*, 12 Kan. 282, the failure to state in the certificate of acknowledgment that the sheriff was personally known to the officer before whom it was acknowledged was held not fatal.

In *Matter of Smith*, 4 Nev. 254, the failure of the officer to acknowledge the deed in his official capacity was held not invalidating.

5. *Samuels v. Shelton*, 48 Mo. 444.

6. In *Terrell v. Martin*, 64 Tex. 121, the following certificate of acknowledgment was approved:

State of Texas, County of Tarrant.

Before the undersigned authority personally appeared J. M. Henderson, sheriff of Tarrant county, by W. T. Steele, deputy, to me well known, and acknowledged that he executed the foregoing deed for the purposes and consideration and in the capacity therein set forth and expressed.

Witness my hand and seal of office, this 10th day of August, 1878.

J. J. Miller,
District Clerk of Tarrant County.

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when permitted by statute, in which case the sheriff may act as notary.¹

c. CONSTRUCTION OF STATUTES — (1) *Directory*. — Statutory provisions requiring certain recitals in a deed under judicial proceedings are, by the great weight of authority, held to be merely directory; hence the failure to follow precisely such statutory directions will not invalidate the deed.²

(2) *Mandatory*. — On the other hand, there are decisions construing such statutes which have adopted a line of strict construction, giving in effect a mandatory force to such recitals.³

1. In *Cook v. Foster*, 96 Mich. 610, the court said: "The deed was executed by the under sheriff, and the acknowledgment was taken by one Myron G. Wood, a notary public. Mr. Wood was at that time sheriff of the county. The statute provides that such sale shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under sheriff, or deputy sheriff of the county, and the deed executed by the officer or person making the sale. How. Stat., §§ 8501, 8505. Mr. Wood, in taking the acknowledgment, did not act as sheriff, but as a notary public. We think the acknowledgment valid."

2. In *Bettison v. Budd*, 17 Ark. 557, the court said: "The statute requires that the deed shall recite the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars recited in the execution; also, a description of the time, place, and manner of sale, and further declares that such recitals shall be received in evidence of the facts therein contained. See section 60 of c. 67 of the Digest. The obvious intention of this statute was to save the purchaser from the necessity of exhibiting the judgment and execution upon the trial in cases where his rights under such judgment and execution might be called in question; and also to serve as a matter of convenience as well to the sheriff as to the purchaser, as it would point the former to his authority to sell, if he was called on to answer, and would facilitate the latter in deriving his title. The recitals of the deed in this case fall short of the statute, yet it was competent evidence in connection with the judgment and execution, since it recited sufficient to show authority in the sheriff to sell."

In *Clark v. Sawyer*, 48 Cal. 139, the court said: "It is insisted by counsel

for the plaintiff that the sheriff's deeds were not made in conformity to the requirements of section 207 of the Act of April 22, 1850, to regulate proceedings in civil cases, and that the court erred in admitting them in evidence. That section reads as follows: 'The officer who shall sell any real estate or lease of lands and tenements for more than one year shall make to the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars as recited in the execution, also a description of the property, the time, place, and manner of sale, which recital shall be received as evidence of the facts therein recited.' The general rule is that a sheriff's deed need not recite the judgment and execution. It is sufficient if it appear that they were the authority under which he acted. *Blood v. Light*, 38 Cal. 649; *Averill v. Wilson*, 4 Barb. (N. Y.) 180; *Jackson v. Jones*, 9 Cow. (N. Y.) 183. When a title is to be established through a sheriff's deed the judgment and execution must be introduced in evidence with the deed. This statute makes the recitals evidence of the facts recited, and when the recitals are full, dispenses with the necessity of introducing the judgment and execution. This, we think, was its only purpose and effect. It could not have been intended to make void all deeds from which were omitted some of the recitals named."

Other instances in support of the text are: *Holman v. Gill*, 107 Ill. 475; *Williamson v. Woodman*, 73 Me. 163; *Thomas v. Le Baron*, 8 Met. (Mass.) 355; *Davis v. Kline*, 76 Mo. 310; *Moore v. Wingate*, 53 Mo. 398; *Perkins v. Dibble*, 10 Ohio 437; *Armstrong v. McCoy*, 8 Ohio 128; *Glover v. Ruffin*, 6 Ohio 255; *Wright v. Young*, 6 Oregon 87.

3. In *French v. Edwards*, 13 Wall.

d. DESIGNATING PARTIES.—A mere clerical error in the designation of the grantee will not destroy the efficacy of a deed.¹ Nor will the failure to designate the ownership of the property in the proceedings invalidate the deed.²

e. DESCRIPTION—*Certainty and Definiteness*.—The description of the property sold should be sufficiently certain and definite to make possible an accurate location of the property without the aid of any other instrument or information.³

(U. S.) 514, the court, by Justice Field, said: "They all proceed on the principle stated by the Supreme Court of Michigan, that 'what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely.' But it is contended that inasmuch as the sale in the present case was had under a decree of a court, the same presumptions must be indulged to sustain the action of the sheriff that would be entertained to uphold ordinary sales made by him under execution, and that he is not to be held to the same strictness in his proceedings that he would be if he had acted without the decree, solely under the statute. And several cases are cited from the reports of the Supreme Court of California, showing that all reasonable presumptions are indulged in support of sales on execution, and that such sales are not rendered invalid by reason of a want of conformity to statutory provisions as to the time, notice, and, in some particulars, manner of the sale. But the obvious answer to this position is that here there is no room for presumptions. The officer recites in his deed the manner in which he sold the property, and from the recitals it appears that the sale was made in conformity with directions which the statute applicable to the case in effect declares shall not govern sales upon judgments for delinquent taxes. Presumptions are not indulged to sustain irregular proceedings of this character, when the irregularity is manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective."

See also *Smith v. Hileman*, 2 Ill. 323; *Buchanan v. Tracy*, 45 Mo. 441; *Tanner v. Stine*, 18 Mo. 586; *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241.

1. In *Alexander v. Bourdier*, 43 La. Ann. 321, the court said: "It is evident that the word tutor, in the transferring clause of the deed, placed after Theodore

S. Alexander's name, was a clerical error. The suit, the judgment, the seizure, show that it is a misdescription and can have no possible effect."

2. *Caldwell v. Blake*, 69 Me. 469.

3. *Alabama*.—*Deloach v. State Bank*, 27 Ala. 437, where the description of 240 acres of land out of a tract of 280, with no further description, was held void for uncertainty.

Arkansas.—*Tatum v. Croom*, 60 Ark. 487. See also *Schattler v. Cassinelli*, 56 Ark. 175.

Connecticut.—*Wright v. Pond*, 10 Conn. 256.

Georgia.—See *Parler v. Johnson*, 81 Ga. 254, holding that a deed is not void for uncertainty because it describes the premises only by the number of acres lying on the north and east side of a specific lot of land.

Illinois.—*Hughes v. Streeter*, 24 Ill. 648.

Indiana.—*Bowen v. Wickersham*, 124 Ind. 404, holding that a description "except such portions * * * as have heretofore been laid out in town lots," etc., made the deed void for uncertainty; *Shoemaker v. McMonigle*, 86 Ind. 421, where the following description was held void for uncertainty, to wit: "The southeast part of the southeast fourth of the northeast quarter of section 36, township 4 south, and range 2 east, containing thirty-two acres." See also *Lewis v. Owen*, 64 Ind. 446.

Missouri.—*Hammond v. Johnston*, 93 Mo. 198; *Clemens v. Rannells*, 34 Mo. 579; *Henry v. Mitchell*, 32 Mo. 512.

North Carolina.—*Perry v. Scott*, 109 N. Car. 374, holding that a description of land in a deed as "lying and being in the county of Jones, bounded as follows, to wit: on the south side of the Trent river, adjoining the lands of Colgrove, McDaniel and others, containing three hundred and sixty acres, more or less," is not so vague and indefinite as to render the conveyance void; but may be aided by parol evidence [overruling *Blow v. Vaughan*,

Reference to Other Instruments.—In seeming contradiction to the foregoing rule, many authorities hold that where a reference to another instrument is made, and by means of such other instrument the description becomes accurate and certain, the deed is not void for uncertainty.¹

f. **EFFECT OF ERRORS AND OMISSIONS.**—Mere irregularities, errors, or omissions in a deed will not invalidate it.²

105 N. Car. 198; *Wilson v. Johnson*, 105 N. Car. 211; *Hinton v. Roach*, 95 N. Car. 106; *Wharton v. Eborn*, 88 N. Car. 344; *Dickens v. Barnes*, 79 N. Car. 490; *Grier v. Rhyne*, 69 N. Car. 346; *Edmundson v. Hooks*, 11 Ired. L. (N. Car.) 373.

Ohio.—*Winkler v. Higgins*, 9 Ohio St. 600, holding a description as "part lot 66" void for uncertainty.

Texas.—*Dwyre v. Speer*, 8 Tex. Civ. App. 88, holding that where a sheriff's deed describes the land conveyed as all of a certain league, excepting therefrom certain tracts, and the tracts excepted cannot be located, the deed is void for uncertainty. *Giddings v. Day*, 84 Tex. 605; *Overand v. Menczer*, 83 Tex. 122; *Allday v. Whitaker*, 66 Tex. 669.

Wisconsin.—*Head v. James*, 13 Wis. 641. But see *Whiton v. Rock County*, 16 Wis. 46.

United States.—*Boardman v. Reed*, 6 Pet. (U. S.) 345.

1. In *Cadwalader v. Nash*, 73 Cal. 45, the court said: "Where a deed refers in general terms to the official map of a town, parol evidence is admissible to identify the map which has been officially declared to be the town map, and the fact that a particular reference in the deed to the survey, and to the surveyor who made the map, does not literally accord with the indorsement on the map is immaterial. *Penry v. Richards*, 52 Cal. 496. In all cases where the deed refers to a map or instrument in writing, the latter is regarded as incorporated in the deed as a part thereof. *Vance v. Fore*, 24 Cal. 435. The deed and the map or instrument, however, when taken together, must be as certain in respect to the description as a description contained in the deed itself, and the identity of the map referred to must be clearly established." See also *Crosby v. Dowd*, 61 Cal. 602; *Parler v. Johnson*, 81 Ga. 254; *Hays v. Perkins*, 109 Mo. 102; *Jackson v. Striker*, 1 Johns. Cas. (N. Y.) 284; *Brown v. Elmendorf*, (Tex. Civ. App.

1894) 25 S. W. Rep. 145; *Wright v. Lassiter*, 71 Tex. 640; and see *infra*, XIV. 7. *h. Evidence Aliunde, When Permitted.*

2. *Alabama.*—*Henley v. Branch Bank*, 16 Ala. 552; *Doe v. Riley*, 28 Ala. 164.

Florida.—*Adams v. Higgins*, 23 Fla. 13, holding that the omission of the word "decendent," in describing an estate, was not fatal.

Georgia.—*Brooks v. Rooney*, 11 Ga. 423.

Illinois.—*Kruse v. Wilson*, 79 Ill. 233; *Gibbs v. Davies*, 168 Ill. 205; *Keith v. Keith*, 104 Ill. 397, holding that a recital in the deed that the decree was for \$175, when in fact it was for only \$100, was no objection; *Phillips v. Coffee*, 17 Ill. 154.

Indiana.—*Carpenter v. Russell*, 129 Ind. 571.

Kentucky.—*Hildebrand v. Bunn-schu*, (Ky. 1897) 40 S. W. Rep. 920.

Louisiana.—*Carroll v. Scheen*, 34 La. Ann. 423.

Maine.—*Wing v. Burgis*, 13 Me. 111, holding that inconsistent statements will be rejected, and the apparently true statements sufficient in themselves construed to give validity to the deed.

Massachusetts.—*Cooper v. Robinson*, 2 Cush. (Mass.) 184; *Thomas v. Le Baron*, 8 Met. (Mass.) 355, holding that in an administrator's deed a misrecital as to the time of granting the license did not render the deed invalid.

Michigan.—*Johnson v. Crispell*, 39 Mich. 82.

Missouri.—*Owen v. Baker*, 101 Mo. 407; *Hall v. Klepzig*, 99 Mo. 83; *Davis v. Kline*, 76 Mo. 310; *Karnes v. Alexander*, 92 Mo. 660; *Evans v. Robberson*, 92 Mo. 192; *Chandler v. Bailey*, 89 Mo. 641; *Lewis v. Morrow*, 89 Mo. 174; *Perkins v. Quigley*, 62 Mo. 498; *Alien v. Sales*, 56 Mo. 28; *Moore v. Wingate*, 53 Mo. 398; *Wilhite v. Wilhite*, 53 Mo. 71 [overruling *Crittenden v. Leitensdorfer*, 35 Mo. 239]; *Union Bank v. McWharters*, 52 Mo. 34; *Strain v. Murphy*, 49 Mo. 337; *Groner v. Smith*, 49

g. PRESUMPTIONS AND LAPSE OF TIME. — The presumptions favor the validity and correctness of a deed,¹ and such presumptions are more especially favored after a great lapse of time.²

h. EVIDENCE ALIUNDE, WHEN PERMITTED. — It is a uniform rule that obscurity and uncertainty in the recitals of a deed may be explained and made certain by parol evidence.³

8. Reforming Deed. — The authorities on this subject are somewhat conflicting. It seems, however, by the weight of authority, that where the rights of third parties have not intervened reformation will be permitted, to carry out the actual proceedings and that which was contemplated and understood by all the parties.⁴

Mo. 318; *Foulk v. Colburn*, 48 Mo. 225; *Buchanan v. Tracy*, 45 Mo. 437; *State Bank v. Bates*, 17 Mo. 583.

Nebraska. — *Lamb v. Sherman*, 19 Neb. 681.

Nevada. — *Zabriskie v. Meade*, 2 Nev. 285.

New Jersey. — *Den v. Sayre*, 16 N. J. L. 532.

New York. — *Dygert v. Pletts*, 25 Wend. (N. Y.) 402; *Jackson v. Robert*, 11 Wend. (N. Y.) 422.

North Carolina. — *Exum v. Baker*, 118 N. Car. 545, holding that the failure of the commissioner to append his official designation was not fatal; *Wilson v. Taylor*, 98 N. Car. 275; *Gifford v. Alexander*, 84 N. Car. 330; *Jones v. Scott*, 71 N. Car. 192; *Den v. Kelly*, 3 Murph. (N. Car.) 507; *Miller v. Miller*, 89 N. Car. 402.

Ohio. — *Armstrong v. McCoy*, 8 Ohio 128.

Tennessee. — *Rogers v. Cawood*, 1 Swan (Tenn.) 143, wherein a variance from the return in stating the day of sale was held not a material defect.

Texas. — *Jones v. Taylor*, 7 Tex. 240.

1. *Blood v. Light*, 38 Cal. 649; *Kendrick v. Latham*, 25 Fla. 819. But see *Goldman v. Kennedy*, 49 Hun (N. Y.) 157, wherein it is held that the recital in a sheriff's deed of the issue of the execution under which the property therein described was sold is not *prima facie* evidence of the fact that such execution was issued.

2. *Bush v. White*, 85 Mo. 339; *Phillips v. Shiffer*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 101; *Logan v. Pierce*, 66 Tex. 126.

3. *Randolph v. Carlton*, 8 Ala. 606; *Webb v. Bumpass*, 9 Port. (Ala.) 201; *Laughlin v. Hawley*, 9 Colo. 170; *Cal-loway v. Henderson*, 130 Mo. 77; *Jackson v. Walker*, 4 Wend. (N. Y.) 463;

Perry v. Scott, 109 N. Car. 374; *Spiller v. Nye*, 16 Ohio 17; *Christian v. Mynatt*, 11 Lea (Tenn.) 615.

In *Hammond v. Johnston*, 93 Mo. 198, and *Bates v. State Bank*, 15 Mo. 309, it was held that, however vague the description, parol evidence is admissible to identify the premises and show that in the community wherein the sale took place, the land was known by the description given.

In *Mason v. White*, 11 Barb. (N. Y.) 173, the rule is adhered to only for the purpose of establishing and carrying out the intent expressed in the deed, and not an intent which the terms of the deed fail to express.

4. See also, *supra*, XIV. 7. *h. Evidence Aliunde, When Permitted.*

Arkansas. — In *Williams v. McIlroy*, 34 Ark. 85, it is held that a misdescription in a deed may be cured, and a subsequent purchaser acquires no title if he has notice.

Florida. — *Moody v. Hamilton*, 22 Fla. 298, holding that a commissioner had authority to correct a deed defective for having no seal affixed to it.

Illinois. — *Kruse v. Wilson*, 79 Ill. 233.

Indiana. — *Johns v. De Rome*, 5 Blackf. (Ind.) 421; *Rogers v. Abbott*, 37 Ind. 138.

Missouri. — *Dollarhide v. Parks*, 92 Mo. 178; *Moore v. Wingate*, 53 Mo. 398.

New Jersey. — *Vanderbeck v. Perry*, 28 N. J. Eq. 367; *Zingsem v. Kidd*, 29 N. J. Eq. 516.

New York. — *Bartlett v. Judd*, 21 N. Y. 200; *De Riemer v. Cantillon*, 4 Johns. Ch. (N. Y.) 85.

North Carolina. — *McMillan v. Edwards*, 75 N. Car. 81.

Ohio. — *Strang v. Beach*, 11 Ohio St. 283.

Canada. — *Doe v. Miller*, 10 U. C. Q. B. 65.

But where the error is due to papers or proceedings upon which such deed is founded, correction will not be permitted.¹ Nor will a correction be permitted after the limitation fixed by statute in which a deed may be executed.² It has been held that in sheriffs' sales equity will not aid an imperfect execution, but that proceedings must be had to obtain a new deed in the court whence the process issued.³ Furthermore, a doctrine contrary to the general rule first above stated is well supported, and relief against defective descriptions has been refused.⁴

9. Canceling.—Where the court has jurisdiction, it is held that a deed can be canceled only by an original bill in equity,⁵ and such relief will be granted where the deed is executed in pursuance of a sale under a satisfied decree,⁶ or where the deed is executed after great lapse of time without notice to the parties in interest,⁷ or before confirmation.⁸ But a deed obtained in a proper manner and under a regular procedure will not be canceled.⁹

XV. RESALE.—The court has undoubted authority to order a resale of the premises for sufficient cause.¹⁰ But the officer con-

1. In *Conyers v. Mericles*, 75 Ind. 443, the court refused to correct an erroneous description which appeared not only in the deed, but in the decree, order of sale, and notice.

2. *Parker v. Shannon*, 137 Ill. 376.

3. *Ware v. Johnson*, 55 Mo. 500.

4. *Lewis v. Owen*, 64 Ind. 446, where the court said: "Deeds of conveyance, as to the description of the premises conveyed, must be construed liberally, and in cases of this kind will be upheld whenever the description is sufficient to direct the sheriff in the execution of a writ of possession, without the exercise of any other than executive powers; otherwise the deed must be held void for uncertainty. By the description before us it would be impossible for the sheriff to find the premises by the face of his writ, and without the exercise of powers not granted to him as an officer. We think the deed set out in this case is void for uncertainty in the description of the premises. *Davis v. Cox*, 6 Ind. 481; *Porter v. Byrne*, 10 Ind. 146; *Howell v. Zerbee*, 26 Ind. 214; *Gano v. Aldridge*, 27 Ind. 294; *Key v. Ostrander*, 29 Ind. 1; *Nolte v. Libbert*, 34 Ind. 163; *White v. Hyatt*, 40 Ind. 385; *Struble v. Neighbert*, 41 Ind. 344. Can a sheriff's deed be reformed in the description of the premises, or can the defects in the description be aided by extrinsic averments? We think not. To do so would be to change the effect of the proceedings and decree upon which it is founded. A final judg-

ment of a court cannot be affected in that way. Upon principle, and by authority, this question is well settled. *Mahan v. Reeve*, 6 Blackf. (Ind.) 215; *Munger v. Green*, 20 Ind. 38; *Rogers v. Abbott*, 37 Ind. 138; *Cochran v. Utt*, 42 Ind. 267; *Miller v. Kolb*, 47 Ind. 220." See also *Hall v. Klepzig*, 99 Mo. 83; *Moreau v. Branham*, 27 Mo. 351; *Wannall v. Kem*, 51 Mo. 150; *Ware v. Johnson*, 55 Mo. 500; *Dickey v. Beatty*, 14 Ohio St. 389; *Hare v. Bedell*, 98 Pa. St. 485; *Garnett v. Loven*, 80 Va. 456.

5. *Jenkins v. Merriweather*, 109 Ill. 647.

6. *New England Mortg. Security Co. v. Robson*, 79 Ga. 757.

7. *Rucker v. Dooley*, 49 Ill. 377.

8. *Miller v. Smoot*, 86 Va. 1050.

9. *Pate v. Hinson*, 104 Ala. 599; *Statesville Bank v. Graham*, 82 N. Car. 489.

10. *Hammond v. Cailleaud*, 111 Cal. 206; *Fenley v. Tyler*, (Ky. 1896) 37 S. W. Rep. 679; *Maher v. Aetna L. Ins. Co.*, 116 Ind. 486; *Boyer v. Cannon*, 46 La. Ann. 767; *Rowan v. Congdon*, 53 N. J. Eq. 385; *Wesson v. Chapman*, 76 Hun (N. Y.) 592; *Weil v. Woodward*, 104 N. Car. 94; *Hildreth v. Turner*, 89 Va. 858. But compare *Gulf Coast Canning Co. v. Foster*, (Miss. 1895) 17 So. Rep. 683, where, in a sale in partition, it was held that an order directing a resale after confirmation is a nullity, the court having lost its jurisdiction as to a second sale; and *Herdman v. Cooper*, 29 Ill. App. 594, wherein the court

ducting the sale has no such authority,¹ except, of course, that he has a general duty to keep the sale open until a competent bid is received, or until satisfied that no such bid will be offered.² The purchaser at the sale is entitled to notice³ unless he be also the plaintiff in the action.⁴

said: "In considering the second error it should be remembered that lot 2 was sold under the decree of foreclosure on the 19th day of February, 1887, and the time of redemption would not expire until February 19, 1888. In May, 1887, Watson had his execution levied on lot 2, and caused the same to be advertised for sale. The law does not permit a second sale on judicial process of same land within the time allowed by law for a redemption from first sale. *Cook v. Chicago*, 57 Ill. 268; *Merry v. Bostwick*, 13 Ill. 398; *Watson v. Reissig*, 24 Ill. 281."

1. *Peirson v. Fisk*, 99 Mich. 43.

2. *Dazet v. Landry*, 21 Nev. 291.

3. *Hammond v. Cailleaud*, 111 Cal. 206; *Weil v. Woodard*, 104 N. Car. 94.

4. *Fenley v. Tyler*, (Ky. 1896) 37 S. W. Rep. 679, wherein the court said:

"Williams, the purchaser, being the plaintiff in the action, was before the court for all the purposes of enforcing the collection of the bonds; and if not, those who united with him in the sale bonds were as much liable as Williams, the principal, and the rule being served on them gave the court jurisdiction to enforce the payment by a resale of the land. But regardless of all this, it was the duty of Williams, when the notes fell due, to come into court and make payment, and not that of the chancellor to hunt him up and inform him that his notes were due. The object of the sale was to sell the land and distribute the proceeds. It was at his instance that the judgment of sale was rendered, and the chancellor had jurisdiction of the parties until this money was paid and deed executed."

JURAT.

See articles *AFFIDAVITS*, vol. 1, p. 316; *AFFIDAVITS OF MERITS OR DEFENSE*, vol. 1, p. 374; *VERIFICATION*.

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BY JOHN LEHMAN.

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CROSS-REFERENCES.

For *Questions of Jurisdiction in Particular Matters*, see specific titles throughout this work.

Amount in Controversy, see article *AMOUNT IN CONTROVERSY*, vol. 1, p. 702.

Another Suit Pending, see article *ANOTHER SUIT PENDING*, vol. 1, p. 750.

Appearance, see article *APPEARANCES*, vol. 2, p. 588.

Appellate Jurisdiction, see article *APPEALS*, vol. 2, p. 1.

Certiorari to Reach Jurisdictional Defects, see article *CERTIORARI*, vol. 4, p. 90 *et seq.*

Removal of Causes, see article *REMOVAL OF CAUSES*.

Service of Process and Publication, see articles *SERVICE OF PROCESS*; *PUBLICATION*.

Terms of Court, see article *TERMS OF COURT*.

Venue, see article *VENUE*.

Writ of Prohibition, see article *PROHIBITION*.

United States Courts, see article *UNITED STATES COURTS*.

I. DEFINITION AND NATURE — 1. Definition — Judicial Power. —

Where power is conferred on a court of justice to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power.¹

1. *Matter of Cooper*, 22 N. Y. 84 Wend. (N. Y.) 154; *Matter of Canal*, [citing *Patchin v. Brooklyn*, 2 Wend. etc., St., 12 N. Y. 406]. And see gen. (N. Y.) 377; *Matter of Canal St.*, 11 *erally*, as to judicial powers, Am. and

By **Jurisdiction** is meant the power conferred by law upon a court or judicial officer to hear and determine the matter in controversy between litigating parties,¹ and to decide whether that state of facts exists which confers jurisdiction, as well as all other matters which arise in the case legitimately before the court.² Jurisdiction embraces the power to carry the judgment of the court into effect, as the judgment or decree is the end for which jurisdiction is exercised, and it is only through the judgment and its execution that the power of the court is made efficacious.³ In order

Eng. Encyc. of Law (2d ed.), vol. 6, p. 1053, title *Constitutional Law*.

1. *Alabama*. — *Lamar v. Gunter*, 39 Ala. 324; *Wightman v. Karsner*, 20 Ala. 446.

Arkansas. — *Ex p. Woods*, 3 Ark. 537; *Trammell v. Russellville*, 34 Ark. 105.

California. — *Sherer v. Superior Ct.*, 96 Cal. 653; *Central Pac. R. Co. v. Placer County*, 43 Cal. 365; *Altschul v. Doyle*, 55 Cal. 633; *Ex p. Bennett*, 44 Cal. 84.

Colorado. — *Bassick Min. Co. v. Schoolfield*, 10 Colo. 46.

Connecticut. — *Sanford v. Sanford*, 28 Conn. 15.

Delaware. — *Lewis v. Hazel*, 4 Harr. (Del.) 470.

Illinois. — *Kirk v. Vonberg*, 34 Ill. 440; *Fleischman v. Walker*, 91 Ill. 318; *Kelly v. People*, 115 Ill. 583.

Indiana. — *McGuffey v. McClain*, 130 Ind. 327; *Lantz v. Maffett*, 102 Ind. 28; *Quarl v. Abbett*, 102 Ind. 239; *Smurr v. State*, 105 Ind. 127; *Spencer v. McGonagle*, 107 Ind. 410; *Robertson v. State*, 109 Ind. 81; *Ellison v. State*, 125 Ind. 496; *Nesbit v. Miller*, 125 Ind. 109; *Clay County v. Markle*, 46 Ind. 96; *Worthington v. Dunkin*, 41 Ind. 515.

Maine. — *Merrill v. Curtis*, 57 Me. 152; *Adams v. Macfarlane*, 65 Me. 143; *Emery v. Legro*, 63 Me. 357; *McVicker v. Beedy*, 31 Me. 314.

Massachusetts. — *Hopkins v. Com.*, 3 Met. (Mass.) 462.

Missouri. — *Babb v. Bruere*, 23 Mo. App. 604.

Nebraska. — *Johnson v. Jones*, 2 Neb. 135.

New Jersey. — *Munday v. Vail*, 34 N. J. L. 422.

New York. — *Hunt v. Hunt*, 72 N. Y. 217.

Texas. — *Brownsville v. Basse*, 43 Tex. 441; *Withers v. Patterson*, 27 Tex. 491; *Stewart v. Anderson*, 70 Tex. 588.

Vermont. — *Perry v. Morse*, 57 Vt. 509; *State v. Wakefield*, 60 Vt. 618.

Wisconsin. — *Wanzer v. Howland*, 10 Wis. 8.

United States. — *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657.

Scope of Right to Render Judgment. — The right of every court to render judgment is co-extensive with its authority to inquire into the facts. *Feusier v. Lammon*, 6 Nev. 209.

2. *Evans v. Percifull*, 5 Ark. 424; *Jackson v. Smith*, 120 Ind. 520; *Babb v. Bruere*, 23 Mo. App. 604; *Hopkins v. Com.*, 3 Met. (Mass.) 462; *Wanzer v. Howland*, 10 Wis. 8.

Exceptions in Particular Cases. — This rule is subject to such exceptions as may arise under a local law, as, for example, in an action of trespass to real estate before a justice of the peace, if a plea of title is interposed the jurisdiction of the justice is arrested, and any judgment rendered by him thereafter except of nonsuit is void. *Morse v. Presby*, 25 N. H. 304; *Pritchard v. Atkinson*, 4 N. H. 291.

Jurisdiction Is Either Exhausted or Retained, and can never properly be said to be in a state where it is *suspended* and can be *revived*. The exercise of it by the court possessing it may be, and often is, suspended, but it still continues to exist, and only awaits the determination of the court as to when and how it shall be called into action. *Sanford v. Sanford*, 28 Conn. 15.

3. *Ex p. Woods*, 3 Ark. 537; *Kirk v. Vonberg*, 34 Ill. 440; *Fleischman v. Walker*, 91 Ill. 318; *Kelly v. People*, 115 Ill. 583; *Merrill v. Curtis*, 57 Me. 152; *Withers v. Patterson*, 27 Tex. 491.

"A law which restricts their power to render a judgment is therefore a limitation upon the exercise of their jurisdiction; and a law which destroys or impairs the effect which their judgments without such law would have is equally

that jurisdiction may be exercised, there must be a case legally before the court,¹ and a hearing as well as a determination.²

Term Used Indeterminately. — It has been said that there is perhaps no word in legal terminology so frequently used as the word "jurisdiction," so capable of use in a general and vague sense, and which is used so often, by men learned in the law, without a due regard to precision in its application.³

so." *Fordyce v. Beecher*, 2 Tex. Civ. App. 29.

1. *Hatch v. Allen*, 27 Me. 85; *Holmes v. Hull*, 48 Iowa 177; *Ex p. Cohen*, 6 Cal. 318. See also *infra*, VII. 1. *Fictitious Issues and Collusion of Parties*.

2. *Altschul v. Polack*, 55 Cal. 641.

In *Ex p. Bennett*, 44 Cal. 84, it was said that jurisdiction was in truth the power to hear without determining, or to determine without hearing, but in that case the question was decided rather as resting upon the proposition that as a general principle the hearing of proof, the argument of counsel, or, in other words, the trial had or the absence of any trial, neither confer jurisdiction in the first instance nor take it away after it has once fully attached; while in *Altschul v. Polack*, 55 Cal. 641, the question involved was whether a recovery in a former suit could be pleaded in bar against a party who had not been permitted to defend therein, and as to whom the said former action had been dismissed.

3. *Per Miller, J.*, in *Watson v. Jones*, 13 Wall. (U. S.) 732. See also to the same point *Withers v. Patterson*, 27 Tex. 495.

Construction of Phrases — Original Jurisdiction. — Jurisdiction is called *original* because it begins with its constitution and does not attach after the happening of some event or fact which calls its power into being. *Root v. McFerrin*, 37 Miss. 48.

Competent Jurisdiction has been construed to mean the jurisdiction of the person as well as of the subject-matter. *Babbitt v. Doe*, 4 Ind. 355.

Common-law Jurisdiction. — Under the U. S. Rev. Stat., § 2165, providing that an alien may be admitted to be a citizen of the United States by "a court of record of any of the states having common-law jurisdiction and a seal and clerk," it has been held that various courts being courts of record and having a seal and clerk have common-law jurisdiction. *Matter of Conner*, 39

Cal. 98; *Gladhill, Petitioner*, 8 Met. (Mass.) 168; *U. S. v. Power*, 14 Blatchf. (U. S.) 223. And on the other hand a court without a clerk has been held to be out of this class. *State v. Whittemore*, 50 N. H. 245; *Ex p. Cregg*, 2 Curt. (U. S.) 98.

Final Jurisdiction inhibits the exercise of appellate jurisdiction by any other court. *Lampson v. Platt*, 1 Iowa 556.

Within the Jurisdiction means, in one sense, within the judicial cognizance, or within the capacity of the court to determine the merits of the dispute or controversy and to grant the relief asked. *Rosenbaum v. Bauer*, 120 U. S. 450; *In re Stupp*, 11 Blatchf. (U. S.) 124. Or it may mean within the state. *Stevens v. Irwin*, 12 Cal. 306, thus construing the rule of law that the execution of an instrument must be proved by subscribing witnesses if they are within the jurisdiction of the court.

Under the English Judicature Act, 1875, schedule 1, order 11, providing that "service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever * * * any act * * * for which damages are sought to be recovered was * * * done * * * within the jurisdiction," it was held that the words "within the jurisdiction" meant within the territorial jurisdiction. *In re Smith*, L. R. 1 Prob. 300.

Out of the Jurisdiction. — By the Act of Congress of April 30, 1790, c. 36, § 8, the United States courts were given jurisdiction to try and punish certain crimes when committed "out of the jurisdiction of any particular state." These words have been defined to mean out of the jurisdiction of any particular state of the Union, and not out of the jurisdiction of any state, foreign or domestic. *U. S. v. Furlong*, 5 Wheat. (U. S.) 184.

"A witness out of the jurisdiction," under the Code of Civil Procedure of California, making provision for the admission of the testimony of a witness

2. Distinction Between Power and Jurisdiction.—Power may exist although it be not proper to exercise it. Thus although the decrees of a court of equity might not be void for want of jurisdiction, yet it is not always proper for the court to exercise its jurisdiction when its aid is invoked.¹

3. Distinction Between Error of Judgment and Want of Jurisdiction.—The boundary between an error of judgment and the usurpation of power is this: the former is reversible by an appellate court within a certain fixed time, and is therefore only voidable, while the latter is an absolute nullity,² and when jurisdiction

on a former trial, means without the state and so beyond the reach of any process of the courts of the state of California to compel his testimony. *Meyer v. Roth*, 51 Cal. 582.

Any Other Jurisdiction.—The expression, "any other jurisdiction," as used in a statute relating to the competency of witnesses, disabling, among others, such as "have been or may be convicted of felony in this state or in any other jurisdiction," applies to the conviction of a felony in the courts of a sister state. *Pitner v. State*, 23 Tex. App. 366.

Jurisdiction Over the Offense.—The statute of 7 Geo. IV., c. 64, § 20, remedies in criminal cases the "want of a proper or perfect venue, where the court shall appear by the indictment * * * to have had jurisdiction over the offense." It has been decided that the word "jurisdiction," as used in that statute, means local jurisdiction, and not jurisdiction with reference to the nature of the offense charged. *Reg. v. O'Connor*, 5 Q. B. 31, 48 E. C. L. 31.

Jurisdiction of the Cause.—Under the rule that parties or witnesses are exempt from service of process when in attendance in any matter pending before a lawful tribunal *having jurisdiction of the cause*, it was held that a party to a suit who attends his counsel into another state for the purpose of assisting in taking depositions before a notary public in that state is not exempt from service of process while there, because the notary could in no sense be said to have "jurisdiction of the cause." *Greer v. Young*, 120 Ill. 184.

"Jurisdiction" Meaning of the Person.—Under a provision that "every person committing an offense against the laws of this state is liable to be punished therefor in the county having the jurisdiction," the word "jurisdiction" was construed as referring to the juris-

diction of the person in the county in which the offense was committed, and not the subject-matter of the offense, "for it must be conceded that each county in the state has equal and like jurisdiction as to the subject-matter of all crimes and offenses." *State v. Herring*, (Ind. App. 1897) 48 N. E. Rep. 599.

1. *Scott v. Whitlow*, 20 Ill. 312, wherein the court said: "In this case, although the court had power to make the decree it did, we do not think it a proper exercise of its chancery powers;" *Williams v. Detroit*, 2 Mich. 585. And see *infra*, X. 2. *g* *Chancery Jurisdiction*.

In *Curtiss v. Brown*, 29 Ill. 231, the court treats the distinction thus: "In many cases the question of *jurisdiction* is considered as distinct from that of power. We often find the jurisdiction denied, where the *power* exists but ought not to be exercised, and in this sense is the word *jurisdiction* usually used when applied to courts of chancery. Where there is a want of power the decree is void collaterally, but where there is said to be a want of jurisdiction merely it is only meant that it would be erroneous to exercise the power, and the decree would be reversed on appeal. It means a want of equity, and not a want of power." In commenting on this distinction the Court of Appeals of New York, in *Bangs v. Duckinfield*, 18 N. Y. 592, said: "There are, I apprehend, very few cases in which that position [that the decree is void for the want of power] could be affirmed, in respect to a court possessing general jurisdiction in law and equity, on grounds relating to the subject-matter of a controversy." See also *People v. McKane*, 78 Hun (N. Y.) 154.

2. *Ex p. Woods*, 3 Ark. 537; *Evans v. Percifull*, 5 Ark. 424; *Paine v. Mooreland*, 15 Ohio 435; *Voorhees v. Jackson*, 10 Pet. (U. S.) 474.

once attaches proceedings thereafter in the litigation, though erroneous, cannot operate to divest it, but the judgment is binding until reversed.¹ This principle has been laid down in the forcible expression that the power to decide necessarily carries with it the power to decide wrongly as well as rightly,² and is subject to the qualification that the court can render only such judgment as does not transcend in extent or character the law which is applicable to that class of cases.³

II. ELEMENTS AND ACQUISITION OF JURISDICTION — 1. In General. — Every power exercised by any court must be found in and derived from the law of the land, and be exercised in the mode and manner prescribed by that law.⁴ If the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or the court is approached in the manner provided, and consent will not avail to change the provisions of the law in this regard.⁵

1. See *infra*, X. 3. *Collateral Impeachment of Judgments*.

2. *Nicklin v. Hobin*, 13 Oregon 406; *Onondaga County v. Briggs*, 2 Den. (N. Y.) 34; *Davis v. Packard*, 10 Wend. (N. Y.) 71.

3. *Windsor v. McVeigh*, 93 U. S. 274; *Nielsen, Petitioner*, 131 U. S. 176; *Seamster v. Blackstock*, 83 Va. 232. See also *infra*, X. 3. *b. Errors of Judgment or Irregularity*.

4. *California*. — *Belcher v. Chambers*, 53 Cal. 642.

Colorado. — *Bossick Min. Co. v. Schoolfield*, 10 Colo. 46.

Georgia. — *Gray v. McNeal*, 12 Ga. 424.

Louisiana. — *State v. Heard*, 45 La. Ann. 680.

Missouri. — *State v. St. Louis*, 1 Mo. App. 503; *Overton v. Johnson*, 17 Mo. 442.

Montana. — *Territory v. Flowers*, 2 Mont. 531.

Nevada. — *Paul v. Armstrong*, 1 Nev. 82.

Rhode Island. — *State v. Wilbor*, 1 R. I. 199.

Texas. — *Gulf, etc., R. Co. v. Rawlins*, 80 Tex. 579; *Withers v. Patterson*, 27 Tex. 495.

United States. — *Pennoyer v. Neff*, 95 U. S. 714; *Windsor v. McVeigh*, 93 U. S. 274.

See also II. 7. *Jurisdiction by Consent*. The State Courts derive their jurisdiction from state law, not from the laws of the United States. *Adams v. Dauter*, 29 La. Ann. 319.

Length of Time will not confer jurisdiction or make that good which was void. *Titus v. Latimer*, 5 Tex. 435; *Foreman v. Carter*, 9 Kan. 679; *Van Loon v. Lyons*, 61 N. Y. 22. But compare *Boone v. Shackelford*, 66 Mo. 493.

Inherent Power. — In *Holmes v. Buckner*, 67 Tex. 107, it is said that there is no such thing as inherent power of a court if by that is meant a power which the court may exercise without a law authorizing it.

In *Louisiana* it was said that jurisdiction denied or not granted by the constitution, could not be exercised by the courts of that state, even though it might result from the want of power that the obligation of a contract could not be enforced. *McNealy v. Gregory*, 13 Fla. 417.

On the other hand, jurisdiction given by the constitution is said to exist as an inherent power. *Swift v. Wayne Circuit Judges*, 64 Mich. 484 [*citing* *Thompson v. School Dist. Number Six*, 25 Mich. 483; *Taylor v. St. Clair Circuit Judge*, 32 Mich. 95; *Merrick v. Township Board*, 41 Mich. 631; *Wilson v. Bartholomew*, 45 Mich. 41]. And courts having common-law jurisdiction have been said to have jurisdiction of all cases cognizable by any of the English courts of common law. *Barrell v. Benjamin*, 15 Mass. 354.

5. *Edmiston v. Edmiston*, 2 Ohio 252; *Vail v. Ely, Wright* (Ohio) 518; *Matter of Gregory*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 363, 25 Civ. Pro. Rep. (N. Y.) 71. See also article APPEALS, vol. 2, p. 1.

2. Elements of Jurisdiction — Subject-matter and Person. — The elements of this jurisdiction are twofold: first, of the subject-matter adjudged; and second, of the parties whose rights are affected by such judgment or decree. The former of these the court acquires by the act of its creation, and possesses inherently by its constitution;¹ the latter it acquires by its own acts through the medium of its process and its officers.²

1. *Lamar v. Commissioners' Ct.*, 21 Ala. 772; *Galveston, etc., R. Co. v. McTigue*, 1 Tex. App. Civ. Cas., § 457; *Fithian v. Monks*, 43 Mo. 502; *Cooper v. Reynolds*, 10 Wall. (U. S.) 319.

Jurisdiction of the Subject-matter is the court's jurisdiction of the cases of a general class to which any particular case and the relief sought therein may belong. *Jackson v. Smith*, 120 Ind. 522; *State v. Wolever*, 127 Ind. 315; *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 415; *McCoy v. Able*, 131 Ind. 420; *McGuffey v. McClain*, 130 Ind. 327; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Lange v. Benedict*, 73 N. Y. 12; *Galveston, etc., R. Co. v. McTigue*, 1 Tex. App. Civ. Cas., § 457; *Munday v. Vail*, 34 N. J. L. 422; *Fithian v. Monks*, 43 Mo. 502.

The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause. *Cooper v. Reynolds*, 10 Wall. (U. S.) 319.

2. Jurisdiction of the Person of the defendant can only be acquired as a general rule by the service of process upon him, or by his voluntary appearance. See, in general, articles APPEARANCES, vol. 2, p. 588; SERVICE OF PROCESS; and see the following cases supporting this proposition:

Alabama. — *McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504; *Brown v. Wheeler*, 3 Ala. 287; *Kirkmans v. Harkins*, 1 Port. (Ala.) 22; *Reid v. Jackson*, 1 Ala. 207.

Arkansas. — *McKnight v. Smith*, 5 Ark. 409; *Pelham v. Page*, 6 Ark. 148; *Jordan v. Jennings*, 7 Ark. 95; *Hall v. Fowlks*, 8 Ark. 176; *Ex p. Pile*, 9 Ark. 337; *McLain v. Taylor*, 9 Ark. 362; *Danley v. Rector*, 10 Ark. 225.

California. — *Whitwell v. Barbier*, 7 Cal. 54; *Keybers v. McComber*, 67 Cal. 397.

Colorado. — *San Juan, etc., Min., etc., Co. v. Finch*, 6 Colo. 214.

Indiana. — *Packard v. Mendenhall*, 42 Ind. 598; *Mitchell v. Gray*, 18 Ind. 123; *Hawkins v. Hawkins*, 28 Ind. 66; *Wells County v. Fahlor*, 132 Ind. 427; *Nicholson v. Stephens*, 47 Ind. 186.

Kansas. — *McNeill v. Edie*, 24 Kan. 108.

Maryland. — *Dorsey v. Garey*, 30 Md. 489.

Massachusetts. — *Elliot v. McCormick*, 144 Mass. 10; *Martin v. Kittredge*, 144 Mass. 13, note; *Hall v. Staples*, 166 Mass. 399; *Brown v. Webber*, 6 Cush. (Mass.) 564.

Michigan. — *Montgomery v. Henry*, 10 Mich. 19; *Perkins v. Perkins*, 16 Mich. 162; *Willard v. Fralick*, 31 Mich. 431; *Ehlers v. Stoeckle*, 37 Mich. 260; *Jewett v. Morris*, 41 Mich. 689; *Watson v. Hinchman*, 41 Mich. 716; *Austin v. Curtis*, 41 Mich. 723; *Noyes v. Hillier*, 65 Mich. 636; *Buck v. Sherman*, 2 Dougl. (Mich.) 176; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Durfee v. Abbott*, 50 Mich. 279; *Hilton v. Briggs*, 54 Mich. 265; *Hamilton v. Rogers*, 67 Mich. 135.

Mississippi. — *Brown v. Levee Com'rs*, 50 Miss. 468; *Ex p. Heyfron*, 7 How. (Miss.) 127; *Prentiss v. Mellen*, 1 Smed. & M. (Miss.) 521; *Zecharie v. Bowers*, 1 Smed. & M. (Miss.) 584, 3 Smed. & M. (Miss.) 641; *Enos v. Smith*, 7 Smed. & M. (Miss.) 85; *Gwin v. McCarroll*, 1 Smed. & M. (Miss.) 351; *Jenkins v. State*, 33 Miss. 382.

Missouri. — *State v. St. Louis*, 1 Mo. App. 503; *Fithian v. Monks*, 43 Mo. 502; *Latimer v. Union Pac. R. Co.*, 43 Mo. 105; *Jasper County v. Mickey*, (Mo. 1887) 4 S. W. Rep. 424; *Hewitt v. Weatherby*, 57 Mo. 276; *Stamps v. Bridwell*, 57 Mo. 22; *Lenox v. Clarke*, 52 Mo. 115.

New Hampshire. — *Whittier v. Wendell*, 7 N. H. 257; *Downer v. Shaw*, 22 N. H. 277; *Wright v. Boynton*, 37 N. H. 9.

New York. — *Griffin v. Norton*, (Buffalo Super. Ct.) 5 N. Y. St. Rep. 812; *Matter of Martin*, 2 How. Pr. N. S. (N. Y. Supreme Ct.) 26, 7 Civ. Pro.

3. Constitutional and Statutory Creation.—The jurisdiction of courts depending upon authority derived from the constitution or statutes enacted in pursuance of constitutional provisions, and the extent of legislative power to confer jurisdiction, is governed of course in each state by the character of the constitutional organization of the courts therein.¹ If the constitution in express terms creates a jurisdiction, the legislature can alter it only in the manner prescribed by the constitution itself,² but the mere enlargement of the jurisdiction conferred by the constitution is not an unauthorized alteration.³ The power to establish courts may, however, be expressly conferred upon the

Rep. (N. Y.) 399; *Decker v. Kitchen*, 26 Hun (N. Y.) 173; *Fenton v. Garlick*, 8 Johns. (N. Y.) 194; *Bulkley v. Bulkley*, 6 Abb. Pr. (N. Y. Supreme Ct.) 307.

North Carolina.—*North Carolina University v. Lassiter*, 83 N. Car. 41.

Oregon.—*Woodward v. Baker*, 10 Oregon 493.

Texas.—*Galveston, etc., R. Co. v. McTigue*, 1 Tex. App. Civ. Cas., § 457; *Witt v. Kaufman*, 25 Tex. Supp. 384; *Tulane v. McKee*, 10 Tex. 335; *Glass v. Smith*, 66 Tex. 548.

Vermont.—*Gilman v. Thompson*, 11 Vt. 643; *Newton v. Adams*, 4 Vt. 444; *State v. Wakefield*, 60 Vt. 618; *Carleton v. Taylor*, 50 Vt. 220; *Vaughn v. Congdon*, 56 Vt. 111; *Clark v. Freeman*, 5 Vt. 122.

Virginia.—*Blanton v. Carroll*, 86 Va. 539.

United States.—*Cooper v. Reynolds*, 10 Wall. (U. S.) 319.

England.—*Ferguson v. Mahon*, 11 Ad. & El. 179, 39 E. C. L. 38; *Ex p. Kinning*, 4 C. B. 525, 56 E. C. L. 525.

A judgment rendered without jurisdiction of the person being absolutely void is no bar to another action upon the same cause of action, and therefore, when the execution of such a void judgment is perpetually enjoined in an action brought for that purpose, the void judgment cannot be set up in bar of a subsequent action. *Packard v. Mendenhall*, 42 Ind. 599.

1. Power of Legislature in Absence of Constitutional Restriction.—It is an axiom that the legislature of a state, as the representative of the people, retains power over all subjects of legislation not taken away by the constitution. *State v. Helfrid*, 2 Nott & M. (S. Car.) 236.

The establishment of courts of justice, in the absence of express or implied constitutional restriction, is a part

of the power and prerogative of the legislature. *People v. Porter*, 90 N. Y. 72.

Right of Legislature to Abolish.—When the legislature may create an inferior court it may also abolish such a court created by it. *Perkins v. Corbin*, 45 Ala. 104.

2. *Canby v. Hartzell*, 167 Ill. 628; *State v. Vallins*, (Mo. 1897) 41 S. W. Rep. 887; *Harris v. Vanderveer*, 21 N. J. Eq. 424; *People v. Nichols*, 79 N. Y. 582; *De Hart v. Hatch*, 3 Hun (N. Y.) 375; *Story v. New York El. R. Co.*, 3 Abb. N. Cas. (N. Y. C. Pl.) 478; *State v. Mace*, 5 Md. 347; *Hicks v. Bell*, 3 Cal. 219; *Zander v. Coe*, 5 Cal. 230; *Caulfield v. Stevens*, 28 Cal. 118. For constitutional authority of appellate courts, see article APPEALS, vol. 2, p. 1. For constitutional law touching powers of legislature over jurisdiction of courts, see the title *Constitutional Law*, Am. and Eng. Encyc. of Law (2d ed.), vol. 6, p. 882.

Where the constitution marks out a complete judicial system, and defines the province of each court and the relation of the courts to each other, the system cannot be changed by the legislature without authority from the constitution itself. *Ex p. Towles*, 48 Tex. 413.

3. *Harris v. Vanderveer*, 21 N. J. Eq. 424.

In *Hunt v. Potter*, 58 Miss. 106, George, J., after pointing out the difficulty in drawing a line which would exactly define in all cases what new powers may or may not be conferred by statute consistently with the constitution of the state, mentioned plain instances in which the jurisdiction if attempted to be conferred would be beyond the power of the legislature to grant, such as the power conferred upon a court of chancery to try an action of trespass or an indictment for

legislature,¹ as well as the power to alter constitutional provisions in certain matters of jurisdiction.² On the other hand, it is held that the mere grant of original jurisdiction by the constitution to certain courts will not prevent the legislature from conferring concurrent jurisdiction upon subordinate courts,³ and this may generally be done under the provisions of the several state constitutions.⁴

murder, as well as instances in which new powers have been conferred consistently with the constitution of the state, such as the power conferred upon courts of law to entertain bills of discovery in aid of actions pending in them, etc. Referring to the latter class, he said that if a rule prohibited the legislature from enacting laws conferring new jurisdictions on the several courts all these grants would be unconstitutional. He further laid down the following rule to sustain such grants, viz., "that although the particular power granted may never have been exercised by the court to which the grant is made, and has uniformly been a part of the jurisdiction of another court, yet if it pertains to the matters of jurisdiction conferred by the constitution on the court which is the grantee of the power (as in case of the chancery court to matters 'of equity or matters of testament and administration,' etc.), and the power granted is auxiliary and appropriate to the complete exercise of the acknowledged jurisdiction of the court as conferred by the constitution, then it is within the power of the legislature to confer it." See also *Matter of Bernstein*, 3 Redf. (N. Y.) 22; *Matter of Stilwell*, 139 N. Y. 337.

Control of Procedure Consistent with Constitutional Powers.—The legislature may prescribe procedure by which constitutional jurisdiction is to be exercised unless such regulations substantially impair the constitutional power of the court and practically defeat its exercise. *Ex p. Harker*, 49 Cal. 465.

1. *State v. Helfrid*, 2 Nott & M. (S. Car.) 236.

2. *Morrow v. State*, (Del. 1897) 37 Atl. Rep. 43.

Revival of Constitutional Jurisdiction by Repeal of Statute.—If by statute jurisdiction which is vested by the constitution of the state in a circuit court is conferred upon a criminal court established by the act, a subsequent repeal of the statute reinvests the circuit court with the jurisdiction under

the constitution, and an indictment found in the criminal court may, after the repeal of the statute creating the criminal court and vesting it with jurisdiction, be tried in the circuit court having original jurisdiction under the constitution. *Anderson v. Com.*, (Ky. 1887) 3 S. W. Rep. 127; *Stapleton v. Com.*, (Ky. 1887) 3 S. W. Rep. 793.

3. *Börs v. Preston*, 111 U. S. 252.

4. *Perkins v. Corbin*, 45 Ala. 104; *Seale v. Mitchell*, 5 Cal. 402; *People v. Toal*, (Cal. 1890) 23 Pac. Rep. 203; *Chicago, etc., R. Co. v. Nester*, 63 Mich. 657; *Covell v. Kent County*, 36 Mich. 333; *Wood v. Adsit*, 105 Mich. 378; *Hayner v. James*, 17 N. Y. 316; *Sill v. Corning*, 15 N. Y. 297; *Brandon v. Avery*, 22 N. Y. 469; *Heidenheimer v. Wilson*, 31 Barb. (N. Y.) 636; *Clepper v. State*, 4 Tex. 242; *Johnson v. Happell*, 4 Tex. 96; *Shaffee v. State*, (Wis. 1897) 72 N. W. Rep. 888.

Under a constitutional provision that "the County Court shall have such jurisdiction in special cases as the legislature may prescribe; but shall have no original civil jurisdiction except in such special cases," it was held that the legislature could not, by limiting the amount to be recovered and confining the jurisdiction to cases where the parties sued resided in the county, convert the usual common-law actions, jurisdiction over which was vested in other courts by the constitution, into special cases within the meaning of the constitution. But a special statutory proceeding different from that existing under the common-law practice is a special case within the meaning of that term in the constitution. *Doubleday v. Heath*, 16 N. Y. 81.

Proceedings Contrary to Course of Common Law.—The provision of a constitution forbidding the creation of courts proceeding differently from the course of the common law, refers to courts exercising the usual jurisdiction of courts of law, but proceeding by modes unknown to the common law. *Matter of Smith*, 10 Wend. (N. Y.) 449.

4. Enlargement of Jurisdiction by Intendment.— Courts established by the written law are dependent for their jurisdiction and the extent of their power upon the law of their creation, and cannot transcend its authority. Their power cannot be enlarged by intendment so as to embrace objects not expressed in the law.¹

5. Partial Jurisdiction.— Proceedings of a court may be valid in part and void as to the residue, as where its action in some part is within its jurisdictional powers, while in other parts its action is without jurisdiction.²

Enlargement of Jurisdiction of Local Court.— Where the constitution confers jurisdiction upon local inferior courts, while the legislature may enlarge such jurisdiction it may not extend the territorial jurisdiction of such court beyond that fixed by the constitution. *Landers v. Staten Island R. Co.*, 53 N. Y. 450; *Rockwell v. Raymond*, (Yonkers City Ct.) 5 N. Y. Supp. 642.

Similar Jurisdiction of Courts Provided.— Under an article of a constitution providing for the creation of a corporation or hustings court with "similar jurisdiction which may be given by law to circuit courts of this state," it was held that the words "similar jurisdiction" did not restrict but enlarged the jurisdiction of these courts, and were intended to elevate them to the grade and dignity of circuit courts, and that therefore it was competent for the legislature to give to such corporation courts jurisdiction to try cases of felony although the jurisdiction in such cases was taken away from the circuit courts. *Chahoon v. Com.*, 21 Gratt. (Va.) 822.

Abridgment of Power Conferred by Constitution.— But the power to create an inferior court and clothe it with jurisdiction concurrent with that exercised by a constitutional court cannot be exercised for the purpose of depriving the constitutional court of its general jurisdiction. *Montross v. State*, 61 Miss. 429; *State Bank v. Duncan*, 52 Miss. 740; *Heath v. Kent Circuit Judge*, 37 Mich. 372; *Brown v. Buck*, 75 Mich. 274; *Flynn v. Central R. Co.*, 142 N. Y. 439.

Where jurisdiction in a certain cause has attached in the court exercising its jurisdiction under the constitution, a removal of such a cause to an inferior court exercising concurrent jurisdiction under a statute cannot be accomplished consistently with the constitution. *Wood v. Adsit*, 105 Mich. 378; *Heath*

v. Kent Circuit Judge, 37 Mich. 372; *Alexander v. Bennett*, 60 N. Y. 204.

1. Baker v. Chisholm, 3 Tex. 157; *Texas, etc., R. Co. v. Gay*, 86 Tex. 571; *Solon v. State*, 5 Tex. App. 301; *Cowan v. Nixon*, 28 Tex. 231; *Pearce v. Calhoun*, 59 Mo. 271; *Ex p. Bollman*, 4 Cranch (U. S.) 75; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119. See also *infra*, V. 1. *Grant of Power to Inferior Courts — Construction.*

On the other hand, general power in any matter carries all power necessary for its execution. *Jenkins v. Simms*, 45 Md. 532.

2. Wade v. Hancock, 76 Va. 620; *Gilliland v. Sellers*, 2 Ohio St. 223; *Matter of Dill*, 32 Kan. 691; *Whitney v. Brunette*, 15 Wis. 61; *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 398; *Wilkins v. Williams*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 168; *In re Bonner*, 151 U. S. 242.

Several Causes in Different Counts.— If several causes of action are embraced in different counts, a portion of which are within the jurisdiction of the court and a portion are not, the court may try and determine those which are within its jurisdiction. *Diblee v. Davison*, 25 Ill. 486; *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 398.

Alternative Prayer for Judgment.— If the prayer for judgment is in the alternative, for that of which the court has no jurisdiction and for that of which the court has jurisdiction, the court may render judgment for that of which it has jurisdiction. *Oger v. Daunoy*, 7 Martin N. S. (La.) 660.

Effect of General Judgment.— In *Louisville, etc., R. Co. v. Fox*, 101 Ind. 418, the complaint consisted of two paragraphs, one seeking to recover \$35, the value of a heifer, and the other seeking the recovery of \$80, the value of a colt, killed by the defendant as

6. After-acquired Jurisdiction. — A court must be clothed with jurisdiction at the time its action is invoked, or at the time it undertakes to exercise its judicial functions, and jurisdiction acquired thereafter will not support its previous proceedings.¹

7. Jurisdiction by Consent — *a.* **EXTENT OF THE RULE AGAINST.** — The jurisdiction of courts having its source in the law of the land, no act of the parties can impart to a court jurisdiction which the law denies,² or to a person the right to exercise judi-

alleged therein. The recovery sought in the first paragraph of the complaint was less than the jurisdictional amount prescribed by law. The defendant urged, on a motion for a new trial, that the trial court had not jurisdiction of the cause of action stated in the first paragraph, and therefore that testimony as to the value of the heifer should have been excluded. The objection to that testimony below was on the ground that the matter sought to be proved was "incompetent, immaterial, and irrelevant." Upon the contention in the Supreme Court that the trial court had no jurisdiction of the cause of action stated in the first paragraph of the complaint, the court held, first, that no objection to the jurisdiction having been made in the court below, "a party cannot resist a ruling below upon one ground and assail it upon another here;" second, that the rule that a judgment rendered without jurisdiction of the subject-matter is void did not apply, because the court had jurisdiction of the cause of action stated in the second paragraph of the complaint, and this was sufficient to uphold the judgment.

Partial Jurisdiction Lost. — Jurisdiction may be lost for one purpose, and retained for another. *Darrow v. Morgan*, 65 N. Y. 333.

1. *Carney v. Taylor*, 4 Kan. 178; *Champlin v. Bakewell*, 21 La. Ann. 353; *Edwards v. Marin*, 28 La. Ann. 567; *Buck v. Dowley*, 16 Gray (Mass.) 555; *Tippack v. Briant*, 63 Mo. 580; *Hart v. Henderson*, 17 Mich. 218; *Conolly v. Taylor*, 2 Pet. (U. S.) 565.

The Legislature Cannot by an Act Validate a Judgment which is void for want of jurisdiction. Such an act would be in contravention of the provision of the constitution that no person can be deprived of his property without due process of law. *Pryor v. Downey*, 50 Cal. 389; *Lane v. Nelson*, 79 Pa. St. 410.

Jurisdiction Acquired Between Dismissal and Consent Reinstatement. — In *Tippack*

v. Briant, 63 Mo. 580, it was held that after a cause is out of court on a dismissal for want of jurisdiction, if the court acquires jurisdiction of the subject-matter a reinstatement of the cause by consent vests the court with full jurisdiction.

Jurisdiction Conferred for Offenses Committed. — When a statute creates a new court or confers on a court already in existence jurisdiction of offenses committed prior to the statute, such statute is not *ex post facto*. *Com. v. Phillips*, 11 Pick. (Mass.) 28.

2. *McKinnon v. Hall*, (Colo. App. 1897) 50 Pac. Rep. 1052; *Andrews v. Wheaton*, 23 Conn. 114; *Dicks v. Hatch*, 10 Iowa 380; *Fahs v. Darling*, 82 Ill. 142; *Leman v. Sherman*, 117 Ill. 657; *Robertson v. Wheeler*, 162 Ill. 566; *McCleary v. Lain*, 2 Ohio St. 368.

Court as Donee of Power of Appointment.

— While a person may provide for the substitution of new trustees in case of a vacancy occurring among those first appointed, either by a direct appointment or by giving a power of appointment to a donee, it is not within his power to confer upon a judicial tribunal, as such, a power of appointment not within its jurisdiction as provided by law. If the court undertakes to exercise such a power under a will, it has been held that the appointment is valid, but that the judge in making it does not act in his official capacity but under the will. *Leman v. Sherman*, 117 Ill. 666, *distinguishing* *Morrison v. Kelly*, 22 Ill. 610, in that the ruling in the latter case, that a grantor conveying to a trustee may confer upon any court of record the power to appoint a trustee in the event of the death of the trustee named in the deed, must be construed with reference to the facts of the case, and when so construed would be found to be limited "to any court of record" which is vested by law with jurisdiction to act in the premises, and that the court there selected as donee of the power was a court having juris-

cial functions.¹ It is accordingly a well-settled and universally applied principle, that consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, con-

diction under the law to perform the functions required of it.

Waiver of Tort — Suing in Contract. — Where the plaintiff has an election to sue either in tort or contract, no court has jurisdiction of the action of assumpsit but one which can give a remedy on the tort itself, because the same questions of law arise in both cases. *Mann v. Kendall*, 2 Jones L. (N. Car.) 192; *Finlay v. Bryson*, 84 Mo. 664.

Agreement for Venue of Future Action. — A provision in a lease that the venue of a suit upon such lease shall be in a certain county will not give to the court of that county jurisdiction of a non-resident of the state. *York v. State*, 73 Tex. 651.

Consent — Illegal Court. — Consent cannot confer jurisdiction upon a tribunal as a court if it is in no legal sense a court. *Norwood v. Kenfield*, 34 Cal. 329.

In *Bates v. Gage*, 40 Cal. 183, it was held that an agreement could not confer jurisdiction on a court to try a cause in one county at a time when by operation of law the court had adjourned in that county and another term had commenced in another county. See further article CHAMBERS AND VACATION, vol. 4, pp. 341, 342.

Jurisdiction Independently of Agreement. — Where the court has jurisdiction of the subject-matter without regard to any agreement between the parties, its jurisdiction is not dependent upon the consent and is not affected thereby. *Yulee v. Canova*, 11 Fla. 9.

1. Effect of Agreement to Confer Power upon Nonjudicial Person. — Consent cannot confer judicial power upon a person who is not a judge of the court. *Haverly Invincible Min. Co. v. Howcutt*, 6 Colo. 574; *Andrews v. Wheaton*, 23 Conn. 114; *Cobb v. People*, 84 Ill. 511; *Bishop v. Nelson*, 83 Ill. 601; *Hoagland v. Creed*, 81 Ill. 506.

Agreement — Effect as Creating Arbitrator. — A jurisdiction depending upon the agreement of the parties is said to constitute the judges arbitrators, and if they act at all upon such authority they act as arbitrators and not as public ministers of justice. *Bradly*

v. Sneath, 6 Ohio 496. But, on the other hand, it has been expressly held that parties cannot stipulate to confer judicial functions upon a nonjudicial individual, and that an attempt to do so is not an arbitration, and that if an arbitrator mutually chosen by the parties is attempted to be clothed with judicial power such an attempt is abortive, and if the arbitrator proceeds to exercise such power the court in carrying out his decision by entering the judgment which he has reached acts without authority, and the judgment so entered is not the judgment of the court. *Hoagland v. Creed*, 81 Ill. 506, approved in *Bishop v. Nelson*, 83 Ill. 601.

Order of Reference to a Judicial Officer — Irregularity. — In *New Jersey* the vice-chancellor cannot assume jurisdiction over a cause except by force of reference made by the chancellor to that effect and a special order for that purpose; this was not done, but the counsel for the petitioner on a regular motion day before the vice-chancellor presented his petition and moved for a day to be set for the hearing. Upon the advice of the vice-chancellor an order was signed by the chancellor requiring the defendant to show cause on a certain day why the prayer of the petition should not be granted, and on the appointed day the motion was heard before the vice-chancellor (who had not been appointed to the duty). Both parties produced their witnesses and presented their arguments, and the first objection to the jurisdiction so assumed by the vice-chancellor was taken on appeal. It was held that the hearing by the vice-chancellor was irregular, and would have been entirely nugatory if properly objected to, but that under the circumstances above detailed the exception must fall because it came too late, the parties by their acquiescence having waived the mistake in question, it being a mere irregularity, and the act of the vice-chancellor having been ratified before objection by the final decree of the chancellor. *Delaware Bay, etc., R. Co. v. Markley*, 45 N. J. Eq. 148.

sent cannot confer jurisdiction of the subject-matter, but it may confer jurisdiction of the person.¹

1. *Alabama*. — *Humphrey v. State, Minor* (Ala.) 64; *Byrd v. McDaniel*, 26 Ala. 582; *Little v. Fitts*, 33 Ala. 343; *Mabry v. Dickens*, 31 Ala. 243.
- Arkansas*. — *Feild v. Dortch*, 34 Ark. 399; *Jacks v. Moore*, 33 Ark. 31.
- California*. — *Bates v. Gage*, 40 Cal. 183; *Gray v. Hawes*, 8 Cal. 562; *People v. Granice*, 50 Cal. 447; *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Feillett v. Engler*, 8 Cal. 76; *Norwood v. Kenfeld*, 34 Cal. 329.
- Colorado*. — *Peabody v. Thatcher*, 3 Colo. 275; *McKinnon v. Hall*, (Colo. App. 1897) 50 Pac. Rep. 1052; *Haverly Invincible Min. Co. v. Howcutt*, 6 Colo. 574; *Derry v. Ross*, 5 Colo. 295.
- Connecticut*. — *Andrews v. Wheaton*, 23 Conn. 115; *Chipman v. Waterbury*, 59 Conn. 497; *Orcutt's Appeal*, 61 Conn. 380.
- Delaware*. — *Carey v. Russel*, 2 Harr. (Del.) 280; *Beeson v. Elliott*, 1 Del. Ch. 368; *Lewis v. Hazel*, 4 Harr. (Del.) 470.
- Georgia*. — *Raney v. McRae*, 14 Ga. 589; *Central Bank v. Gibson*, 11 Ga. 453; *Low v. Pilotage Com'rs, R. M. Charlt. (Ga.)* 302; *Bostwick v. Perkins*, 4 Ga. 47; *Georgia R., etc., Co. v. Harris*, 5 Ga. 527.
- Illinois*. — *Union Coal Co. v. La Salle*, 136 Ill. 119; *Richards v. Lake Shore, etc., R. Co.*, 124 Ill. 516; *Bureau County v. Thompson*, 39 Ill. 566; *Fahs v. Darling*, 82 Ill. 142; *Foley v. People*, 1 Ill. 57; *Leigh v. Mason*, 2 Ill. 249; *Leman v. Sherman*, 18 Ill. App. 368, *affirmed* 117 Ill. 657; *Allen v. Belcher*, 8 Ill. 594; *Pearce v. Swan*, 2 Ill. 266; *Randolph County v. Ralls*, 18 Ill. 29; *Birks v. Houston*, 63 Ill. 77.
- Indiana*. — *Barnard v. Cox*, 25 Ind. 251; *Davis v. Davis*, 36 Ind. 160; *Doctor v. Hartman*, 74 Ind. 228; *Smith v. Myers*, 109 Ind. 1; *Robertson v. State*, 109 Ind. 81; *Ex p. Sweeney*, 126 Ind. 586; *Tucker v. Sellers*, 130 Ind. 514; *Brady v. Richardson*, 18 Ind. 1; *Indianapolis, etc., R. Co. v. Solomon*, 23 Ind. 534; *Indianapolis, etc., R. Co. v. Renner*, 17 Ind. 135.
- Iowa*. — *Dicks v. Hatch*, 10 Iowa 380; *Walker v. Kynett*, 32 Iowa 524; *Rogers v. Loop*, 51 Iowa 41; *McMeans v. Cameron*, 51 Iowa 691; *Cerro Gordo County v. Wright County*, 59 Iowa 485; *Hynds v. Fay*, 70 Iowa 433; *Miller v. Haley*, 66 Iowa 260; *Easton v. Fleming*, 51 Iowa 305; *Walters v. The Steamboat Mollie Dozier*, 24 Iowa 192; *Davidson v. Wheeler, Morr. (Iowa)* 238; *O'Hagen v. O'Hagen*, 14 Iowa 264; *Groves v. Richmond*, 56 Iowa 69; *Iowa Northern Cent. R. Co. v. Ritter*, 36 Iowa 568; *Marquardt v. Thompson*, 78 Iowa 158; *German Bank v. American F. Ins. Co.*, 83 Iowa 491; *Milner v. Chicago, etc., R. Co.*, 77 Iowa 755.
- Kansas*. — *Van Bentham v. Osage County*, 49 Kan. 30.
- Kentucky*. — *Brown v. Crow, Hard. (Ky.)* 456; *Ormsby v. Lynch, Litt. Sel. Cas. (Ky.)* 303; *Banks v. Towler*, 3 Litt. (Ky.) 332; *Brown v. M'Kee*, 1 J. J. Marsh. (Ky.) 476.
- Louisiana*. — *Duvey v. Greffin*, 1 Martin N. S. (La.) 200; *Greiner v. Thielien*, 6 Rob. (La.) 365; *Fleming v. Hiligsberg*, 11 Rob. (La.) 77.
- Maine*. — *Powers v. Mitchell*, 75 Me. 364; *State v. Bonney*, 34 Me. 223.
- Massachusetts*. — *Bearce v. Bowker*, 115 Mass. 130; *Brown v. Webber*, 6 Cush. (Mass.) 564; *Foster v. Durant*, 2 Cush. (Mass.) 544; *Peabody v. School Committee*, 115 Mass. 383; *Cleveland v. Welsh*, 4 Mass. 593; *Folger v. Columbian Ins. Co.*, 99 Mass. 267.
- Michigan*. — *Kirkwood v. Hoxie*, 95 Mich. 62; *Beach v. Botsford*, 1 Dougl. (Mich.) 199; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Spear v. Carter*, 1 Mich. 19; *Wilson v. Davis*, 1 Mich. 156; *Allen v. Carpenter*, 15 Mich. 32; *Youngblood v. Sexton*, 32 Mich. 406; *Landon v. Comet*, 62 Mich. 80.
- Missouri*. — *Williams's Estate*, 62 Mo. App. 339; *Grimm v. Dundee Land, etc., Co.*, 55 Mo. App. 457; *State v. St. Louis*, 1 Mo. App. 503; *Stone v. Corbett*, 20 Mo. 350; *Dodson v. Scroggs*, 47 Mo. 285; *Cones v. Ward*, 47 Mo. 289.
- Montana*. — *Wilson v. Davis*, 1 Mont. 98; *Sanders v. Farwell*, 1 Mont. 599; *Rader v. Nottingham*, 2 Mont. 157; *Daniels v. Andes Ins. Co.*, 2 Mont. 503.
- Nebraska*. — *Brondberg v. Babbott*, 14 Neb. 517; *Union Pac. R. Co. v. Ogilvy*, 18 Neb. 639.
- Nevada*. — *Paul v. Armstrong*, 1 Nev. 82; *Hastings v. Burning Moscow Co.*, 2 Nev. 93; *Phillips v. Welch*, 11 Nev. 187.
- New Hampshire*. — *Batchelder v. Currier*, 45 N. H. 460.
- New Jersey*. — *Collins v. Keller*, 58 N. J. L. 429; *School Dist. No. 28 v.*

Statute Authorizing Consent. — Of course the general rule that consent cannot confer jurisdiction may be obviated by some provision of local law, as where jurisdiction is restricted to a certain

Stocker, 42 N. J. L. 115; Falkenburgh v. Cramer, 1 N. J. L. 35; Parker v. Munday, 1 N. J. L. 83; Mitten v. Smock, 3 N. J. L. 470; Northampton Tp. v. Woodward, 5 N. J. L. 908; Cottrell v. Den, 15 N. J. L. 344; Howe v. Lawrence, 22 N. J. L. 99; Newkirk v. Morris, 12 N. J. Eq. 62; State v. Conover, 7 N. J. L. 203; Paulison v. Halsey, 37 N. J. L. 205; Greenway v. Dare, 6 N. J. L. 306; Ryno v. Ryno, 27 N. J. Eq. 522.

New York. — Davidsburgh v. Knickerbocker L. Ins. Co., 90 N. Y. 526; McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303, 80 N. Y. 353, 99 N. Y. 65; Wilkins v. Williams, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 168; Perry v. Erie Transfer Co., (C. Pl.) 23 N. Y. Supp. 878; Parkhurst v. Rochester Lasting Mach. Co., 65 Hun (N. Y.) 489; Matter of Campbell, 88 Hun (N. Y.) 374; Coffin v. Tracy, Col. & C. Cas. (N. Y.) 470, 3 Cal. (N. Y.) 129; Dakin v. Demming, 6 Paige (N. Y.) 95; Heyer v. Burger, Hoffm. Ch. (N. Y.) 1; McMahon v. Rauhr, 47 N. Y. 67; Harriott v. New Jersey R., etc. Co., 2 Hilt. (N. Y.) 262, 8 Abb. Pr. (N. Y.) 284; People v. Hartwell, 2 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 32; People v. Campbell, 4 Park. Cr. Rep. (N. Y. Gen. Sess.) 386; Carpenter v. Central Park, etc., R. Co., 11 Abb. Pr. N. S. (N. Y. C. Pl.) 416, 4 Daly (N. Y.) 550. Compare Bowers v. Durant, 43 Hun (N. Y.) 351.

North Carolina. — Greer v. Cagle, 84 N. Car. 385; State v. Giles, 103 N. Car. 391; Burroughs v. McNeill, 2 Dev. & B. Eq. (N. Car.) 297; State v. Moss, 2 Jones L. (N. Car.) 66; Branch v. Houston, Busb. L. (N. Car.) 85.

Ohio. — Rohn v. Dunbar, 13 Ohio St. 572; Walker v. Walker, 4 W. L. M. (Ohio) 32; McCleary v. McLain, 2 Ohio St. 368; Bradley v. Sneath, 6 Ohio 496; Vail v. Ely, Wright (Ohio) 518; State v. Turner, Wright (Ohio) 23; Gilliland v. Sellers, 2 Ohio St. 223; Evans v. Iles, 7 Ohio St. 233; Egan v. Lumsden, 2 Disney (Ohio) 169.

Oklahoma. — American F. Ins. Co. v. Pappe, (Okla. 1896) 43 Pac. Rep. 1085.

Pennsylvania. — Hanau's Estate, 12 Pa. Co. Ct. Rep. 386, 2 Pa. Dist. Rep. 127.

Rhode Island. — *In re* College St., 11 R. I. 474.

South Carolina. — Overstreet v. Brown, 4 McCord L. (S. Car.) 79; Wells v. Reynolds, 1 Treadw. (S. Car.) 478; Simpson v. M'Million, 1 Nott & M. (S. Car.) 192; Bent v. Graves, 3 McCord L. (S. Car.) 280.

Tennessee. — M'Henry v. Wallen, 2 Verg. (Tenn.) 441.

Texas. — Southern Pac. Co. v. Burns, (Tex. Civ. App. 1893) 23 S. W. Rep. 288; Blagge v. Moore, 6 Tex. Civ. App. 359; Piedmont, etc., L. Ins. Co. v. Fitzgerald, 1 Tex. App. Civ. Cas., § 1344; McMahon v. Dennis, 1 Tex. App. Civ. Cas., § 1209; York v. State, 73 Tex. 651; Burnley v. Cook, 13 Tex. 586; Campbell v. Wilson, 6 Tex. 379; Pool v. Pickett, 8 Tex. 122; Morton v. Gordon, Dall. (Tex.) 396; Wynns v. Underwood, 1 Tex. 48.

Washington. — Steiner v. Nerton, 6 Wash. 23.

Virginia. — Bogle v. Fitzhugh, 2 Wash. (Va.) 213.

Wisconsin. — Hager v. Falk, 82 Wis. 644; Walker v. Rogan, 1 Wis. 597; Damp v. Dane, 29 Wis. 419; Henckel v. Wheeler, etc., Mfg. Co., 51 Wis. 363; Wanzer v. Howland, 10 Wis. 8; Hills v. Miles, 13 Wis. 625; Steen v. Norton, 45 Wis. 419; Blackwood v. Jones, 27 Wis. 498.

United States. — Indiana v. Tolleston Club, 53 Fed. Rep. 18; St. Louis R. Co. v. Pacific R. Co., 52 Fed. Rep. 770; Willard v. Wood, 135 U. S. 309; Olds Wagon Works v. Benedict, 67 Fed. Rep. 1, 32 U. S. App. 116; Harrison v. Rowan, Pet. (C. C.) 489; Thatcher v. Powell, 6 Wheat. (U. S.) 119.

See also *infra*, X. 2. f. *Effect of Failure to Raise Objection*; and the articles APPEARANCES, vol. 2, p. 588; EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

In *International Trust Co. v. Keokuk Electric St. R. Co.*, 90 Iowa 90, an order for the sale of real estate entered in a court which had no authority to make it, but reciting that it was made by the consent of the parties, was held to be good in support of the sale, the court holding that the sale was not made by virtue of any power exercised by the court, but exclusively by the authority of the agreement of

amount, but the parties are specially permitted to agree to extend the jurisdiction to a larger amount. If consent is given in such a case, it is held that the judgment is valid even though no record was made of the fact.¹

Particular Matter in Subject of General Jurisdiction.—Where the court has jurisdiction of the subject-matter, jurisdiction over the particular action may be conferred by consent.²

6. EXCEPTION—AFTER EXHAUSTION OF POWER.—When the court once had jurisdiction, although the power may have been executed so that without consent of parties it could not change its judgment or decree, the jurisdiction may be restored by consent.³

8. Effect of Pleadings.—Before the power to hear and determine a cause attaches, the parties must be brought before the tribunal by proper pleading according to the practice and the law of each particular state.⁴ But as a general proposition, jurisdiction of the subject-matter is conferred by law, and does not rest upon averments in pleading, nor is it affected by error in sustaining a pleading,⁵ and if the pleadings contain sufficient matter to chal-

the parties, and that the principle that consent could not confer jurisdiction of the subject-matter had no application.

Jurisdiction of Person—Rights of Third Persons.—In *Raney v. McRae*, 14 Ga. 593, while the principle was laid down that parties could not consent to confer jurisdiction over the subject-matter though they might do so as to the person, it was held that they could not consent to jurisdiction of the person so as to prejudice the rights of third persons; *approving* *Central Bank v. Gibson*, 11 Ga. 453, wherein the court said: "This bank is a public corporation; its funds belong to the state; all the people are interested in them. The legislature has made it suable at Milledgeville. Reasons of public policy require that it be sued there alone, which reasons do not apply with the same force to individuals."

1. *Schlisman v. Webber*, 65 Iowa 116.

2. *Greer v. Cagle*, 84 N. Car. 385; *Tucker v. Sellers*, 130 Ind. 514; *Wanzer v. Howland*, 10 Wis. 8. See *infra*, X. 2. d. (2) *Jurisdiction of Court of General Jurisdiction in Particular Cases*.

3. *Brown v. Crow*, Hard. (Ky.) 456; *Bogle v. Fitzhugh*, 2 Wash. (Va.) 213; *Byrd v. McDaniel*, 26 Ala. 582.

4. *Jordan v. Brown*, 71 Iowa 421; *Dunlap v. Southerlin*, 63 Tex. 38; *Sheldon v. Newton*, 3 Ohio St. 499, wherein the court, speaking of the power to hear and determine a cause, says that "before this power can be

affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained. When these appear the jurisdiction has attached; the right to hear and determine is perfect." See also *infra*, II. 9. *Matters Not in Issue*.

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing a petition containing all the requisites, and in the manner required by law." *Gri-gnon v. Astor*, 2 How. (U. S.) 338; *U. S. v. Arredondo*, 6 Pet. (U. S.) 709.

5. *Trumble v. Williams*, 18 Neb. 144; *Taylor v. Coots*, 32 Neb. 30; *Wellshear v. Kelley*, 69 Mo. 343; *Herron v. Dater*, 120 U. S. 464. See also *Dexter v. Cranston*, 41 Mich. 451; *Blanchard v. De Graff*, 60 Mich. 110.

Insufficient Pleading.—Jurisdiction

lenge the attention of the court, and such a case is thereby presented as to authorize the court to deliberate and act, it is sufficient for the purpose of conferring jurisdiction.¹ When the

may be conferred notwithstanding that the objection of the insufficiency of the facts stated in the pleading to constitute a cause of action might have been available if a demurrer had been interposed in the action. *Wright v. Ware*, 50 Ala. 557; *Comer v. Bray*, 83 Ala. 217; *Rood v. Hurd*, 41 Conn. 322; *James's Estate*, 99 Cal. 374; *Head v. Daniels*, 38 Kan. 1; *Morrow v. Weed*, 4 Iowa 77; *Read v. Howe*, 39 Iowa 553; *De Graw v. De Graw*, 7 Mo. App. 121; *Wenner v. Thornton*, 98 Ill. 156; *Hunt v. Hunt*, 72 N. Y. 229; *Norman v. Zieber*, 3 Oregon 197; *North Pac. Cycle Co. v. Thomas*, 26 Oregon 381; *Moore v. Perry*, (Tex. Civ. App. 1896) 35 S. W. Rep. 838; *McGuffey v. McClain*, 130 Ind. 329. And an error of judgment holding an insufficient petition to be good will not affect the jurisdiction. *Nesbit v. Miller*, 125 Ind. 106. See also the rule requiring a bill in equity to state the facts which bring the case within the jurisdiction of the court, *infra*, X. 2. *g. Chancery Jurisdiction.*

So, on the other hand, while there must be a properly framed complaint or other pleading showing a cause of action within the jurisdiction of the court, before it can lawfully proceed to adjudicate, behind all this there must be power in the court, conferred by law, to act in a real case of the character of the one supposed by the pleading or complaint, and if there is not, the whole proceeding, and all acts done under it, will be inoperative and void. *Thomas v. People*, 107 Ill. 524; *Sheldon v. Newton*, 3 Ohio St. 498.

In Criminal Cases the indictment may often determine the jurisdiction. Thus where the defendant is convicted of a misdemeanor which is a constituent part of a felony, in a court having no original jurisdiction for misdemeanors, such original jurisdiction being by law conferred upon some other court, the conviction is good if the indictment charges the felony, and as to this question the averments in the indictment control. *McLean v. State*, 23 Fla. 281; *State v. Reaves*, 85 N. Car. 553; *Harberger v. State*, 4 Tex. App. 26; *Ex p. Donahue*, 65 Cal. 474; *People v. Holland*, 59 Cal. 364.

See further article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

1. *Rowe v. Palmer*, 29 Kan. 337; *Morrow v. Weed*, 4 Iowa 77. See also *infra*, X. 3. *b. Errors of Judgment or Irregularity.*

Effect of Address to Particular Court.—

In a proceeding in partition in regard to which the court had both statutory and general chancery jurisdiction, it was held that the address of the bill indicated the intention of the party as to which jurisdiction he sought to call into action. *Cost v. Rose*, 17 Ill. 276.

But in *Goudy v. Hall*, 36 Ill. 316, it was held that in a petition by an administrator for leave to sell real estate, filed in the Circuit Court, addressed by the administrator to the judge "in chancery sitting," the action of the court when collaterally called in question would be referred either to its general or statutory powers as might be necessary to sustain its jurisdiction, without reference to such a mere matter of form as the address of the petition, the petition itself clearly showing that it was the statutory power of the court which was invoked, and the fact being that the court could not have taken jurisdiction of an administrator's petition of this specific character and granted the particular relief sought except by virtue of the statute.

In *Iowa* it was held that a petition without an address to the court in which it was filed was void, and judgment thereunder subject to collateral attack. In this case a petition had been filed in one court, and the clerk had enclosed it in a wrapper, making the usual indorsement thereon, after which it had been dismissed, and the petitioner filed the same petition in another court, changing the indorsement on the wrapper to conform to the court in which it was last filed. The court held that the indorsement on the wrapper was no part of the petition. *Jordan v. Brown*, 71 Iowa 421. See also *Garretson v. Hays*, 70 Iowa 19.

In *Ury v. Bush*, 85 Iowa 703, which was a proceeding to establish a claim against the estate of a decedent, it was objected in the Supreme Court that the petition was fatally defective on ac-

pleadings are thus presented, the jurisdiction is determined as regards the nature of the thing in controversy by the character of the suit without reference to the defense which may exist or be set up on behalf of the defendant.¹

9. Matters Not in Issue.— Courts have no power to adjudicate matters not involved in issues in the case before them, and such adjudications, if made, are not binding.²

count of the address. The court to which it was addressed was in existence when the claim was filed, and had jurisdiction of probate matters, but thereafter ceased to exist, another court having succeeded to its jurisdiction, and the claim was filed without changing the form of address. It was held that the omission to substitute the name of the latter court for that of the former in the address was a formal error which was waived by failure to object in the lower court; *distinguishing* *Jordan v. Brown*, 71 Iowa 421, and *Garterson v. Hays*, 70 Iowa 19, above cited, in that those cases arose under a different statute and involved dissimilar facts.

1. *Boone v. Poindexter*, 12 Smed. & M. (Miss.) 640; *Neihardt v. Kilmer*, 12 Neb. 35.

The Answer of a Garnishee cannot deprive the court of jurisdiction. *Buisson v. Staats*, 9 La. Ann. 236; *Gustine v. New Orleans Oil Co.*, 13 La. Ann. 510.

Defense Enforceable in Another Court.— Jurisdiction cannot be defeated by a defendant by pleading a defense which can only be enforced in another forum. *Scarborough v. Powell*, 2 Tex. App. Civ. Cas., § 734; *Crozier v. Stephens*, 2 Tex. App. Civ. Cas., § 801. See also *Jersey City v. Gardner*, 33 N. J. Eq. 630.

Exception to the Rule.— "It is a general rule that the character of the rights which inhere in the person seeking redress in court determines the tribunal which he must resort to for their adjudication and enforcement. And, as a rule, recourse can be had to a court of equity only when the suitor himself comes, clothed with such rights as give him standing there. Jurisdiction is not gained through the defendant's status. Exceptions may exist to the rule, and the common foreclosure proceeding may, in some of its features, indicate such an exception. There the owner of the legal title has standing in equity because of the wide and

well-recognized difference between the form of the contract, viz., a conveyance in fee defeasible upon a condition subsequent, and that which, within the true intent and meaning of the parties, it was designed to be — a real security for a debt. The mortgagee was let in after default, to have the lands sold to pay his debt immediately, or to call upon the mortgagor to redeem his estate presently, or, in default thereof, forever to be foreclosed from redeeming the same. All the rights of the parties rest in a single contract." *Jersey City v. Gardner*, 33 N. J. Eq. 631.

2. *Indiana*. — *McFadden v. Ross*, 108 Ind. 517; *Hutts v. Martin*, 134 Ind. 592; *Ringgenberg v. Hartman*, 124 Ind. 190; *Tracy v. Reed*, 4 Blackf. (Ind.) 56. *Kentucky*. — *McKinsey v. Anderson*, 4 Dana (Ky.) 62.

Massachusetts. — *Standish v. Parker*, 2 Pick. (Mass.) 20; *Spooner v. Davis*, 7 Pick. (Mass.) 149.

New Hampshire. — *Moulton v. Libbey*, 15 N. H. 480; *King v. Chase*, 15 N. H. 9.

New Jersey. — *Munday v. Vail*, 34 N. J. L. 418; *Reynolds v. Stockton*, 43 N. J. Eq. 211.

New York. — *Pray v. Hegeman*, 98 N. Y. 358; *Embury v. Conner*, 3 N. Y. 522; *Dunham v. Bower*, 77 N. Y. 76; *Manny v. Harris*, 2 Johns. (N. Y.) 24; *People v. Johnson*, 38 N. Y. 63; *Reid v. Gardner*, 65 N. Y. 579; *Smith v. Weeks*, 26 Barb. (N. Y.) 463.

Ohio. — *Spoors v. Coen*, 44 Ohio St. 497.

Pennsylvania. — *Kille v. Ege*, 82 Pa. St. 111; *Lentz v. Wallace*, 17 Pa. St. 412; *Martin v. Gernandt*, 19 Pa. St. 124; *Hibshman v. Dulleban*, 4 Watts (Pa.) 183; *Lewis's Appeal*, 67 Pa. St. 165.

Vermont. — *Lamoille Valley R. Co. v. Bixby*, 57 Vt. 563.

Virginia. — *Seamster v. Blackstock*, 83 Va. 232; *Wade v. Hancock*, 76 Va. 620.

United States. — *Reynolds v. Stockton*, 140 U. S. 254.

10. Jurisdiction Dependent upon Amount in Controversy. — The jurisdiction of various courts is often dependent upon the amount in controversy under various statutory provisions, and this matter has been fully treated in a preceding article.¹

Inherent Jurisdiction of Court of Chancery. — But independently of the subject of jurisdictional amount as controlled by general statutes, the inherent jurisdiction of a court of chancery was restricted in respect of the amount in controversy, upon the principle *de minimis non curat lex*;² and this character of minimum jurisdic-

England. — *Outram v. Morewood*, 3 East 351..

For the effect generally of such adjudication see the title *Res Adjudicata*, Am. and Eng. Encyc. of Law.

Agreement to Submit Outside Issues. — In *Campbell v. Consalus*, 25 N. Y. 616, it is said that "even an agreement between the parties that matters foreign to the pleadings shall be given in evidence and decided by the verdict of a jury will not, it seems, enlarge the operation of a judgment entered on such verdict by way of estoppel." *Wolfe v. Washburn*, 6 Cow. (N. Y.) 262; *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Lamoille Valley R. Co. v. Bixby*, 57 Vt. 563; *Guest v. Warren*, 9 Exch. 379.

But, on the other hand, it has been said that an exception to this phase of the rule exists where the parties, by agreement in open court, permit matters to be adjudicated which are not involved in the issues in the cause, and that in such cases judgment rests upon the agreement of the parties and not upon the pleadings. *Hutts v. Martin*, 134 Ind. 592 [citing *Lyon v. Roy*, 54 Ind. 300; *Indiana, etc., R. Co. v. Bird*, 116 Ind. 217; *Fletcher v. Holmes*, 25 Ind. 458; *Hudson v. Allison*, 54 Ind. 215.] But it may be noted that in the last two cases there was an agreement that a certain judgment might be entered, and no issues appear to have been submitted by consent.

Consent Decrees in Equity form exceptions to the rule that relief in equity is circumscribed by the pleadings. See article DECREES, vol. 5, p. 962.

1. See article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

2. **Rule from Bacon — £10.** — It was under a provision in one of Lord Bacon's ordinances (Rule 15) that all suits under the value of £10 were regularly to be dismissed; and his rules come with the imposing character of original constitutional ordinances for the government of the practice of the

court. *Moore v. Lyttle*, 4 Johns. Ch. (N. Y.) 184; *Swedish Evangelical Lutheran Church v. Shivers*, 16 N. J. Eq. 453.

Anciently the jurisdiction of the court was extended in practice to very small demands. Thus it was held that a bill in equity would lie for the recovery of ancient quit rents, though very small, as two shillings and three shillings per annum, if proved to have been constantly paid; and Sir Wm. Beresford's case was cited, in which there had been a decree for rent of one shilling and three pence per annum. *Cocks v. Foley*, 1 Vern. 359. "This case was as early as 1685; yet in another case, a few years earlier (*Fox v. Frost*, Rep. temp. Finch 253), the plaintiff had grounded his equity upon the payment of five shillings as earnest money, to bind the alleged bargain, and on demurrer to the bill for not having a sufficient sum to warrant a decree, the court allowed the demurrer. Afterwards, in 1728, we find the Master of the Rolls (Anon. Moseley, 47) denying an injunction where the original matter at law was only five pounds, though, by letting judgment go by default, it had increased to fifteen pounds; he said that he had dismissed another bill on the same account, because the sum was originally 'below the dignity of the court,' though by neglect or mismanagement it had amounted to a competent sum. In *Brace v. Taylor*, 2 Atk. 253, Lord Hardwicke dismissed a bill at the hearing, though the defendant did not demur, as being of too small and trifling consequence for that court, it being for the arrears of an annuity, and only six pounds fifteen shillings in amount. He referred to a case in the time of Lord Harcourt, where a bill was brought for tithes, and as the tithes which were due appeared to be only of the value of five pounds, the bill was dismissed at the hearing. The next case, which was determined about

tional limit was adopted as a part of the inherent constitution of courts of chancery in this country,¹ courts of equity refusing to allow their powers to be called into exercise to consider matters of a trifling amount,² sometimes by virtue of express statute.³

the same time, in the Exchequer, advanced the requisite sum for the jurisdiction of the court to ten pounds and upwards. The bill in *Owens v. Smith*, 2 Comyns Rep. 715, was against an executor, for discovery of assets and payment of a demand of £10. 10s. 2d., but the bill was dismissed without demurrer, and at the hearing, because the demand was 'beneath the dignity of the court.' " *Moore v. Lyttle*, 4 Johns. Ch. (N. Y.) 185.

After the Judicature Act in England the same principle was retained. "Before the Judicature Act this action could not have been brought in a common law court, because it seeks to enforce a charge, and it could not have been brought in the Court of Chancery, because the value of the subject-matter is under £10. It cannot, therefore, now be brought in the High Court, to which only the jurisdiction of those courts has been transferred." *Westbury-on-Severn Rural Sanitary Authority v. Meredith*, 30 Ch. Div. 389.

1. \$50 Is More than £10, and therefore, even following the English rule, a court of equity will take jurisdiction of a cause involving that amount. *Vredenberg v. Johnson*, Hopk. (N. Y.) 112; *Fullerton v. Jackson*, 5 Johns. Ch. (N. Y.) 276; *Allen v. Demarest*, 41 N. J. Eq. 162.

Of an Amount under \$50 a court of equity will not entertain jurisdiction. *Fullerton v. Jackson*, 5 Johns. Ch. (N. Y.) 276.

The Reason Seems to Be that for an amount within the jurisdiction of justices of the peace the parties can have an equitable determination of the matters. *Moore v. Lyttle*, 4 Johns. Ch. (N. Y.) 184, wherein the court said: "I therefore hesitatingly allow the injunction, and under a doubt whether the demand ought not to exceed the jurisdiction of justices of the peace, which is now fifty dollars."

In Alabama it was said that the statutes regulate appeals from justices of the peace and the mode of trial in the higher court, securing to the parties all the justice and equity to which they are entitled, especially where the amount in controversy does not exceed

\$20; if in any such case a court of equity will interfere, it must be where the amount in controversy exceeds \$20. *Wood v. Wood*, 3 Ala. 763; *Williams v. Berry*, 3 Stew. & P. (Ala.) 284.

In Ohio it was said that the common-law rule prevailed, with the modification that under the statute there an injunction bill might be maintained to restrain proceedings at law where the matter in dispute was of the value of \$20, and that by analogy courts of equity in that state have entertained bills, though not for injunction, if their subject-matter was of that value. *Carr v. Iglehart*, 3 Ohio St. 459.

Exception to the Rule. — "In England the rule of the courts of equity is not to entertain a bill under the value of ten pounds sterling, or forty shillings per annum in land, except in special cases, such as in cases of charity, in cases of fraud, and in cases of bills to establish a right of a permanent and valuable nature; such as in the case of six shillings claimed to be due as an Easter offering, or of a perpetual rent charge of five shillings." *Story's Equity Pleadings* (10th ed.), § 500; *Swedish Evangelical Lutheran Church v. Shivers*, 16 N. J. Eq. 453.

2. *Gale v. Nickerson*, 151 Mass. 432; *Smith v. Williams*, 116 Mass. 512; *Cummings v. Barrett*, 10 Cush. (Mass.) 190; *Chapman v. Banker, etc.*, Pub. Co., 128 Mass. 479.

Improper Joinder of Claims. — The plaintiffs cannot, by improperly joining in one bill two such claims which are in their nature several and distinct, compel the court to take jurisdiction thereof. *Chapman v. Banker, etc.*, Pub. Co., 128 Mass. 480 [citing *Ballard Paving Co. v. Mulford*, 100 U. S. 147; *Jones v. Garcia del Rio, T. & R.* 297].

The Sum of £10 Fixed by Lord Bacon seems to have been assumed as the criterion of equity jurisdiction; but then it must have been an original demand due to that amount, and not one increased to or beyond it by default or neglect at law. *Moore v. Lyttle*, 4 Johns. Ch. (N. Y.) 185.

3. *Steinbach v. Hill*, 25 Mich. 78; *Smets v. Williams*, 4 Paige (N. Y.) 364; *Bradt v. Kirkpatrick*, 7 Paige (N. Y.)

III. TERRITORIAL JURISDICTION — 1. Restriction of Sovereign Power.— Courts derive their authority from the sovereign power of the state, and are restricted in its exercise to the circumscribed limits of the state.¹ They have authority over all persons and things within their territorial jurisdiction,² but the sovereignty of the state itself does not embrace authority to control the manner of executing process to the extent of making lawful any service against a person without the jurisdiction of the court, as a basis for a personal judgment.³

2. Local and Transitory Actions. (See also article VENUE.) —

a. CRIMES AND PENALTIES.— Crimes and penalties are in their nature local, and jurisdiction thereof is restricted to the state within which the crime is committed or the penalty is provided. Therefore, one state court cannot punish for an offense committed in another state, nor enforce the penal laws thereof.⁴

62; *Reynolds v. Howard*, 3 Md. Ch. 333.

Objection, How Made.— See *infra*, X. 2, g. (2) *Matters Beneath the Dignity of the Court*.

Sufficiency of Allegation.— Where a statute provides that the jurisdiction of a court of equity shall not be exercised in matters not exceeding \$100, the bill should aver that the value of the defendant's equitable interest, etc., exceeds or is more than \$100. *Bradt v. Kirkpatrick*, 7 Paige (N. Y.) 64.

1. *Adams v. Lamar*, 8 Ga. 83; *Sturgis v. Fay*, 16 Ind. 429; *Hood v. State*, 56 Ind. 263; *Gary v. Northwestern Mut. Aid Assoc.*, 87 Iowa 25; *Marquardt v. Thompson*, 78 Iowa 158; *Lovejoy v. Albee*, 33 Me. 414; *Howell v. Manglesdorf*, 33 Kan. 194; *McEwan v. Zimmer*, 38 Mich. 765; *Sheldon v. Rice*, 30 Mich. 297; *Tyler v. People*, 8 Mich. 320.

2. See the cases in the last preceding note.

3. *Pennoyer v. Neff*, 95 U. S. 714; *Freeman v. Alderson*, 119 U. S. 187; *Stone v. Wainwright*, 147 Mass. 202; *Smith v. Grady*, 68 Wis. 215. See also, in *England*, *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73.

As to the manner of executing process in this connection, see, for a full treatment, the articles SERVICE OF PROCESS; PUBLICATION.

"It is conceded that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law or to enforce obedience to that law without the circle in which

that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign." *Marshall, C. J.*, in *Rose v. Himely*, 4 Cranch (U. S.) 280.

4. *Gilbert v. Steadman*, 1 Root (Conn.) 403; *Sherman v. Gassett*, 9 Ill. 521; *Missouri River Tel. Co. v. Sioux City First Nat. Bank*, 74 Ill. 217; *State v. Reonnals*, 14 La. Ann. 276; *Manley v. People*, 7 N. Y. 295; *State v. Knight, Tayl.* (3 N. Car.) 65; *State v. Hall*, 114 N. Car. 903; *State v. Cutshall*, 110 N. Car. 538; *Com. v. Kunzmann*, 41 Pa. St. 429; *Huntington v. Attrill*, 146 U. S. 657; *Warrender v. Warrender*, 9 Bligh 119; *Rex v. Hooker*, 7 Mod. 193; *Rafael v. Verelst*, 2 W. Bl. 1058. And see, in general, article PENALTIES AND PENAL ACTIONS.

"Our legislature may define and punish crimes committed within the state, whether by citizens or strangers, because the former are supposed to have consented to all laws made by the legislature, and the latter, whether their residence be temporary or permanent, do impliedly agree to yield obedience to all such laws as long as they remain in the state; but they cannot define and punish crimes committed in another state, the citizens of which, while they remain there, are bound to regulate their civil conduct only according to their own laws." *State v.*

b. JURISDICTION IN REM. — Whenever it becomes necessary for the judgment or decree to act upon the particular property or thing in litigation, the jurisdiction attaches to the thing, and can only be brought into action by a suit where the thing is.¹

c. RIGHTS IN REAL PROPERTY. — Rights in real property, the subject being fixed and immovable, are local, and when they are sought to be adjudicated, or a judgment or decree must operate directly upon the land, courts outside of the state in which the land is situated cannot be resorted to.²

Knight, Tayl. (N. Car.) 65; State v. Cutshall, 110 N. Car. 538.

Personal Injuries Resulting in Death. — See article DEATH BY WRONGFUL ACT, vol. 5, p. 860.

Exceptions in the Application of the Rule.

— In the application of the rule to particular cases there are instances of offenses which seem to form exceptions to the rule, or at least broad variations thereof, either by reason of the fact that an offense committed in one state may, under particular statutes, be continued in another in some other form, or where, though the person is out of the jurisdiction, the act itself is within the jurisdiction. For example, see State v. Grady, 34 Conn. 129, wherein it is said: "It is undoubtedly true, as claimed, that the courts of this state can take no cognizance of an offense committed in another state. Such was the decision in Gilbert v. Steadman, 1 Root (Conn.) 403. But it is true, and universally conceded, that if an offense is committed in this state by the procurement of a resident of another state who does not himself personally come here to assist in the offense, of a grade below felony, such nonresident offender can be punished for the offense by our courts if jurisdiction can be obtained of his person. It is said, however, that if the offense is of the grade of felony, no such punishment can be inflicted. As it is more important to protect our citizens against great crimes than small ones, unless such a distinction not only exists but is founded in justice and essential to the symmetry of the law, it should be discarded. Such a rule cannot be founded in justice. The general proposition that no man is to suffer criminally for what he does out of the territorial limits of the country, if applied to a case where the act is completed out of the country, is correct; but it is the highest injustice that a man should be protected in doing a

criminal act here because he is personally out of the state. His act is here, although he is not. The injustice of the rule has compelled courts of other states to disregard it in cases of great crimes. Thus, if a man, standing beyond the outer line of one state, discharges a ball over the line and kills another, it has been holden that he was punishable, though the crime was a felony." See, in general, article HOMICIDE, vol. 10, p. 106, and the other particular titles in this work.

1. See *infra*, III. 5. *Proceedings in Rem.*

2. *Maryland.* — White v. White, 7 Gill & J. (Md.) 208.

Michigan. — Graydon v. Church, 7 Mich. 36.

New Jersey. — Bullock v. Bullock, 52 N. J. Eq. 561; Tiffany v. Crawford, 14 N. J. Eq. 278; Servis v. Nelson, 14 N. J. Eq. 94; Davis v. Headley, 22 N. J. Eq. 115.

New York. — Bennett v. Erving, 4 Robt. (N. Y.) 671; Genet v. Delaware, etc., Canal Co., 13 Misc. Rep. (N. Y. Super. Ct.) 409.

Texas. — Texas, etc., R. Co. v. Gay, 86 Tex. 571.

Vermont. — Niles v. Howe, 57 Vt. 388.

Virginia. — Wimer v. Wimer, 82 Va. 890; Gibson v. Burgess, 82 Va. 650; Poindexter v. Burwell, 82 Va. 513; Pillow v. Southwest Virginia Imp. Co., 92 Va. 144.

United States. — Boyce v. Grundy, 9 Pet. (U. S.) 275.

Injury to Land in Another State. — Howard v. Ingersoll, 23 Ala. 673, 17 Ala. 780; Du Breuil v. Pennsylvania Co., 130 Ind. 137; American Union Tel. Co. v. Middleton, 80 N. Y. 408; Watts v. Kinney, 6 Hill (N. Y.) 82; Cragin v. Lovell, 88 N. Y. 258; Genet v. Delaware, etc., Canal Co., (Supreme Ct.) 8 N. Y. Supp. 822; Missouri Pac. R. Co. v. Cullers, 81 Tex. 382; Morris v. Missouri Pac. R. Co., 78 Tex. 17.

d. JUDGMENTS OR DECREES OPERATIVE AGAINST THE PERSON.

— But if a person is within the jurisdiction of the court, a personal judgment or decree may be rendered in a matter susceptible of such a judgment or decree, and the court may exercise jurisdiction to that extent.¹

Contra. — Little v. Chicago, etc., R. Co., 65 Minn. 48.

Where there is no legal presumption arising from the declaration and evidence that the property was real estate, it devolves upon the defendant to show such a fact in order to oust the court of jurisdiction. Rogers v. Woodbury, 15 Pick. (Mass.) 156.

Waiver. — It has also been held that while, as a general rule of law, actions for injuries to real property must be brought in the *forum rei sitæ*, a party may waive the objection, when the action is brought in another state in a court of general jurisdiction, by going to trial without objection. Sentenis v. Ladew, 140 N. Y. 463.

Trespass Followed by Asportation of Timber. — It has also been held that where trespass on land has been followed by the asportation of timber severed from the land, if the plaintiff waives the original trespass and sues simply for the conversion of property carried away, the action becomes transitory. Whidden v. Seelye, 40 Me. 247. But the contrary is held in American Union Tel. Co. v. Middleton, 80 N. Y. 408.

See in General, upon This Subject, article REAL PROPERTY.

1. *Arkansas.* — Pickett v. Ferguson, 45 Ark. 177.

Illinois. — Heyer v. Alexander, 108 Ill. 385.

Iowa. — Gilliland v. Inabnit, 92 Iowa 46.

Louisiana. — McDowell v. Read, 3 La. Ann. 391; Seixas v. King, 39 La. Ann. 510; Edwards v. Ballard, 14 La. Ann. 362.

Maryland. — Loney v. Penniman, 43 Md. 150; White v. White, 7 Gill & J. (Md.) 208.

New Jersey. — Wood v. Warner, 15 N. J. Eq. 81.

New York. — Roblin v. Long, 60 How. Pr. (N. Y. Supreme Ct.) 200; Hawley v. James, 7 Paige (N. Y.) 213; Reading v. Haggin, 58 Hun (N. Y.) 450.

Pennsylvania. — McElwath v. Pittsburgh, etc., R. Co., 55 Pa. St. 189.

South Carolina. — Episcopal Church v. Wiley, 2 Hill Eq. (S. Car.) 584.

Texas. — Texas, etc., R. Co. v. Gay, 86 Tex. 571.

Virginia. — Poindexter v. Burwell, 82 Va. 507; Davis v. Morriss, 76 Va. 21; Guerrant v. Fowler, 1 Hen. & M. (Va.) 5.

United States. — Muller v. Dows, 94 U. S. 444.

The Doctrine is that if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority operating territorially within the foreign jurisdiction, the court may act *in personam*, and oblige the party to convey, or otherwise to comply with its decree. But it is not competent to the court to decree touching a foreign subject when the act to be done can be accomplished and perfected only by an authority operating territorially. Poindexter v. Burwell, 82 Va. 513.

In Massie v. Watts, 6 Cranch (U. S.) 158, it was said that where one is liable to another in consequence of a contract, or as trustee, or as holder of a legal title acquired by any species of *mala fides*, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that the question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction; though it is otherwise if the question involved is a mere naked question of title.

Faith and Credit of Judgment Extraterritorially. — When a decree compelling a conveyance of land situated in another state comes in question in the courts of the state where the land is situated, it will be entitled to full faith and credit if jurisdiction of the defendants was once obtained by the court rendering the decree. Burnley v. Stevenson, 24 Ohio St. 474.

But it is said that such a decree is not effectual unless a conveyance is executed by the owner of the land in person, and that therefore a deed from a committee of the estate of a defendant adjudged insane after a decree by the courts of New York requiring the execution of the deed by him passed no title to land in Texas. Morris v.

6. JURISDICTION OF THE PERSON IN TRANSITORY ACTIONS.—As has been shown, jurisdiction of the person may be acquired, as a general rule, wherever the defendant can be found within the reach of the process of the court.¹ This proposition refers to the acquisition of jurisdiction over a person outside the state of his residence, independently of the venue of actions when the parties are all residents of the same state, the latter being controlled by the character of the action as transitory or local and by particular statutes.² The well-established rule is therefore that transitory actions are not confined to any particular state;³

Hand, 70 Tex. 481 [citing *Moseby v. Burrow*, 52 Tex. 404; *Paschal v. Acklin*, 27 Tex. 175; *Watts v. Waddle*, 6 Pet. (U. S.) 400; *Booth v. Clark*, 17 How. (U. S.) 322; *Watkins v. Holman*, 16 Pet. (U. S.) 25; *Page v. McKee*, 3 Bush (Ky.) 135].

1. See *infra*, III. 4. *Nonresident Personally Within the Jurisdiction*.

2. See article VENUE.

A statute relating to the venue of certain actions between residents of the state has no application to actions wherein the parties are not residents. *Atkins v. Borstler*, 46 Mich. 553.

3. *Alabama*.—*Helton v. Alabama Midland R. Co.*, 97 Ala. 275; *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294.

Arkansas.—*St. Louis, etc., R. Co. v. Brown*, 62 Ark. 254.

California.—*Roberts v. Dunsmuir*, 75 Cal. 203.

Maryland.—*Northern Cent. Co. v. Scholl*, 16 Md. 331.

Michigan.—*Cofrode v. Gartner*, 79 Mich. 332.

Minnesota.—*Midland Co. v. Broat*, 50 Minn. 562.

Missouri.—*Hannibal, etc., R. Co. v. Mahoney*, 42 Mo. 467; *Gregg v. Union Pac. R. Co.*, 48 Mo. App. 494.

Nebraska.—*Chicago, etc., R. Co. v. Lundstrom*, 16 Neb. 254; *Painter v. Ives*, 4 Neb. 122.

New Jersey.—*Hale v. Lawrence*, 21 N. J. L. 714.

New York.—*Johnson v. Dalton*, 1 Cow. (N. Y.) 543; *Gardner v. Thomas*, 14 Johns. (N. Y.) 134; *Smith v. Bull*, 17 Wend. (N. Y.) 323.

Texas.—*Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565.

In *Watson v. Richmond, etc., R. Co.*, 91 Ga. 222, the lessee of a railroad was held to be subject to suit in the state of Georgia for a personal injury sustained in Alabama though the lessee was a foreign corporation.

Actions Ex Delicto.—Personal injuries are of a transitory nature and *sequuntur forum rei*. *Rafael v. Verelst*, 2 W. Bl. 1058.

Where the injury concerns the rights in personal property, it may be laid wherever the defendant is found. This is the doctrine in *Mostyn v. Fabrigas*, 1 Cowp. 161, and *Rafael v. Verelst*, 2 W. Bl. 1058, cited in *Glen v. Hodges*, 9 Johns. (N. Y.) 67. To the same principle, see *Tupper v. Morin*, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 398; *McQueen v. New*, 87 Hun (N. Y.) 206; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 53; *Watts v. Thomas*, 2 Bibb (Ky.) 458; *Hurley v. Missouri Pac. R. Co.*, 57 Mo. App. 679; *Mayer v. Brown*, (Tex. App. 1890) 16 S. W. Rep. 788.

Statutory Provisions Remedial.—An action for personal injuries may be brought outside the state where the injury occurred, and a statute of the state where the injury occurred providing certain conditions to be performed by a railway company, the failure of which shall subject such company to an action for damages, is remedial and not penal. *Gardner v. New York, etc., R. Co.*, 17 R. I. 790; *McLeod v. Connecticut, etc., R. Co.*, 58 Vt. 727.

Nonresidence of One or Both Parties.—It is held that one nonresident may sue another, both being residents of the same state, upon a cause of action which originated in the state of their residence. *Miller v. Black*, 2 Jones L. (N. Car.) 341; *Walters v. Breder*, 3 Jones L. (N. Car.) 64; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70. See also *Furbush v. Nye*, 17 N. Y. App. Div. 325. And one alien may sue another, both parties being transiently present. *Roberts v. Knights*, 7 Allen (Mass.) 449. A foreigner may sue in the courts of *Massachusetts* a nonresident who is within that state, in a transitory action. *Peabody v. Hamilton*, 106

though as a matter of comity the courts of one state may refuse to entertain jurisdiction of matters which arise in another and

Mass. 217; *Barrell v. Benjamin*, 15 Mass. 354.

Corporations.—A domestic corporation may be sued in the state of its domicile by citizens of that state for injuries inflicted in another state. *Helton v. Alabama Midland R. Co.*, 97 Ala. 275; *Northern Cent. Co. v. Scholl*, 16 Md. 331. And a citizen of a state may sue a foreign corporation which can be reached in that state for injury suffered in another state. *Hills v. Richmond, etc., R. Co.*, 37 Fed. Rep. 660; *Pullman Palace Car Co. v. Lawrence*, (Miss. 1897) 22 So. Rep. 53; *Western Union Tel. Co. v. Clark*, (Tex. Civ. App. 1896) 38 S. W. Rep. 225.

Torts Committed Abroad.—Jurisdiction by Comity.—In *Great Western R. Co. v. Miller*, 19 Mich. 305, while the undoubted jurisdiction of the courts of Michigan in actions for torts committed abroad was conceded, it was said that the exercise of such jurisdiction could only be claimed as a matter of comity, and that the courts were not compelled to proceed in cases where the parties are not residents of the United States and the trespass was committed abroad, and that the danger of injustice and the inconvenience attending the investigation of such controversies rendered it proper for the courts of Michigan to decline to proceed therein.

In *California* it was held that such an action could not be dismissed for want of jurisdiction. *Roberts v. Duns-muir*, 75 Cal. 203 [*citing Johnson v. Dalton*, 1 Cow. (N. Y.) 543; *Gardner v. Thomas*, 14 Johns. (N. Y.) 134; *Smith v. Bull*, 17 Wend. (N. Y.) 323]. These *New York* cases support the right of courts to entertain such jurisdiction, and to this point the first two are cited in *Burdick v. Freeman*, 120 N. Y. 420, which was an action for criminal conversation brought in the state of New York, all the parties thereto being residents of the state of Pennsylvania, where the wrong was alleged to have been committed, and the action of the trial court in refusing a charge to the jury that the suit could not be maintained in the courts of the state of New York was held to be without error, the court having a discretion to entertain jurisdiction or to refuse to entertain it

under the circumstances of the particular case presented. *Overruling Molony v. Dows*, 8 Abb. Pr. (N. Y. C. Pl.) 316, and *Latourette v. Clark*, 30 How. Pr. (N. Y. Supreme Ct.) 242, in so far as they held otherwise, and *citing* also in point *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31; *McIvor v. McCabe*, 26 How. Pr. (N. Y. Super. Ct.) 257; *Newman v. Goddard*, 3 Hun (N. Y.) 70.

The courts will not entertain such jurisdiction, however, except under special circumstances making it necessary. *Burdick v. Freeman*, 46 Hun (N. Y.) 140; *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31, wherein it is said that "actions for injuries to the person are transitory and follow the person; and, therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in our courts for a tort committed in another country, the same as on a contract made in another country. * * * But as a question of policy there are many reasons why jurisdiction should not be entertained. Unless for special reasons, nonresident foreigners should not be permitted the use of our courts to redress wrongs or enforce contracts committed or made within their own territory. Our courts are organized and maintained at our own expense for the use, benefit, and protection of our citizens. Foreigners should not be invited to bring their matters here for litigation. But if a foreigner flees to this country he may be pursued and prosecuted here. Nothing appears in this case showing why jurisdiction should be entertained. It seems an ordinary case of assault and battery, committed in Canada, both parties still residing there, the defendant being casually here when arrested. It is most clearly against the interests of those living on the border for our courts to encourage or entertain jurisdiction of such actions. To do so would establish a practice which might often be attended with serious disadvantage to persons crossing the border. The true policy is to refuse jurisdiction in all such cases unless for special reasons shown." See also *Ferguson v. Neilson*, (Supreme Ct.) 11 N. Y. Supp. 524, and *Morris v. Missouri Pac. R. Co.*, 78 Tex. 17.

over which the courts of the latter have ample power.¹

f. REMEDY AFFECTED BY CONFLICT OF LAWS.—In order to maintain an action of tort founded upon an injury to personal property, and not upon a breach of contract, it is held that the act which caused the injury must at least be actionable or punishable by the law of the place where it was done.²

A *Right in Derogation of the Common Law* is confined to the jurisdiction in which it accrues. That is to say, the statutes of a state have no effect beyond the limits of the state, and if the act or omission be not actionable by the law of the state where it occurs, no action can properly be brought on it in another state, although, by the laws of the latter, if the act or omission had occurred within its jurisdiction an action could have been maintained.³ The nature of the remedy and the jurisdic-

1. *Alger v. Alger*, 31 Hun (N. Y.) 471; *Delaware, etc., R. Co. v. New York, etc., R. Co.*, 12 Misc. Rep. (N. Y. Supreme Ct.) 230. See also the cases cited in the preceding note.

2. *Carter v. Goode*, 50 Ark. 156; *Holland v. Pack, Peck* (Tenn.) 151; *McLeod v. Connecticut, etc., R. Co.*, 58 Vt. 727; *Le Forest v. Tolman*, 117 Mass. 109 [*citing* *Smith v. Condry*, 1 How. (U. S.) 28; *The China*, 7 Wall. (U. S.) 64; *Blad's Case*, 3 Swanst. 603; *Blad v. Bamfield*, 3 Swanst. 604; *General Steam Nav. Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R. 4 Q. B. 239; *The Halley*, L. R. 2 Adm. & Eccl. 3, L. R. 2 P. C. 193; *Stout v. Wood*, 1 Blackf. (Ind.) 71; *Wall v. Hoskins*, 5 Ired. L. (N. Car.) 177; *Mahler v. Norwich, etc., Transp. Co.*, 35 N. Y. 352; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85] See in general Am. and Eng. Encyc. of Law (2d ed.), title *Private International Law*.

The case of *Western Union Tel. Co. v. Phillips*, (Tex. Civ. App. 1893) 30 S. W. Rep. 494, was a suit for damages accruing by reason of the negligence of the telegraph company in the delivery of a telegram outside of the state of Texas, and it was held that the action could be brought in Texas. The court referred to the statement in *Willis v. Missouri Pac. R. Co.*, 61 Tex. 434, that "rules governing suits arising out of torts committed in a locality other than the government where the redress is sought are about these, as deduced from the authorities upon the subject: where the action is transitory, and is based on personal injuries recognized

as such by universal law, the suit may be brought wherever the aggressor is found, irrespective of the provisions of the local law, or whether there be any law at all in force at the place where the wrong was committed." Without approving this statement of the law to the extent of holding that a cause of action in such cases would exist irrespective of the provisions of the local law if the local law changed what is termed the "universal law" and made the act complained of lawful in that jurisdiction, the rule laid down was said by the court to be sound in cases where there is a simple failure to provide a remedy, without making the act lawful. The court further said that even if the case be treated as one purely of tort, it was not prepared to hold that the inability of the courts where the cause of action arose to afford a remedy would deprive the injured party of all remedy everywhere, although the cases of *Carter v. Goode*, 50 Ark. 156, and *Holland v. Pack, Peck* (Tenn.) 151, would seem to go far in that direction.

3. While this proposition is in one aspect the statement of a doctrine of law rather than a principle of procedure, it is valuable as indicating the forum to which resort should be had in these cases.

Injuries Resulting in Death.—The principle stated in the text is announced in actions brought for damages for injuries resulting in death, and is of general application. *Kahl v. Memphis, etc., R. Co.*, 95 Ala. 341; *Selma, etc., R. Co. v. Lacy*, 43 Ga. 461; *McCarthy v. Chicago, etc., R. Co.*, 18 Kan. 46; *Davis v. New York, etc., R.*

tion of courts to enforce it are not necessarily dependent upon the question whether the right is a statutory or a common-law one.¹

g. ENFORCEMENT OF RIGHT BY COMITY. — While the cases previously cited support the principle stated, some of them at the same time support what seems to be an independent principle rather than an exception to the rule stated, to wit, that as far as the enforcement of a right is concerned, if the right conferred in the state where the act or omission took place is like a right arising from the same act or omission in the state where the action is brought, it is not in contravention of the public policy of the latter state to give enforcement thereto.²

Co., 143 Mass. 306; Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; Debevoise v. New York, etc., R. Co., 98 N. Y. 379; Whitford v. Panama R. Co., 23 N. Y. 465; Vanderwerken v. New York, etc., R. Co., 6 Abb. Pr. (N. Y. Supreme Ct.) 239; Beach v. Bay State Steamboat Co., 30 Barb. (N. Y.) 433; Crowley v. Panama R. Co., 30 Barb. (N. Y.) 99; McDonald v. Mallory, 77 N. Y. 547; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 53; Hover v. Pennsylvania Co., 25 Ohio St. 667; Hobbs v. Memphis, etc., R. Co., 9 Heisk. (Tenn.) 880; Nashville, etc., R. Co. v. Sprayberry, 8 Baxt. (Tenn.) 341; Nashville, etc., R. Co. v. Eakin, 6 Coldw. (Tenn.) 582; De Harn v. Mexican Nat. R. Co., 86 Tex. 68; Willis v. Missouri Pac. R. Co., 61 Tex. 432; St. Louis, etc., R. Co. v. McCormick, 71 Tex. 660. And see generally article DEATH BY WRONGFUL ACT, vol. 5, p. 848.

1. McLeod v. Connecticut, etc., R. Co., 58 Vt. 727; Dennick v. Central R. Co., 103 U. S. 11.

The Enforcement of the Right in the manner provided by the law of the state where the right accrued was held to be proper in *Dennick v. Central R. Co.*, 103 U. S. 21 [*disapproving* Woodard v. Michigan Southern, etc., R. Co., 10 Ohio St. 121; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *McCarthy v. Chicago, etc., R. Co.*, 18 Kan. 46; and *approving* Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48]. See also *Chesapeake, etc., R. Co. v. Heath*, 87 Ky. 651; *Bruce v. Cincinnati R. Co.*, 83 Ky. 174; *Nashville, etc., R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Usher v. West Jersey R. Co.*, 126 Pa. St. 210; *Morris v. Chicago, etc., R. Co.*, 65 Iowa 727; *Cincinnati, etc., R. Co. v. McMullen*, 117 Ind. 439; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848; *South Carolina R.*

Co. v. Nix, 68 Ga. 572; *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 684.

Later, in *Massachusetts*, the court adverted to the unfavorable view taken by the Supreme Court of the United States of the decision in *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, and said: "It is unnecessary to reconsider our own decision, as the plaintiff seeks only to maintain his action under our statute," etc. *Davis v. New York, etc., R. Co.*, 143 Mass. 302. And in *Higgins v. Central New England, etc., R. Co.*, 155 Mass. 178, the holding in *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, is distinguished.

2. *St. Louis, etc., R. Co. v. Brown*, 62 Ark. 254; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Louisville, etc., R. Co. v. Shively*, (Ky. 1892) 18 S. W. Rep. 944; *Boyce v. Wabash R. Co.*, 63 Iowa 71; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 53 [*citing* *Madrazo v. Willes*, 3 B. & Ald. 353, 5 E. C. L. 313; *Melan v. De Fitzjames*, 1 B. & P. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161, 1 Smith's L. Cas. 652; *Shipp v. M'Craw*, 3 Murph. (N. Car.) 463; *Wall v. Hoskins*, 5 Ired. L. (N. Car.) 177; *Stout v. Wood*, 1 Blackf. (Ind.) 71].

This further appears by necessary implication in many of the cases which hold that the action can be brought in a state other than the one in which the injury occurred when a like right of action exists in the state where the injury occurred. *Nashville, etc., R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Nashville, etc., R. Co. v. Eakin*, 6 Coldw. (Tenn.) 582; *Boyce v. Wabash R. Co.*, 63 Iowa 71; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Selma, etc., R. Co. v. Lacy*, 43 Ga. 461; *De Harn v. Mexican Nat. R. Co.*, 86 Tex. 69; *St. Louis, etc., R. Co. v. McCormick*, 71

Rights Enforceable Independently of Concurrent Statutes. — It has also been held that while the statute of a state has no extraterritorial force, rights acquired under it will in comity be enforced in another state if not against the public policy of the laws of the latter, independently of the question whether or not the statutes in the two states concur in giving a right of action.¹

Tex. 660; *Dennick v. Central R. Co.*, 103 U. S. 11.

Pleading Statute. — The statute of the state where the cause of action accrued should be set out in the declaration or complaint. *Nashville, etc., R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Hobbs v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 880; *Kahl v. Memphis, etc., R. Co.*, 95 Ala. 341. And the plaintiff must be prepared to show the law of that state under which he claims the right. *Hobbs v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 880; *Whitford v. Panama R. Co.*, 23 N. Y. 466; *Debevoise v. New York, etc., R. Co.*, 98 N. Y. 378. See article FOREIGN LAWS, vol. 9, p. 542.

The statutes need not be precisely the same. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48.

1. *Eingartner v. Illinois Steel Co.*, 94 Wis. 70; *Herrick v. Minneapolis, etc., R. Co.*, 31 Minn. 14; *Delahaye v. Heitkemper*, 16 Neb. 475; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171. But in the last case there was an actual coincidence of statutes. See also *Anderson v. Milwaukee, etc., R. Co.*, 37 Wis. 321. And see in general Am. and Eng. Encyc. of Law (2d ed.), tit. *Private International Law*.

Special Remedies — Comity. — In *Marshall v. Sherman*, 148 N. Y. 26, the question of the enforcement of special remedies under foreign statutes is ably discussed and the authorities exhaustively reviewed: "The courts of Massachusetts have uniformly refused to entertain actions of this character, upon the ground either that to enforce the foreign law would be injurious to its own citizens, or that complete justice could not be administered in its courts under its special and peculiar provisions. *Erickson v. Nesmith*, 4 Allen (Mass.) 233; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Post v. Toledo, etc., R. Co.*, 144 Mass. 341; *Bank of North America v. Rindge*, 154 Mass. 203. The arguments of the court in these cases upon

which the conclusion was based deserve the highest respect, and it is worthy of notice that in the case last cited the statute sought to be enforced was the identical one now under consideration in the case at bar. The highest court of Illinois has also refused to enforce this same statute and provision of the Kansas Constitution, on the ground that the remedy was special and must be pursued in the state where the corporation exists. *Fowler v. Lamson*, 146 Ill. 472. In another case (*Young v. Farwell*, 139 Ill. 326), it held that it could not enforce by action at law a statute of Oregon for the collection of unpaid subscriptions, for the reason that a complete settlement of the controversy required a bill in equity where all the parties interested were before the court, so that complete justice could be meted out to all, and all conflicting rights and equities finally adjusted. *Patterson v. Lynde*, 112 Ill. 196, 106 U. S. 519. By the constitution and laws of Michigan, stockholders of corporations of that state are individually liable for certain debts to be enforced by action of assumpsit; and the highest court of Wisconsin has held that the remedy was exclusive, that the corporation itself was a necessary party, and that the liability could be enforced only in the courts of Michigan. *May v. Black*, 77 Wis. 101. It has been also held, after exhaustive consideration, that a creditor of an Ohio corporation could not enforce the statutory liability of a stockholder in the courts of West Virginia. *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184. There are numerous other decisions in the state and federal courts that hold in effect, either that such a liability cannot be enforced at all beyond the local jurisdiction, or that such an action must be in equity after all remedies against the corporation have been exhausted, and that too in the state where the stockholder is sought to be charged; or at least the bill must show upon its face by proper allegations that such a proceeding was im-

The Doctrine of Comity Has Many Limitations and qualifications, and generally each sovereignty has the right to determine for itself its true scope and extent,¹ and to decide whether it can enforce a foreign law without at the same time neglecting the duty it

possible, and that all the corporate assets have been applied to the payment of the claims of creditors. *Terry v. Little*, 101 U. S. 216; *National Tube Works Co. v. Ballou*, 146 U. S. 517; *Pollard v. Bailey*, 20 Wall. (U. S.) 520; *New York Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Peck v. Miller*, 39 Mich. 594; *Barrick v. Gifford*, 47 Ohio St. 181; *Allen v. Walsh*, 25 Minn. 543; *Smith v. Hockabee*, 53 Ala. 191. The decisions of our own courts are also to the effect that special remedies provided by foreign laws to enforce the liability of stockholders in foreign corporations must be applied by the courts of the state in the local jurisdiction and where the corporation is domiciled. *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97; *Barnes v. Wheaton*, 80 Hun (N. Y.) 8. The statutes in these cases were, it is true different in some respects from that now under consideration, but when these cases are read with some of our more recent decisions as to the mode of enforcing the liability of stockholders in our own corporations, it becomes at once apparent that they apply to the statute in question. *National Bank v. Dillingham*, 147 N. Y. 603." To the same effect is *Russell v. Pacific R. Co.*, 113 Cal. 258.

Contra, *Guernsey v. Moore*, 131 Mo. 650.

1. Even When the Laws of Both Jurisdictions Give a Right of Action, the court is not always bound to entertain the action for a cause arising under the foreign law. In *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, which was an action against the defendant railway company for an injury sustained by the plaintiff in the republic of Mexico while in the employ of said company in that country, the court said that the decisions in Texas established the doctrine that the courts of that state would not undertake to adjudicate rights which originated in another state or country under statutes materially different from the law of Texas in relation to the same subject, and added: "Many difficulties would present themselves in an attempt to determine the meaning of the Mexican law

and to apply it in giving redress to the parties claiming rights under it. * * * The language of some of the articles quoted [referring to the laws of Mexico] is ambiguous, and we find great difficulty in determining what would be a proper interpretation of the law. We might or might not give the same effect to the language that is given to it in the courts of Mexico. * * * This difficulty of itself furnishes a sufficient reason for the courts of this state to decline to assume jurisdiction of this class of cases. * * * There are other sufficient reasons why our courts should not attempt to enforce the Mexican law in cases like this. The reason which influences the courts of one state to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign state or country, is that the defendant, having removed from such other state or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and as matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, because it would be unjust that the wrongdoer should be permitted, by removing from the country where he inflicted the injury, to avoid reparation for the wrong done by him. In this case there has been no removal of the person or property of the defendant."

In *Kimball v. St. Louis, etc., R. Co.*, 157 Mass. 7, the court, assuming, for the purposes of decision, that it had jurisdiction in such a case and could proceed to a decree upon the merits which would be binding in Missouri, said: "But it seems to us clear that, as among the states of this Union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts, in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law."

owes to its own citizens.¹ See in general upon this subject Am. and Eng. Encyc. of Law (2d ed.), title *Private International Law*.

3. Nonresidents—Person or Property Within Jurisdiction.—The jurisdiction of a court extends over persons and property within its territorial limits, but no further,² and it is stated generally that in order to acquire jurisdiction the defendant must be served with process by original summons, attachment and summons, or otherwise as required by law.³ The rule is that when a party out of the jurisdiction has property within the jurisdiction of the court, the jurisdiction of the cause may be acquired by issuance of process against and seizure of such property, even though the defendant cannot be served with personal process, but the jurisdiction thus acquired will merely authorize the ascertainment of the obligation and subjection of the property to the extent thereof if so much is seized, and will not support a personal judgment in the absence of personal service.⁴ A judg-

1. *Marshall v. Sherman*, 148 N. Y. 26.

2. See *supra*, III. 1. *Restriction of Sovereign Power*; *infra*, III. 4. *Nonresident Personally Within the Jurisdiction*.

3. *Brown v. Webber*, 6 Cush. (Mass.) 564.

Even in proceedings *in rem* against the property of nonresident debtors, the citation by publication or otherwise to the defendants, as expressly provided by law, must be given, whereby they may have their day in court, otherwise the court will acquire no jurisdiction or authority to adjudge a sale of their property to satisfy their debts. *Smith v. Montoya*, 3 N. Mex. 44. And see article PUBLICATION.

4. *California*.—*Anderson v. Goff*, 72 Cal. 65; *Belcher v. Chambers*, 53 Cal. 635; *Brown v. Campbell*, 100 Cal. 636; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524.

Connecticut.—*Easterly v. Goodwin*, 35 Conn. 276; *Kibbe v. Kibbe*, Kirby (Conn.) 119.

Kentucky.—*Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 45.

Maine.—*Ruffum v. Ramsdell*, 55 Me. 252; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Lovejoy v. Albee*, 33 Me. 414; *McVicker v. Beedy*, 31 Me. 316.

Maryland.—*Grover, etc., Sewing Mach. Co. v. Radcliffe*, 66 Md. 517.

Michigan.—*Moore v. Speed*, 55 Mich. 84.

Minnesota.—*Kenney v. Goergen*, 36 Minn. 192.

Missouri.—*Abbott v. Sheppard*, 44 Mo. 273; *Latimer v. Union Pac. R. Co.*, 43 Mo. 105.

New Hampshire.—*Eastman v. Dearborn*, 63 N. H. 364, *overruling Kendrick v. Kimball*, 33 N. H. 482.

New Mexico.—*Smith v. Montoya*, 3 N. Mex. 44.

New York.—*Force v. Gower*, 23 How. Pr. (N. Y. C. Pl.) 294; *McKinney v. Collins*, 88 N. Y. 216; *Warren v. Tiffany*, 17 How. Pr. (N. Y. Supreme Ct.) 106; *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. (N. Y. Supreme Ct.) 275; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37; *Fitzsimmons v. Marks*, 66 Barb. (N. Y.) 333; *Robinson v. Ward*, 8 Johns. (N. Y.) 86.

North Carolina.—*Bernhardt v. Brown*, 118 N. Car. 700; *Winfree v. Bagley*, 102 N. Car. 515.

Ohio.—*Arndt v. Arndt*, 15 Ohio 33.

South Carolina.—*Stanley v. Stanley*, 35 S. Car. 94.

Texas.—*Barnett v. Rayburn*, 4 Tex. App. Civ. Cas., § 84; *Weems v. Miles*, 1 Tex. App. Civ. Cas., § 1207; *Thomson v. Shackelford*, 6 Tex. Civ. App. 121; *Martin v. Cobb*, 77 Tex. 544; *Heady v. Bexar Bldg., etc., Assoc.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 468.

Vermont.—*Price v. Hickok*, 39 Vt. 292; *Woodruff v. Taylor*, 20 Vt. 74.

Virginia.—*O'Brien v. Stephens*, 11 Gratt. (Va.) 610.

West Virginia.—*Fowler v. Lewis*, 36 W. Va. 112.

Wisconsin.—*Renier v. Hurlbut*, 81 Wis. 24; *Smith v. Grady*, 68 Wis. 215.

United States.—*Pennoyer v. Neff*, 95 U. S. 714; *Boswell v. Otis*, 9 How. (U. S.) 336; *Picquet v. Swan*, 5 Mason (U.

ment when neither the person nor the property of the defendant is within the jurisdiction of the court and no personal service is had upon the defendant is absolutely void,¹ except, however, in

S.) 35; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308.

See also articles GARNISHMENT, vol. 9, p. 810; ATTACHMENT, vol. 2, p. 1; and *infra*, IX. *General Rule of Presumptions as to Jurisdiction*.

A personal judgment void because rendered on publication and not on service of process cannot be made good by reason of the fact that a motion for new trial was made and overruled. The court said: "The judgment was void when rendered. The filing of a motion to set it aside, or the overruling of the motion, could not make it better or worse. The record does not show that defendants filed the motion or that it was done by their authority. The filing of the motion does not show that the defendants were present in court when the judgment was rendered." *Martin v. Cobb*, 77 Tex. 544. See article APPEARANCES, vol. 2, p. 653 *et seq.*

1. *Connecticut*. — *Wood v. Watkinson*, 17 Conn. 504.

Georgia. — *Dearing v. Charleston Bank*, 5 Ga. 497; *Adams v. Lamar*, 8 Ga. 83.

Indiana. — *Nicholson v. Stephens*, 47 Ind. 186; *Horner v. Doe*, 1 Ind. 130; *Ashley v. Laird*, 14 Ind. 222; *Hawkins v. Hawkins*, 28 Ind. 66; *Rice v. Loomis*, 28 Ind. 399; *State v. Hudson*, 37 Ind. 198; *Packard v. Mendenhall*, 42 Ind. 598; *Beard v. Beard*, 21 Ind. 321.

Kentucky. — *Mattingly v. Corbit*, 7 B. Mon. (Ky.) 378; *Manifee v. Hyneman*, 3 T. B. Mon. (Ky.) 406; *Berry v. Berry*, 6 Bush (Ky.) 595; *Griswold v. Popham*, 1 Duv. (Ky.) 170; *Jackson v. Speed*, 2 Duv. (Ky.) 429; *Harris v. Adams*, 2 Duv. (Ky.) 141; *Graham v. Sublett*, 6 J. Marsh. (Ky.) 45.

Maine. — *Lovejoy v. Albee*, 33 Me. 414; *Smith v. Eaton*, 36 Me. 298.

Maryland. — *Grover, etc., Sewing Mach. Co. v. Radcliffe*, 66 Md. 517.

Massachusetts. — *Eliot v. McCormick*, 144 Mass. 10; *Martin v. Kittredge*, 144 Mass. 13, note; *Stone v. Wainwright*, 147 Mass. 201.

Mississippi. — *Cocke v. Brewer*, 68 Miss. 775.

New Hampshire. — *Bruce v. Cloutman*, 45 N. H. 37.

New York. — *Bartlett v. Spicer*, 75

N. Y. 528; *Schwinger v. Hickok*, 53 N. Y. 280.

Texas. — *Goodman v. Henley*, 80 Tex. 499; *Scott v. Streepy*, 73 Tex. 547; *Martin v. Cobb*, 77 Tex. 544.

Vermont. — *Skinner v. McDaniel*, 4 Vt. 418; *Price v. Hickok*, 39 Vt. 292.

See also *Charlotte First Nat. Bank v. Wilson*, 80 N. Car. 200; *Stancill v. Gay*, 92 N. Car. 462; *Carter v. Rountree*, 109 N. Car. 29. And see cases cited in last preceding note.

The leading case upon this subject, *Pennoyer v. Neff*, 95 U. S. 714, holding that a valid judgment *in personam* cannot be obtained against one not within the jurisdiction who has not been personally served with process and has not appeared in the action, and that it is not competent for a state to authorize such a judgment which will bind property not within the state at the time or not proceeded against *in rem* in satisfaction of the claim, is now generally followed. *Eliot v. McCormick*, 144 Mass. 10; *Needham v. Thayer*, 147 Mass. 536; *Grover, etc., Sewing Mach. Co. v. Radcliffe*, 66 Md. 517; *York v. State*, 73 Tex. 651; *Osborne v. Barnett*, 1 Tex. App. Civ. Cas., § 129; *Smith v. Montoya*, 3 N. Mex. 44. See also *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 148; *Earle v. McVeigh*, 91 U. S. 503; *Settlemyer v. Sullivan*, 97 U. S. 444; *Cheely v. Clayton*, 110 U. S. 701, and the cases cited generally in this section.

Appearance After Publication. — If a party appears after publication and constructive service, such appearance is equivalent to personal service. *Reed v. Chilson*, (Supreme Ct.) 16 N. Y. Supp. 744, 142 N. Y. 152; *Duncan v. Wickliffe*, 4 Metc. (Ky.) 119. See also *Olcott v. Maclean*, 73 N. Y. 223; *Jones v. Jones*, 108 N. Y. 415; *Carroll v. Lee*, 3 Gill & J. (Md.) 504. See further, *infra*, X. 2. f. (2) *Jurisdiction of the Person*, and article APPEARANCES, vol. 2, p. 639 *et seq.*

In *Kirkpatrick v. Post*, 53 N. J. Eq. 600, wherein it was held that if the nonresident defendant should fail to appear, and final decree should be eventually entered against him, then the question of his right to protection

so far as a citizen of a state domiciled therein may be bound by a service of process there lawful.¹

The Mere Fact that Property Is Within the Jurisdiction of the court is not sufficient to justify an action *in personam* against the defendant where he cannot be served with process, but the property itself must be brought before the court.²

4. Nonresident Personally Within the Jurisdiction. — A nonresident, however, is not, merely by reason of his nonresidence, exempt from the jurisdiction of a court, if he is within the territorial limits of such jurisdiction and can be served with process, or if he appears in the action voluntarily.³

5. Proceedings in Rem — a. PROPERTY WITHIN TERRITORIAL LIMITS. — Whenever specific property is subject to seizure and

under the Fourteenth Amendment to the Constitution of the United States might properly arise, the court said: "But I cannot hold that it has arisen by virtue of making the order of publication for the purpose of acquiring jurisdiction of the nonresident defendant and allowing him to come in to defend if he wishes."

1. *Hunt v. Hunt*, 72 N. Y. 240. See also *Taylor v. Rountree*, 15 Lea (Tenn.) 727; *Kyle v. Phillips*, 6 Baxt. (Tenn.) 43; *Mulloy v. White*, 3 Tenn. Ch. 9; *Stewart v. Anderson*, 70 Tex. 588. See generally articles PUBLICATION; SERVICE OF PROCESS.

2. *Stewart v. Anderson*, 70 Tex. 588; *McVicker v. Beedy*, 31 Me. 314; *Bissill v. Briggs*, 9 Mass. 468; *Morris v. Union Pac., etc., R. Co.*, 56 Iowa 135; *Kenney v. Goergen*, 36 Minn. 192.

Jurisdiction cannot be made to depend upon facts to be ascertained after the court has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. *Pennoyer v. Neff*, 95 U. S. 728.

3. *Roberts v. Dunsmuir*, 75 Cal. 203; *Haussman v. Burnham*, 59 Conn. 136; *Loyd v. Hicks*, 31 Ga. 140; *Marquardt v. Thompson*, 78 Iowa 158; *Swan v. Smith*, 26 Iowa 87; *People's Bldg., etc., Assoc. v. Mayfield*, 42 S. Car. 424; *St. Louis, etc., R. Co. v. Whitley*, 77 Tex. 126. See generally the cases cited in this section.

See also *infra*, X. 2. f. (2) *Jurisdiction of the Person*.

In *Alabama* it was said: "The whole subject of jurisdiction of nonresidents is one of statutory creation and regulation. Our statutes make no distinction in this particular between nonresident natural persons and foreign corporations. There are but two general classes of cases where they are allowed to be sued in the courts of Alabama. The first is by process of attachment at law, under like circumstances and in like manner as against natural persons residing without the state. Code 1876, § 3263. The other is in any case in equity arising under subdivision 2 of section 3753 of the Code of 1876, designated as section 3414 of the present Code of 1886, which confers jurisdiction on courts of chancery against nonresidents, in four particular classes of cases: (1) When the object of the suit concerns an estate of, or lien or charge upon, lands within this state, or the disposition thereof; or (2) any interest in, title to, or incumbrance on personal property within this state; or (3) when the cause of action arose in this state; or (4) when the act on which the suit is founded was to have been performed in this state." *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498.

Citizens Will Not Be Sent Abroad. — Where the courts get jurisdiction of the person or property of a nonresident, they will retain it, to administer justice to resident citizens, and not send them to a foreign jurisdiction to seek redress. *Callaway v. Jones*, 19 Ga. 277.

Removal After Jurisdiction Acquired. — When the court has acquired jurisdiction of the person by service of process, his absence from the jurisdiction there-

sale for the satisfaction of particular demands, courts of the state where the property is situated have undoubted jurisdiction without reference to the residence of the parties.¹

b. NECESSITY OF SEIZURE. — The basis of the jurisdiction of proceedings *in rem* and *quasi in rem* is the seizure of the property upon which the judgment is to operate, and such jurisdiction cannot be acquired except by lawful seizure.²

c. NOTICE. — In proceedings *in rem*, as well as in those which are in the nature of proceedings *in rem*, actual notice to parties is not necessary,³ but constructive notice, either generally to the whole world where the proceeding is purely *in rem*, or specially to the parties interested where the proceeding is *quasi in rem*, is sufficient.⁴

after will not affect the jurisdiction acquired. *People's Bldg., etc., Assoc. v. Mayfield*, 42 S. Car. 424. See also *infra*, VIII. 2. *Effect of Subsequent Events.*

1. *La Trobe v. Hayward*, 13 Fla. 190.
2. *Wyman v. Campbell*, 6 Port. (Ala.) 239; *Gould v. Jacobson*, 58 Mich. 292; *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 24; *Miller v. U. S.*, 11 Wall. (U. S.) 294; *The Rio Grande*, 23 Wall. (U. S.) 463; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, cited in *Hall v. Hall*, 12 W. Va. 15.

An order of publication without the seizure of property is wholly without authority of law. *Williams v. Lowe*, 4 Neb. 399 [citing *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 475; *Enos v. Hunter*, 9 Ill. 216].

Mode of Seizure — Sufficiency of Return. — In proceedings under the Acts of Congress, for confiscation of shares of stock in corporations used for insurrectionary purposes, it was held that neither the writ nor the law required the return of the sheriff or marshal to show the mode of seizure, and that a return was sufficient which showed that the property had been seized and held by the officer subject to the further orders of the court, and was conclusive. *Miller v. U. S.*, 11 Wall. (U. S.) 294.

Situs of Res. — In proceedings *in rem*, the thing or matter affected by the decree must be subject to the dominion of the court. The *situs* must be such as that the judgment may be operative upon it. *Brown v. Levee Com'rs*, 50 Miss. 480; *Thomas v. People*, 107 Ill. 526, wherein it was said that "in every proceeding *in rem*, and in every case in the nature of a proceeding *in rem*, there is some great central controlling fact upon which the jurisdiction or power in the court to act at

all depends, and such fact must have an actual existence, otherwise the jurisdiction will fail" [citing *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Rose v. Himely*, 4 Cranch (U. S.) 269, in which latter case Marshall, C. J., speaking for the court, said: "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property."]

3. *Rayl v. Lapham*, 27 Ohio St. 452; *Crowell v. Johnson*, 2 Neb. 155; *Wiley v. Pavey*, 61 Ind. 457; *Hanley v. Hanley*, 114 Cal. 690.

No Controversy Between Parties Involved. — A proceeding *in rem* is not necessarily involved in a controversy between parties, and in fact in a majority of instances no such controversy exists. *Gaines v. Fuentes*, 92 U. S. 21; *Woodruff v. Taylor*, 20 Vt. 65.

Intervention. — Where persons are not made parties by name to such suits, they come into the litigation as interveners. *Brown v. Levee Com'rs*, 50 Miss. 481. See in general article INTERVENTION, vol. II, p. 494.

4. *Moore v. Speed*, 55 Mich. 87; *Woodruff v. Taylor*, 20 Vt. 65.

Where the proceeding becomes one *in rem* by reason of the fact that the defendant is beyond reach of personal process, see *supra*, III. 3. *Nonresidents*

6. Jurisdiction Over Foreign Corporations. — A corporation which confines its business within the state of its incorporation cannot be brought into court in another state, where it has not established any office or transacted any business, by the service of process on an officer who may be accidentally present in such state.¹ Such officer does not represent the corporation, nor does

— *Person or Property Within Jurisdiction.* See also generally article PUBLICATION.

Seizure—Notice to World. — In the initiation of proceedings *in rem* all persons are cited to appear. *Gaines v. Fuentes*, 92 U. S. 21, citing *Freeman v. Alderson*, 119 U. S. 187.

"In every court and in all countries whose judgments are respected notice of some kind is given. It is, indeed, as I apprehend, just as essential to the validity of a judgment *in rem* that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding." *Woodruff v. Taylor*, 20 Vt. 76, citing *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. (U. S.) 607.

A Legal Seizure under Lawful Authority gives jurisdiction, and decrees and sentences thereunder divest the title of the whole world, and pass *in rem adjudicatam*. *Wyman v. Campbell*, 6 Port. (Ala.) 239; *Rose v. Himely*, 4 Cranch (U. S.) 278; *Hibbard v. People*, 4 Mich. 125; *Wight v. Maxwell*, 4 Mich. 45.

In *Brown v. Levee Com'rs*, 50 Miss. 480, it was said that it is not necessary that the owner, or any person having interest in the thing to be affected by the judgment, should have notice other than such as is implied in the seizure itself. And see *Branch Bank v. Hodges*, 12 Ala. 118, wherein it was said that notice served on the thing will give information to all who have any interest in it. See also *Cross v. Armstrong*, 44 Ohio St. 624.

In *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 24, it was held that the seizure of the thing is considered notice to all the parties interested, and that the conclusiveness of such proceedings rests upon the principle of public policy.

In *Brigham v. Fayerweather*, 140

Mass. 412, in determining the effect of a judgment *in rem* against strangers in interest, it was said that the general statement that such proceedings embraced all the world as parties was misleading, and that they were not such parties in interest as to be precluded by the judgment, but to that end were strangers in interest, and were not precluded upon the facts.

Confiscation. — Under the Act of Congress providing for the confiscation of property used for insurrectionary purposes, the object of the writ is to bring the property under the control of the court and keep it there, as well as to give notice to the world. *Miller v. U. S.*, 11 Wall. (U. S.) 294.

Distinction Between Proceedings in Rem and Quasi in Rem. — In *Freeman v. Alderson*, 119 U. S. 187, the court lays down the distinction between proceedings which are purely *in rem* and those which are in the nature of proceedings *in rem*, as follows: "There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of nonresidents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties." *Woodruff v. Taylor*, 20 Vt. 65.

1. See in general article SERVICE OF PROCESS.

Incorporation under Laws of Two States. — A corporation existing under the Volume XII.

he carry with him his official character into the state where the corporation had done no business nor established any office.¹ This difficulty of serving process was the reason of the early doctrine that a corporation could not be sued out of the state of its domicile,² though that rule does not now prevail,³ and corporations may now be sued in any state in which they enter to carry on their business, and in which they establish agents upon whom process may be served under the law of such jurisdiction.⁴

laws of two states is subject to the jurisdiction of either. *Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (N. Car.) 195; *Richardson v. Vermont, etc.*, R. Co., 44 Vt. 613; *Matter of St. Paul, etc.*, R. Co., 36 Minn. 85; *Baltimore, etc.*, R. Co. *v. Gallahue*, 12 Gratt. (Va.) 655; *Baltimore, etc.*, R. Co. *v. Harris*, 12 Wall. (U. S.) 65. See also *South Carolina R. Co. v. Nix*, 68 Ga. 572. See also *infra*, IV. 2. *Exclusive Right of Court First Acquiring Jurisdiction.*

1. *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 223; *Latimer v. Union Pac. R. Co.*, 43 Mo. 105.

2. Process, it is said, must be served on the head or principal officer within the jurisdiction of the sovereignty where the official body exists, and if the president of such corporation comes into another state, his functions will not accompany him and move beyond the jurisdiction of the government under whose laws he derives his character. *M'Queen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5; *Bushel v. Commonwealth Ins. Co.*, 15 S. & R. (Pa.) 176. See also *Peckham v. North Parish*, 16 Pick. (Mass.) 286; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 116, wherein it is indicated that the force of the decision in *M'Queen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5, *supra*, induced the enactment of the statutes of New York under which foreign corporations may be sued in that state.

3. If, upon principles of law and comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another jurisdiction, it will be strange if they should not also be liable to be sued in the same jurisdiction; if they are recognized for one purpose, they must also be recognized for the other. *Libbey v. Hodgdon*, 9 N. H. 396. This case recognizes the difficulty of serving process upon such corporation personally, and doubts whether the casual presence of a principal officer and service upon

him would be sufficient, but intimates that if the corporation has property within the state or if it sends its officers to reside there and transact business, upon whom by the law of the state process may be served, there is no reason why jurisdiction cannot be acquired. See also *Day v. Essex County Bank*, 13 Vt. 97, wherein, without reference to any statute and without further comment, it is said that the court could see no reason why a foreign corporation as well as any other person should not be sued in the courts of Vermont.

In *Smith v. Mutual L. Ins. Co.*, 14 Allen (Mass.) 336, it was said that by comity foreign corporations are permitted to contract and sue in other states; that if they avail themselves of that comity to sue or to make contracts in another state, they may become liable to its jurisdiction to the extent to which they have voluntarily subjected themselves; that if they have property or rights within the limits of another state, suits can be maintained and judgments enforced against them to the extent of such property and rights, but that this results from the authority of the state over whatever is within its limits, and not from any jurisdiction over the corporation itself.

4. *Alabama*. — *Richmond, etc., R. Co. v. Trousdale*, 99 Ala. 389.

California. — *Lawrence v. Ballou*, 50 Cal. 264.

Colorado. — *Colorado Iron-Works v. Sierra Grande Min. Co.*, 15 Colo. 499.

Georgia. — *Selma, etc., R. Co. v. Tyson*, 48 Ga. 351.

Illinois. — *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204.

Massachusetts. — *National Bank v. Huntington*, 129 Mass. 444; *Atty.-Gen. v. Bay State Min. Co.*, 99 Mass. 153; *Reyer v. Odd Fellows' Fraternal Acc. Assoc.*, 157 Mass. 367.

Missouri. — *Morgan v. Chicago, etc., R. Co.*, 76 Mo. 176; *McNichol v. U. S. Mercantile Reporting Agency*, 74 Mo. 465; *Farnsworth v. Terre Haute, etc.*,

Subject-matter and Residence of Plaintiff.—The modern rule that an action may be brought against a foreign corporation is not unrestricted, however.¹ Thus the jurisdiction of such an action for a cause arising out of the state where it is brought,² or of an action by a nonresident for such a cause is not permitted in some states.³ Statutes sometimes indicate the cases in which such suits may be brought, expressly restricting the right on the part of nonresidents.⁴

R. Co., 29 Mo. 75; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580.

Nebraska.—*Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537.

New York.—*Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 322; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 309; *Jones v. Norwich, etc., Transp. Co.*, 50 Barb. (N. Y.) 193; *Delaware, etc., R. Co. v. New York, etc., R. Co.*, 12 Misc. Rep. (N. Y. Supreme Ct.) 230.

North Carolina.—*Shields v. Union Cent. L. Ins. Co.*, 119 N. Car. 380.

Pennsylvania.—*Bushel v. Commonwealth Ins. Co.*, 15 S. & R. (Pa.) 176.

South Carolina.—*Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. Car. 319.

Texas.—*Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382; *Southern Ins. Co. v. Wolverton Hardware Co.*, (Tex. 1892) 19 S. W. Rep. 615.

United States.—*Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Baltimore, etc., R. Co. v. Harris*, 12 Wall. (U. S.) 81. *Ex p. Schollenberger*, 96 U. S. 369.

This subject is now largely regulated by the statutes of the various states, which should be consulted.

Foreign Corporation Lessee of Domestic Corporation.—It is competent for the General Assembly to make the residence of a lessee corporation, for the purpose of suit, the same as that which the lessor had when the relation of lessor and lessee originated. A declaration against a lessee alleging that its principal office within the state is in the county where the suit is brought shows jurisdiction over the person of the lessee, though the latter be a foreign corporation. *Watson v. Richmond, etc., R. Co.*, 91 Ga. 222.

Effect of Judgment in State of Domicil.—When the laws of a state permit a foreign corporation to transact business within its borders upon condition that certain service of process shall be con-

sidered as service, a judgment against such a corporation under such service should be respected in the state of its incorporation with the same faith and credit to which it is entitled in the state where it was rendered. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

1. The provisions of statutes to the effect that process against a foreign corporation may be served upon certain persons or officers connected therewith describes the mode of effecting service, but has nothing to do with prescribing the cases in which such service can be made. *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; *Central R., etc., Co. v. Carr*, 76 Ala. 388.

2. *Richmond, etc., R. Co. v. Trousdale*, 99 Ala. 389; *Central R., etc., Co. v. Carr*, 76 Ala. 388; *Western Union Tel. Co. v. Pleasants*, 46 Ala. 641; *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 N. Y. App. Div. 444; *Allison v. T. A. Snider Preserve Co.*, 20 Misc. Rep. (N. Y. Supreme Ct.) 367; *Bawknigh v. Liverpool, etc., Ins. Co.*, 55 Ga. 195, *overruling* a contrary dictum in *Wilson v. Danforth*, 47 Ga. 676. See also *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 223.

3. *Sawyer v. North American L. Ins. Co.*, 46 Vt. 697, *distinguishing* *Day v. Essex County Bank*, 13 Vt. 97, in that in the latter case the cause of action accrued in Vermont, and the corporation appeared and answered.

Contra.—In *Massachusetts* it is held that a nonresident may sue a foreign corporation upon a debt contracted elsewhere, although the statute was not framed for that purpose, and its object was simply to provide for serving process upon such corporations. *Johnston v. Trade Ins. Co.*, 132 Mass. 432, *noticing* the former contrary holding in that state in *Smith v. Mutual L. Ins. Co.*, 14 Allen (Mass.) 341.

4. Thus in *South Carolina* and in *New York* the statutory provisions permit an action by a resident against a

IV. CONCURRENT AND EXCLUSIVE JURISDICTION — 1. Construction of Grant. — While it is held that if the constitution confers upon one court in express terms jurisdiction over a particular subject-matter the presumption is that it was intended that the jurisdiction thus conferred should be exclusive,¹ a mere grant of jurisdiction to a particular court, without words of exclusion as to the other courts previously possessing the like power, will only have the effect of constituting the former a court of concurrent jurisdiction with the latter, and will not destroy the like jurisdiction

foreign corporation for any cause of action, but restrict an action by a non-resident against a foreign corporation to causes which arise within the state, or wherein the subjects of the action are situated within the state. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 322; *Perry v. Erie Transfer Co.*, 28 Abb. N. Cas. (N. Y. C. Pl.) 430; *Manda v. Wells, etc., Co.*, 21 Misc. Rep. (N. Y. Supreme Ct.) 308; *House v. Cooper*, 30 Barb. (N. Y.) 158, wherein a complaint filed by one foreign corporation against another was dismissed for not stating a cause of action, because it did not state that the plaintiffs were residents of the state, or that the cause of action arose within the state, or that the subject-matter of the action was situated within the state, but on the contrary it appeared that the cause of action arose in another state. And see *Galt v. Provident Sav. Bank*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 431; *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. Car. 319.

Consistent with Constitution of United States. — Such statutes are not repugnant to that article of the Federal Constitution which provides that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. *Adams v. Penn Bank*, 35 Hun (N. Y.) 394; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315; *Central R., etc., Co. v. Georgia Constr., etc., Co.*, 32 S. Car. 319. See also *Cummings v. Wingo*, 31 S. Car. 428; *Campbell v. Morris*, 3 Har. & M. (Md.) 535; *Frost v. Brisbin*, 19 Wend. (N. Y.) 11; *Chemung Canal Bank v. Lowery*, 93 U. S. 72; *Missouri v. Lewis*, 101 U. S. 22; *McCready v. Virginia*, 94 U. S. 395.

Corporation Not Within the Meaning of the Constitution. — In *Paul v. Virginia*, 8 Wall. (U. S.) 177, upon the contention that the statute of the state of Virginia discriminating between the corporations of that state and other

states was in conflict with that clause of the Federal Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," it was said that "the term 'citizens' as there used applies only to natural persons, members of the body politic, owing allegiance to the state, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed." *Kilmer v. Groome*, 19 Pa. Co. Ct. Rep. 339.

Objection for Want of Jurisdiction. — This objection is to the subject-matter of the action where the statute provides that the cases designated are the only ones in which a foreign corporation can be sued, and it may be taken at any stage of the action, and the court may, on its own motion, at any time when its attention is called to the fact, refuse to proceed, and dismiss the action. *Perry v. Erie Transfer Co.*, 28 Abb. N. Cas. (N. Y. C. Pl.) 430, 22 Civ. Pro. Rep. (N. Y.) 178; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 323, decided under N. Y. Code Civ. Pro., § 1780, and indicating that this section changes the rule laid down in *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303. But see *Simon v. Sheridan, etc., Co.*, 21 Misc. Rep. (N. Y. Supreme Ct.) 489.

1. *Holmes v. Buckner*, 67 Tex. 107; *Griffin v. Ing*, 3 Dev. L. (N. Car.) 358; *Knox v. Gurnett*, 28 La. Ann. 60; *Macklot v. Davenport*, 17 Iowa 379.

Where an inferior court has original inferior jurisdiction, it is held that an appellate court cannot exercise original jurisdiction in the matter confided to the inferior court. *Territory v. Mix*, 1 Arizona 52.

Affirmative Grant—Negative of Other Power. — An affirmative grant of original jurisdiction in particular cases implies a negative upon its exercise in any other case. *Territory v. Ortiz*, 1 N. Mex. 5.

existing in the latter.¹ There are no cases denying this rule, although there are instances where, under constitutional provisions giving original jurisdiction, Congress has by law made the jurisdiction of federal courts exclusive.²

2. Exclusive Right of Court First Acquiring Jurisdiction. — It is a settled rule that when two courts have concurrent jurisdiction over a particular subject-matter, the one which first takes cognizance of a cause falling thereunder will retain the jurisdiction throughout, to the exclusion of the other, and until final determination.³

If a New Offense Is Created by statute or a different penalty is affixed to an existing offense, and the jurisdiction is limited to a particular court, the jurisdiction is exclusive. *Rossett v. State*, 17 Ala. 496; *Reed v. Omnibus R. Co.*, 33 Cal. 212; *Aldrich v. Hawkins*, 6 Blackf. (Ind.) 125.

1. *Alabama*. — *State v. Abram*, 4 Ala. 272.

California. — *Courtwright v. Bear River, etc., Water, etc., Co.*, 30 Cal. 573.

Florida. — *Thrasher v. Dorg*, 18 Fla. 809; *State v. Butt*, 25 Fla. 258.

Idaho. — *Greathouse v. Heed*, 1 Idaho 498.

Illinois. — *McNab v. Heald*, 41 Ill. 326.

Indiana. — *Browning v. Smith*, 139 Ind. 280.

Iowa. — *Sterritt v. Robinson*, 17 Iowa 61.

Kansas. — *Shoemaker v. Brown*, 10 Kan. 392.

Maine. — *Small v. Swain*, 1 Me. 133; *Ridlon v. Emery*, 6 Me. 261.

Massachusetts. — *Com. v. Hudson*, 11 Gray (Mass.) 64.

Missouri. — *State v. Wister*, 62 Mo. 592; *Dobyns v. McGovern*, 15 Mo. 662; *Real Estate Sav. Inst. v. Collonious*, 63 Mo. 296; *Pratt v. Clark*, 57 Mo. 189; *State v. County Ct.*, 38 Mo. 402.

New York. — *People v. Excise Board*, (City Ct.) 3 N. Y. St. Rep. 253; *Delafield v. Illinois*, 2 Hill. (N. Y.) 159; *Cooke v. State Nat. Bank*, 52 N. Y. 96.

Pennsylvania. — *Kline v. Wood*, 9 S. & R. (Pa.) 298.

South Carolina. — *State v. Glenn*, 14 S. Car. 127.

Texas. — *Johnson v. Happell*, 4 Tex. 96; *Swan v. State*, 48 Tex. 120.

Vermont. — *Montpelier First Nat. Bank v. Hubbard*, 49 Vt. 1.

Washington. — *Jones v. Reed*, 3 Wash. 57; *State v. Hunter*, 3 Wash. 92.

United States. — *Ames v. Kansas*, 111

U. S. 449; *U. S. v. Louisiana*, 123 U. S. 32; *Börs v. Preston*, 111 U. S. 252.

The grant of original jurisdiction in the constitution to a particular court in a class of cases, without any words excluding other courts from jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction where the matters fall within the general jurisdiction of such other courts. *Courtwright v. Bear River, etc., Water, etc., Co.*, 30 Cal. 577, where the court said: "The question here is not the same as that presented in *Zander v. Coe*, 5 Cal. 230, or *Caulfield v. Stevens*, 28 Cal. 118. There the question was whether it was competent for the legislature to confer upon certain courts * * * jurisdiction of a subject-matter that was vested by the constitution in other courts, and here the question is whether one court possesses jurisdiction of a subject-matter specially allotted to it by the constitution, to the exclusion of another court to which jurisdiction is given in general terms, there being no words of exclusion in either case."

New Remedy to Courts of Record Generally. — If the legislature confers upon courts of record generally a remedy entirely new, all courts of record may take the power; but where it merely adds an additional ground for invoking an existing remedy, the term "court of record," when used in the new act, applies only to courts of record exercising jurisdiction to which the addition is made. *People v. Excise Board*, (City Ct.) 3 N. Y. St. Rep. 253.

Jurisdiction Conferred by Municipal Charter — Effect upon State Jurisdiction.

— If a municipal charter does not confer exclusive jurisdiction upon the city court in particular cases, the jurisdiction which the state courts previously exercised in such cases is not thereby ousted. *State v. Wister*, 62 Mo. 592; *Rice v. State*, 3 Kan. 141.

2. *Jones v. Reed*, 3 Wash. 62.

3. *Alabama*. — *Gould v. Hayes*, 19

Reason of the Rule.—This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, either of distinct or concurrent jurisdiction. Any

- Ala. 438; *Eaton v. Patterson*, 2 Stew. & P. (Ala.) 9.
- Arkansas.*—*State v. Devers*, 34 Ark. 188.
- California.*—*Averill v. The Steamer Hartford*, 2 Cal. 308.
- Colorado.*—*Parks v. Wilcox*, 6 Colo. 489; *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 22 Colo. 102.
- Connecticut.*—*Parsons v. Lyman*, 32 Conn. 570.
- Delaware.*—*Beeson v. Beeson*, 1 Harr. (Del.) 394, note a; *Beeson v. Elliott*, 1 Del. Ch. 368.
- Florida.*—*Beatty v. Ross*, 1 Fla. 232; *Beatty v. Scurry*, 1 Fla. 245; *Boswell v. State*, 20 Fla. 869.
- Georgia.*—*Hardeman v. Battersby*, 53 Ga. 36.
- Illinois.*—*Mason v. Piggott*, 11 Ill. 85; *McNab v. Heald*, 41 Ill. 327; *Ross v. Buchanan*, 13 Ill. 55; *Mapes v. People*, 69 Ill. 523; *Mall v. Maxwell*, 107 Ill. 554; *Whitney v. Stevens*, 97 Ill. 482; *Howell v. Moores*, 127 Ill. 67; *Mount v. Scholes*, 21 Ill. App. 192; *Lancashire Ins. Co. v. Corbett*, 62 Ill. App. 236; *Aldrich v. Polo*, 8 Ill. App. 45.
- Indiana.*—*Taylor v. Fort Wayne*, 47 Ind. 274.
- Iowa.*—*Ex p. Holman*, 28 Iowa 88.
- Kansas.*—*Rice v. State*, 3 Kan. 141; *State v. Brannon*, (Kan. App. 1897) 50 Pac. Rep. 986; *State v. Chinault*, 55 Kan. 326.
- Louisiana.*—*Barkdull v. Herwig*, 30 La. Ann. 618.
- Maryland.*—*Withers v. Denmead*, 22 Md. 135; *Meyer v. Saul*, 82 Md. 459; *Cole v. Flitcraft*, 47 Md. 312; *Brooks v. Delaplaine*, 1 Md. Ch. 351; *Snyder v. Snyder*, 1 Md. Ch. 295; *Winn v. Albert*, 2 Md. Ch. 42; *Brown v. Wallace*, 4 Gill & J. (Md.) 496.
- Massachusetts.*—*Stearns v. Stearns*, 16 Mass. 171; *Bemis v. Stearns*, 16 Mass. 203; *Miller v. Barnstable County*, 119 Mass. 485; *Powers v. Springfield*, 116 Mass. 84.
- Michigan.*—*E. T. Barnum Wire, etc., Works v. Speed*, 59 Mich. 272; *Maclean v. Speed*, 52 Mich. 257.
- Mississippi.*—*McPike v. Wells*, 54 Miss. 156.
- New Jersey.*—*Home Ins. Co. v. Howell*, 24 N. J. Eq. 238; *Parkes v. Aldridge*, 4 N. J. L. J. 299.
- New York.*—*Garlock v. Vandervoort*, (Supreme Ct.) 5 N. Y. Supp. 737; *Schuchle v. Reiman*, 86 N. Y. 270; *Travis v. Myers*, 67 N. Y. 542; *Rogers v. King*, 8 Paige (N. Y.) 210; *Lewis v. Maloney*, 12 Hun (N. Y.) 207; *Purdy v. Hayt*, 92 N. Y. 446; *Matter of Verplanck*, 91 N. Y. 439; *Riggs v. Cragg*, 89 N. Y. 479; *McCarthy v. Peake*, 18 How. Pr. (N. Y. Supreme Ct.) 138, 9 Abb. Pr. (N. Y.) 164.
- North Carolina.*—*State v. Yarbrough*, 1 Hawks (N. Car.) 78; *Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (N. Car.) 195.
- Ohio.*—*Ex p. Bushnell*, 8 Ohio St. 599; *Merrill v. Lake*, 16 Ohio 373.
- Pennsylvania.*—*Slyhoof v. Flitcraft*, 1 Ashm. (Pa.) 171; *Walker v. Marine Nat. Bank*, 98 Pa. St. 574; *White v. Johnson*, 2 Ashm. (Pa.) 146; *Cleveland, etc., R. Co. v. Erle*, 27 Pa. St. 380.
- Rhode Island.*—*Chapin v. James*, 11 R. I. 86.
- Tennessee.*—*Thompson v. Hill*, 3 Yerg. (Tenn.) 167.
- Texas.*—*Clepper v. State*, 4 Tex. 242; *Burdett v. State*, 9 Tex. 43; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1; *Continental Ins. Co. v. Chase*, 89 Tex. 212.
- Vermont.*—*Bellows Falls Bank v. Rutland, etc., R. Co.*, 28 Vt. 470; *Glas-tenbury v. McDonald*, 44 Vt. 450; *Wit-ters v. Sowles*, 61 Vt. 366.
- Virginia.*—*Griffin v. Birkhead*, 84 Va. 612; *Ford v. Watts*, (Va. 1897) 28 S. E. Rep. 179.
- West Virginia.*—*Parsons v. Snider*, 42 W. Va. 517.
- United States.*—*Haines v. Carpenter*, 1 Woods (U. S.) 262; *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294; *Buck v. Colbath*, 3 Wall. (U. S.) 334.
- England.*—*Wedderburn v. Wedderburn*, 2 Beav. 208.
- Where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the court in which the former suit is pending cannot properly proceed to final judgment. *Niblo v. Harrison*, 9 Bosw. (N. Y.) 668.

other rule would unavoidably lead to perpetual collision and be productive of most calamitous results.¹

In Order to Apply This Rule, however, the suits should be between the same parties, seeking the same remedy, and apply to the same question,² and the court first obtaining jurisdiction should be in a position to determine the whole controversy and settle all the rights of the parties; and if by reason of the limited jurisdiction or mode of proceedings of the court these results cannot be accomplished, another court may take jurisdiction.³

Interference. — When a court of competent jurisdiction has become possessed of a case, its jurisdiction continues, subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of co-ordinate power is at liberty to interfere with its action.⁴

1. *Brooks v. Delaplaine*, 1 Md. Ch. 354; *Brown v. Campbell*, 110 Cal. 648.

Courts of Co-ordinate Appellate Jurisdiction. — Where two courts have concurrent appellate jurisdiction and an appeal is taken to both by the different parties, the jurisdiction is conferred upon that court to which the appeal is first perfected, to the exclusion of the other. *Aldrich v. Polo*, 8 Ill. App. 45.

Several Departments of One Court. — The rule that the judgment of that court which first acquires jurisdiction of the subject-matter of a cause of action and of the parties thereto will prevail over the judgment of another court whose jurisdiction was subsequently acquired rests upon comity and the necessity of avoiding a conflict in the execution of judgments by independent courts, either of distinct or concurrent jurisdiction; and the rule has no existence in a case where the actions are brought in the same court; and the assignment of causes to different departments of the same court not taking place until after jurisdiction is acquired, such jurisdiction, after a cause has been assigned, remains in the same court. *Brown v. Campbell*, 110 Cal. 648.

Action in Two Counties—Interpleader. — Where an insurance company was garnished in one county at the instance of the creditors of the beneficiary in the policy, and thereafter an assignee of said beneficiary brought suit in another county for the proceeds of the policy, it was held that a bill of interpleader was properly filed upon the equity side of the court first obtaining jurisdiction of the question sought to be determined. *Hogan v. Wayne* Circuit Judge, 106 Mich. 254.

Between State and Federal Courts. — See article UNITED STATES COURTS.

2. *Boston, etc., R. Corp. v. New York, etc., R. Co.*, 12 R. I. 220; *McKibben v. Salinas*, 41 S. Car. 105; *Turner v. Hatch*, 100 Mich. 65; *Granger v. Wayne* Circuit Judge, 27 Mich. 406; *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Putnam v. New Albany*, 4 Biss. (U. S.) 365.

The Date of Service of Process will control when there is a question between two courts as to which first acquired jurisdiction. *Craig v. Hoge*, (Va. 1897) 28 S. E. Rep. 317.

3. *Eaton v. Patterson*, 2 Stew. & P. (Ala.) 9; *Gould v. Hayes*, 19 Ala. 438; *Uhlfelder v. Levy*, 9 Cal. 607; *Anthony v. Dunlap*, 8 Cal. 26. See also *Gilliam v. Chancellor*, 43 Miss. 437; *Collins v. Calley*, (N. J. 1897) 11 Atl. Rep. 118.

The Orphans' Court and Court of Chancery have, to a certain extent, concurrent jurisdiction in reference to the accounts of executors, administrators, and guardians; but in all cases where a party seeks relief on grounds peculiarly of chancery jurisdiction, and which call for the exercise of chancery powers, the jurisdiction of the chancery court is paramount. *King v. Bettry*, 3 N. J. Eq. 44. See article PROBATE AND ADMINISTRATION.

4. *California.* — *Revalk v. Kraemer*, 8 Cal. 66; *Anthony v. Dunlap*, 8 Cal. 26.

Illinois. — *Hupp v. Hupp*, 61 Ill. App. 445; *Mail v. Maxwell*, 107 Ill. 554; *Newman v. Commercial Nat. Bank*, 156 Ill. 530.

Indiana. — *Indiana, etc., R. Co. v. Williams*, 22 Ind. 198; *Jones v. Tipton*, 13 Ind. App. 392.

Massachusetts. — *Stearns v. Stearns*,

Concurrent Jurisdiction of Foreign Courts.—The common-law rule is that the pendency of a suit *in personam* in a foreign court between the same parties for the same cause of action is not a bar to, nor sufficient cause for a stay of, a suit instituted in a domestic court, and this rule obtains in regard to actions pending in another state of the Union.¹

16 Mass. 167; Powers v. Springfield, 116 Mass. 84; Miller v. Barnstable County, 119 Mass. 485.

Michigan.—Maclean v. Speed, 52 Mich. 257; Carroll v. Farmers', etc., Bank, Harr. (Mich.) 197.

Missouri.—Seibel v. Simeon, 62 Mo. 255.

Nevada.—*Ex p.* Gardner, 22 Nev. 280.

New Hampshire.—Peterborough First Nat. Bank v. Barker, 58 N. H. 185.

New Jersey.—Home Ins. Co. v. Howell, 24 N. J. Eq. 238; New Jersey Zinc Co. v. Franklin Iron Co., 29 N. J. Eq. 422.

New York.—Seymour v. Seymour, 4 Johns. Ch. (N. Y.) 409; Whitney v. Monro, 4 Edw. Ch. (N. Y.) 5; Ruthven v. Patten, 1 Robt. (N. Y.) 416, 2 Abb. Pr. N. S. (N. Y.) 121; Chester v. Jumel, (Supreme Ct.) 24 N. Y. St. Rep. 233, 5 N. Y. Supp. 819; Schuehle v. Reiman, 86 N. Y. 270; Matter of Wing, 83 Hun (N. Y.) 284; Matter of Ayrault, 81 Hun (N. Y.) 107; Crane v. Bunnell, 10 Paige (N. Y.) 333; McLaren v. McLaren, 6 Wend. (N. Y.) 537.

Ohio.—*Ex p.* Langston, 8 Ohio St. 599; Totten v. Lawton, 8 Ohio Cir. Ct. Rep. 377; Ries v. Farmers', etc., State Bank, 10 Ohio Cir. Ct. Rep. 656, 5 Ohio Dec. 20.

Texas.—National Bank v. Goolsby, 12 Tex. Civ. App. 362; Winstead v. Evans, (Tex. Civ. App. 1896) 33 S. W. Rep. 580.

Vermont.—Cheever v. Rutland, etc., R. Co., 39 Vt. 653.

Virginia.—Griffin v. Birkhead, 84 Va. 612.

Wisconsin.—Akerley v. Vilas, 15 Wis. 401; How v. Kane, 2 Chand. (Wis.) 222; Northwestern Iron Co. v. Land, etc., Imp. Co., 92 Wis. 487.

United States.—Riggs v. Johnson County, 6 Wall. (U. S.) 166; Peck v. Jenness, 7 How. (U. S.) 624.

A Court of Chancery will not assume jurisdiction on a bill to interfere and direct how the County Court shall distribute a trust fund over which it has full and complete jurisdiction by posi-

tive statute, unless under special circumstances. Freydenhall v. Baldwin, 103 Ill. 330.

Courts of Concurrent Jurisdiction cannot set aside or modify the orders or decrees of other courts of like jurisdiction. Dodge v. Northrop, 85 Mich. 243.

Injunction.—“It is true, in cases of fraud, this court has concurrent jurisdiction with courts of law. And where a party comes into this court in the first instance to be relieved from a fraudulent contract, especially where a discovery is necessary to establish the fraud, this court, having obtained jurisdiction of the cause for one purpose, may proceed and make a final decree therein between the parties, after such discovery has been obtained. But even in cases of that kind this court does not grant an injunction for the mere purpose of transferring the jurisdiction from a court of law to this court, after the commencement of a suit there, except to stay the trial in the suit at law until the defendant in this court has fully answered the complainant's bill.” Crane v. Bunnell, 10 Paige (N. Y.) 341. See also King v. Berry, 3 N. J. Eq. 44; Anthony v. Dunlap, 8 Cal. 26; Revalk v. Kraemer, 8 Cal. 66.

An injunction will not be granted for the mere purpose of transferring the jurisdiction from a court of law, where no discovery is necessary, or after it has been given. Crane v. Bunnell, 10 Paige (N. Y.) 333; New Jersey Zinc Co. v. Franklin Iron Co., 29 N. J. Eq. 422.

1. Lowry v. Hall, 2 W. & S. (Pa.) 129; Hatch v. Spofford, 22 Conn. 485 [citing Maule v. Murray, 7 T. R. 466; Imlay v. Ellefsen, 2 East 453; Bayley v. Edwards, 3 Swanst. 703; Australasia Bank v. Nias, 4 Eng. L. & Eq. 252]; Smith v. Lathrop, 44 Pa. St. 326; Seever v. Clement, 28 Md. 426; Cole v. Flitcraft, 47 Md. 317; Bowne v. Joy, 9 Johns. (N. Y.) 221; White v. Whitman, 1 Curt. (U. S.) 494. See article ANOTHER SUIT PENDING, vol. 1, pp. 764, 770.

Comity.—There is no legal obligation on a state court to suspend its action in a case between its suitors because a

V. GENERAL, LIMITED, AND INFERIOR JURISDICTION — 1. Grant of Power to Inferior Courts — Construction. — In construing grants of power to inferior courts of limited jurisdiction, or courts not proceeding according to the course of the common law, nothing is to be held as granted by implication which is not necessary to the full exercise of the powers expressly granted, and such courts are confined strictly within the limits of the powers granted.¹

suit is pending in another state for the same property between the same parties. It depends upon the comity of the courts of the several states what effect may be given to the pending process of the court of one state in another. *Cole v. Flitcraft*, 47 Md. 317; *Brinkley v. Brinkley*, 50 N. Y. 202; *Sulz v. Mutual Reserve Fund L. Assoc.*, 145 N. Y. 563.

Where the subject-matter of the suit is in one state, and it appears that a suit is there pending between the same parties in a court which has power to do full justice, the court of another state which has jurisdiction of a part of the parties only will leave them to their remedy in the first suit. *Harris v. Pullman*, 84 Ill. 20.

Corporation Existing under Laws of Two States. — If a corporation exists under the laws of two states, it is subject to the jurisdiction of either, and a suit brought in one jurisdiction is exclusive of the jurisdiction of the courts of the other state in the same matter. *Cooper v. Dismal Swamp Canal Co.*, 2 Murph. (N. Car.) 195. See *supra*, III. 6. *Jurisdiction over Foreign Corporations.*

Suits in Sister States — Injunction. — An injunction bill to restrain a suit previously begun in a sister state will not be sustained. *Carroll v. Farmers*, etc., Bank, Harr. (Mich.) 197; *Edson v. Cumings*, 52 Mich. 52.

Upon principles of courtesy and public policy the power of a court of one state to enjoin the parties within its jurisdiction from proceeding in an action in another state will not be exercised ordinarily when the court of the other state has concurrent jurisdiction, unless there are peculiar equitable grounds. *Bellows Falls Bank v. Rutland, etc., R. Co.*, 28 Vt. 470; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Cunningham v. Butler*, 142 Mass. 47; *Mead v. Merritt*, 2 Paige (N. Y.) 402; *Bicknell v. Field*, 8 Paige (N. Y.) 440; *Burgess v. Smith*, 2 Barb. Ch. (N. Y.) 277; *Pickett v. Ferguson*, 45 Ark. 189 [citing *French v. Hay*, 22 Wall. (U. S.) 250; *Bushby v.*

Munday, 5 Madd. 297; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 438].

When the court of the sister state has no jurisdiction of one of the parties, so that full justice cannot be done, the prosecution of the suit in the sister state may be enjoined. *Pickett v. Ferguson*, 45 Ark. 190.

But it is also held that the power does not exist in one state to enjoin the bringing of an action in a court of another state. *State v. Rightor*, 39 La. Ann. 619.

Comity. — In *New York* it was said that "it has generally been a matter of comity that the courts of one state should not, even by injunction, restrain actions commenced in another. For it has been well said that were this to be done, the court of the other state might retaliate and enjoin the injunction action." *Durant v. Pierson*, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 203, *distinguishing Bowers v. Durant*, 43 Hun (N. Y.) 348, in that the parties in the latter case had entered into a full agreement to the effect that courts of New York should have jurisdiction, that the agreement might be pleaded as conferring jurisdiction, etc., and that it was in virtue of that consent that an injunction (not a stay of proceedings) was granted. See further *supra*, II. 7. *Jurisdiction by Consent.*

1. *Arkansas.* — *McClure v. Hill*, 36 Ark. 272.

California. — *Winter v. Fitzpatrick*, 35 Cal. 269.

Illinois. — *School Inspectors v. People*, 20 Ill. 525.

Indiana. — *English v. Smock*, 34 Ind. 115; *Mossman v. Forrest*, 27 Ind. 233; *White v. Conover*, 5 Blackf. (Ind.) 462.

Iowa. — *Ham v. Steamboat Hamburg*, 2 Iowa 460; *Cooper v. Sunderland*, 3 Iowa 114; *Morrow v. Weed*, 4 Iowa 77.

Kansas. — *Willis v. Sproule*, 13 Kan. 269.

Maine. — *Prentiss v. Parks*, 65 Me. 559.

Courts of General Jurisdiction — Statutory Powers. — The rule also applies where summary or special powers are conferred upon courts of general jurisdiction, in which case even such courts must not go beyond the special powers conferred.¹ But it is also held that where a court enforces a statutory cause of action over which cognizance is given to it in the exercise of its general jurisdiction of the subject-matter of such action, the same presumptions arise in its favor as exist in the exercise of its general jurisdiction.²

Maryland. — *Baltimore v. Porter*, 18 Md. 284.

Michigan. — *Wight v. Warner*, 1 Dougl. (Mich.) 384; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Spear v. Carter*, 1 Mich. 19; *Wilson v. Davis*, 1 Mich. 156; *Shadbolt v. Bronson*, 1 Mich. 85; *Chandler v. Nash*, 5 Mich. 409; *Elliott v. Dudley*, 8 Mich. 62; *Platt v. Stewart*, 10 Mich. 260; *Bush v. Dunham*, 4 Mich. 339; *Bryan v. Smith*, 10 Mich. 229; *Merrill v. Montgomery*, 25 Mich. 74; *Weimer v. Bunbury*, 30 Mich. 219; *Hartford F. Ins. Co. v. Owen*, 30 Mich. 441; *Wall v. Trumbull*, 16 Mich. 235; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433; *Truesdale v. Hazzard*, 2 Mich. 348.

Missouri. — *Powers v. Blakey*, 16 Mo. 437; *Jefferson County v. Cowan*, 54 Mo. 234; *State v. St. Louis County Ct.*, 38 Mo. 402.

Nevada. — *Paul v. Armstrong*, 1 Nev. 97.

New York. — *Risley v. Phenix Bank*, 83 N. Y. 318; *Jones v. Reed*, 1 Johns. Cas. (N. Y.) 20; *Farrington v. Morgan*, 20 Wend. (N. Y.) 208.

North Carolina. — *Thompson v. Cox*, 8 Jones L. (N. Car.) 311; *Hurroughs v. McNeil*, 2 Dev. & B. Eq. (N. Car.) 297; *Noville v. Dew*, 94 N. Car. 43.

Ohio. — *Beebe v. Scheidt*, 13 Ohio St. 406.

South Carolina. — *Pringle v. Carter*, 1 Hill L. (S. Car.) 53.

Texas. — *Cowan v. Nixon*, 28 Tex. 230; *Baker v. Chisholm*, 3 Tex. 157.

Vermont. — *Paine v. Ely*, 1 D. Chip. (Vt.) 37; *Barrett v. Crane*, 16 Vt. 246; *Walbridge v. Hall*, 3 Vt. 114; *Darling v. Bowen*, 10 Vt. 148; *Emerson v. Reading*, 14 Vt. 279.

England. — *Watson v. Bodell*, 14 M. & W. 69.

Irregularities. — See *infra*, X. 3. *c. Courts of Limited and Inferior Jurisdiction.*

"Of Limited Jurisdiction." — Where the court attempts to execute a power not inherent, but specially given by statute or other instrument authorizing

it to do a particular thing in a particular way, then the power to do the thing is inseparably connected with the mode of doing it, and any attempt to do it otherwise or to do more or less than what is authorized is not an exercise of that special power, but an idle and void act. *Cason v. Stone*, 1 Oregon 41; *Voorhees v. Jackson*, 10 Pet. (U. S.) 449.

Mode of Executing Process — Matter of Remedy or Practice. — In *Hickman v. O'Neal*, 10 Cal. 295, the court said: "The Superior Court of San Francisco would be no less an inferior court from the possession of the power to send its process out of the city. Its jurisdiction would not be enlarged by it. The prescribing of this mode, or any other mode, of enforcing its decree or exercising its powers, is merely a matter of remedy or practice which is left to the legislative direction. 'Jurisdiction is the power to hear and determine,' but after the determination of a matter over which the court has this cognizance, it cannot be contended, it seems to us, that a law fixing the mode by which effect is to be given to a lawful judgment is not a mere subject of municipal regulation, which has nothing to do with a question of jurisdiction."

1. *Cohen v. Barrett*, 5 Cal. 195; *Haywood v. Collins*, 60 Ill. 333; *Bradley v. Jamison*, 46 Iowa 68; *Miller v. Corbin*, 46 Iowa 150; *Prentiss v. Parks*, 65 Me. 559; *Den v. Hammel*, 18 N. J. L. 79; *Ludlow v. Johnston*, 3 Ohio 553; *Northcut v. Lemery*, 8 Oregon 316; *Ferguson v. Jones*, 17 Oregon 204; *Odell v. Campbell*, 9 Oregon 298; *Peacock v. Bell*, 1 Saund. 69. See *infra*, IX. 1. *c. Courts of General Jurisdiction Exercising Special Power.*

2. *Hahn v. Kelly*, 34 Cal. 391; *Charley v. Kelley*, 120 Mo. 141; *Brown v. Walker*, 11 Mo. App. 230, 85 Mo. 262; *Wellshear v. Kelley*, 69 Mo. 351; *Allen v. McCabe*, 93 Mo. 143; *Falkner v. Guild*, 10 Wis. 572; *Newcomb v. Newcomb*, 13 Bush (Ky.) 544.

2. Distinction Between Courts of General and of Inferior Jurisdiction

— **No Definite Distinction.** — The distinction above drawn, in determining the powers of courts of limited jurisdiction, is, in general terms, the distinction usually made between courts of general or superior and courts of limited and inferior jurisdiction. But the line of demarcation between courts of general, limited,

Distinction Drawn. — In *Harvey v. Tyler*, 2 Wall. (U. S.) 342, Mr. Justice Miller, delivering the opinion of the court, said: "The jurisdiction which is now exercised by the common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create, for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law, but often in derogation of that law. In all cases where the new powers, thus conferred, are to be brought into action in the usual form of common-law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court, and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined nor easily ascertained at all times." To the same effect, *Hansen v. Schlesinger*, 125 Ill. 230; *Bush v. Hanson*, 70 Ill. 480; *Osgood v. Blackmore*, 59 Ill. 261.

In *New Jersey* it was said in one case that a judgment of a Court of Common Pleas, rendered in a proceeding by attachment against an absent or absconding debtor, though irregular and not pursuant to the statute, is not void, and cannot be impeached collaterally; that the court has a general jurisdiction over the whole subject-matter; and although it acted under the requisitions of a particular statute, and not according to the course of the common law, it is not thereby degraded into a

court of such inferior and limited jurisdiction as that all its proceedings, while acting within its jurisdiction, are rendered void if a single requisition of the statute be not complied with. *Diehl v. Page*, 3 N. J. Eq. 143.

But on the Other Hand, it has been said that where a court is one of *limited* jurisdiction, though it may not, strictly speaking, be an *inferior* court, the cause must appear on the record in a direct proceeding to be within the jurisdiction. *Commissioners' Ct. v. Thompson*, 18 Ala. 697 [citing *Coningsby's Case*, 9 Mod. 95; *Wood v. Wagon*, 2 Cranch (U. S.) 9; *Capron v. Van Noorden*, 2 Cranch (U. S.) 126; *Turner v. Bank of North America*, 4 Dall. (U. S.) 8; *Abercrombie v. Dupuis*, 1 Cranch (U. S.) 343]; *Börs v. Preston*, 111 U. S. 255. See also *Wright v. Marsh*, 2 Greene (Iowa) 103, wherein the court, referring to federal cases, said: "These authorities pertain exclusively to the jurisdiction of the Circuit and District Courts of the United States, and have no bearing whatever upon the territorial District Courts, nor do the authorities cited hold that those United States courts are of inferior jurisdiction. They are limited, but not inferior. Their proceedings, therefore, are not nullities, even if their jurisdiction does not appear of record, and if not reversed for that defect, those proceedings are conclusive evidence between parties and privies" [citing *M'Cormick v. Sullivant*, 10 Wheat. (U. S.) 192; *Turner v. Bank of North America*, 4 Dall. (U. S.) 8; *Reed v. Vaughn*, 10 Mo. 447]. See, to the same effect, *The Tug Montauk v. Walker*, 47 Ill. 341; *Guilford v. Love*, 49 Tex. 747; *Flanagan v. Pierce*, 27 Tex. 79.

Where a Court Has Both a Statutory and General Chancery Jurisdiction, the action of the court, when collaterally called in question, will be referred either to its general or statutory powers, as may be necessary to sustain its jurisdiction. *Goudy v. Hall*, 36 Ill. 313; *Nichols v. Mitchell*, 70 Ill. 261. See also *Harvey v. Tyler*, 2 Wall. (U. S.) 328.

and inferior jurisdiction is not so definite as might be supposed.¹ The distinction arises in considering how far presumptions should be indulged in favor of the records of particular courts; and the apparent indiscriminate use of terms, as well as the uncertainty which seems to pervade adjudicated cases, precludes the statement of a universal rule.²

1. *Tucker v. Harris*, 13 Ga. 7, wherein it is aptly said: "It is usual to state what particular courts fall within the one class and what within the other. But what author has undertaken to mark with accuracy and precision the boundary between the two? Bacon has not, nor has Blackstone, nor any other elementary writer."

"There is, perhaps, no subject in reference to which it is more difficult to lay down precise rules by which every case can be clearly and certainly determined, than the subject of the jurisdiction of courts. It is a subject, too, about which much has been loosely said; and it has only been occasionally that superior minds have closely considered the principles involved, and have undertaken to define, with care, the boundaries of the jurisdiction of courts which are said to have general jurisdiction, and the circumstances under which their jurisdiction will, and will not, attach." *Withers v. Patterson*, 27 Tex. 495.

Full Jurisdiction, granted by the constitution to chancery courts, in all matters of equity, means that nothing is reserved. *State Bank v. Duncan*, 52 Miss. 740.

Superior Court — General Jurisdiction. — A court before which every question of civil right may be brought is a superior court of general jurisdiction. *Gillet v. Powell*, Spear's Eq. (S. Car.) 142.

To constitute a court a superior court as to any class of actions, within the common-law meaning of the term, its jurisdiction over such actions must be unconditional, so that the only thing requisite to enable the court to take cognizance of them is the acquisition of jurisdiction of the person of the party, with the further qualification that the court is one of record and proceeds according to the general course of the common law. *Simons v. DeBare*, 4 Bosw. (N. Y.) 547 [citing *Foot v. Stevens*, 17 Wend. (N. Y.) 483; *Hart v. Seixas*, 21 Wend. (N. Y.) 40].

In *Connecticut* the Superior Court is a court of general jurisdiction; that is, it has jurisdiction as a court of law of

all matters expressly committed to it as well as all other matters cognizable by any law court of which exclusive jurisdiction is not given to some other court; and the fact that no other court has exclusive jurisdiction in any matter is sufficient to give the Superior Court jurisdiction over that matter. *State v. Bulkeley*, 61 Conn. 374.

Power Derived Directly from Constitution. — Where the power of a court in a particular matter is derived directly from the constitution, it is not a special jurisdiction. *Bordages v. Higgins*, 1 Tex. Civ. App. 43; *Sheldon v. Newton*, 3 Ohio St. 501.

Jurisdiction is called "general" because it applies to all subjects embraced within the object of its general organization, and to all parties who can be reached by its process and be bound by its power. *Root v. McFerrin*, 37 Miss. 48.

2. Uncertainty of Test. — In *Ex p. Kearny*, 55 Cal. 212, it is said that there is no certain test by which to determine in all cases to which class, inferior or superior, any given court may belong, but that the question seems to have resolved itself into one of public policy, and whether the particular court of the limited jurisdiction ought to have extended to its judgment the sanctity of the presumptions arising from the adjudications of tribunals of general common-law jurisdiction; citing *Wright v. Hazen*, 24 Vt. 143, wherein it was said that the jurisdiction of justices of the peace had become so important and extensive as to incline the court to the belief that sound policy required the extension of the same rules of construction in favor of their jurisdiction as is done in favor of courts of general jurisdiction. See *Williams v. Ball*, 52 Tex. 609; *Bumpus v. Fisher*, 21 Tex. 567; and as to the character of the jurisdiction of justices of the peace, see article JUSTICES OF THE PEACE, *post*, this volume.

In *Hendrick v. Whittemore*, 105 Mass. 28, it was held that the rule which makes the judgment of a court of record binding upon the parties until reversed by proper proceedings therefor,

Where Judgments Subject to Review. — It may be conceded, however, that all courts in America are in one sense inferior, in that their judgments are generally subject to review and reversal by an appellate court;¹ but this is not the sense in which the term is technically used.²

Some Matters Excluded from Cognizance. — So it may be said that courts in the United States are generally of limited jurisdiction whenever some subject-matters are excluded from their cognizance.³

"Limited Jurisdiction" — "Inferior" Courts. — A court of limited jurisdiction is therefore not necessarily an inferior court in its technical sense,⁴ and it is said that those created by express con-

although jurisdiction of the person was not properly obtained, is applicable as well to a judgment of a justice of the peace as to one of a court of general jurisdiction; applying the rule pronounced in *Hawes v. Hathaway*, 14 Mass. 233, which was cited with approval in *Crockett v. Drew*, 5 Gray (Mass.) 399, and disapproving a contrary decision in *Rossiter v. Peck*, 3 Gray (Mass.) 538, as having been made without consideration.

On the other hand, speaking of justices' courts, it is said that no principle of law is more evident than that where the tribunal is of limited jurisdiction, or the proceedings are particularly prescribed by a statute made on the subject, that course of procedure so prescribed must, on the face of the record, appear to have been if not literally at least substantially complied with, or the case must by the proceedings disclose itself to be within the limited jurisdiction. *Fahey v. Mottu*, 67 Md. 250 [citing *Shivers v. Wilson*, 5 Har. & J. (Md.) 132; *Owings v. Worthington*, 10 Gill & J. (Md.) 293]. See, further, article JUSTICES OF THE PEACE, *post*, this volume.

1. "All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried; but they are not therefore inferior courts in the technical sense of those words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is

not prepared to say that they are absolute nullities, which may be totally disregarded." Marshall, C. J., in *Kempe v. Kennedy*, 5 Cranch (U. S.) 173. See also *Peacock v. Bell*, 1 Saund. 73.

2. *Grignon v. Astor*, 2 How. (U. S.) 319.

The term "inferior court," in a strict and legal sense, is only applicable to courts of special and limited jurisdiction, in which the proceedings are not according to the course of the common law but are defined by statutory regulations; and where the powers of a court are general, its jurisdiction, in legal contemplation, is not limited or inferior. *Wright v. Marsh*, 2 Greene (Iowa) 104.

At Common Law. — The term "inferior court," at the common law, always meant a court which was not one of the four great courts of the realm; that is, the Court of Chancery and the three common-law courts sitting at Westminster. *Swift v. Wayne Circuit Judges*, 64 Mich. 480.

3. *Brooks v. Duckworth*, 59 Mo. 48.

4. Illustrations of Distinctions Drawn. — In *Den v. Hammel*, 18 N. J. L. 78, the distinction between a court of limited and special jurisdiction is considered as follows: "I apprehend the term 'limited jurisdiction' to be somewhat ambiguous, and that the books sometimes use it without due precision. Our Supreme Court is limited by acts of the legislature; so likewise is the Court of Common Pleas, and the newly constituted Circuit Courts, yet each of them exercises a general jurisdiction. The word 'limited' seems to be used sometimes carelessly instead of the term 'special'; for I take the true distinction between courts to be such as possess a general, and such as have only a special jurisdiction, for a par-

stitutional enactments, with general and exclusive powers to hear and determine all controversies within their particular judicial

particular purpose; or clothed with special powers, for the performance of specific duties, beyond which they have no manner of authority; and these special powers to be exercised in a summary way, either by a tribunal already existing for general purposes or else by persons appointed or to be appointed in some definite form. Such tribunals with special powers for adjudicating in particular cases, under the various names of commissioners, surveyors, appraisers, committees, directors, overseers, and the like, abound in our statute book, little or in no wise relating to the general administration of justice, whose modes of proceeding are prescribed in the statutes by which they are erected; and unless their proceedings, on the face of them, show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction or exceeded it. And each case cited in support of the plaintiff's position was that of a tribunal empowered for a special purpose, and that alone, as to liberate from confinement certain prisoners, to make an inquest concerning certain water, or to inquire respecting the value of certain land; and there terminated their functions."

In *State v. Daniels*, 66 Mo. 201, it is said that general jurisdiction is that which extends to a great variety of matters, while limited jurisdiction, also called "special" and "inferior," is that which extends only to certain specified cases. This statement is clearly confused when placed beside those which point out that a court may be of limited jurisdiction and yet not an inferior court.

In *Tucker v. Harris*, 13 Ga. 7, it was held that while the Superior Courts of *Georgia* are called courts of general jurisdiction, yet their jurisdiction is limited by the constitution. "They cannot try titles to land out of the county where they are situated, or a person accused of a crime out of the county where the offense was committed; nor can they in a civil suit carry the defendant in any case out of the county of his residence, except in a few specified cases, such as joint promisors, co-obligors, etc. Indeed, it is a well-settled principle that the judg-

ments and decrees of courts of the most unlimited jurisdiction, and of the highest rank, as well as those of a tribunal of *peculiar* jurisdiction, have been adjudged nullities because the circumstances of the case made it an exception to the general jurisdiction of the court."

In *Raymond v. Bell*, 18 Conn. 88, it is said that none of the courts of *Connecticut* are courts of general jurisdiction in the sense of the term as applied to the Superior Courts in England.

In *Texas* it was said that all the courts of that state were limited in their jurisdiction with reference to the division of judicial powers between them, and that they were special in reference to what might be adjudicated by each of them, but that they were not all thereby made courts of inferior jurisdiction whose judgments are void unless the record shows the antecedent facts necessary to call their powers into exercise. *Guilford v. Love*, 49 Tex. 744; *Williams v. Ball*, 52 Tex. 603.

"The recorder's court is a court of record by name, and, so far as it has common-law powers, its records are treated as common-law records. But it also has special and peculiar powers, where its records are open to the more or less limited objections allowed by all jurisprudence in such peculiar cases. And it is very well known that in England there have always been many courts, not sitting at Westminster, whose records are respected. The term 'inferior' is not of one single meaning in law, but is used in different senses. Under the Constitution of the United States, Congress has no power to create courts which are not inferior to the Supreme Court. The cases cited from the decisions of that court do not claim that the Circuit and District Courts are not inferior to the Supreme Court, but merely that, being courts of general powers and of record, they are not inferior courts in the sense in which that word is sometimes used to distinguish courts among themselves after their kind." *Swift v. Wayne Circuit Judges*, 64 Mich. 480.

In *Summary Proceedings* where the court exercises an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed, and those facts which give

sphere, cannot be said to be courts of limited or special jurisdiction within the meaning of the rule as to presumptions.¹

Court of Record.—Expressions found in some opinions would seem to indicate a distinction between courts of general and courts of inferior jurisdiction dependent entirely upon whether the court was one of record or not,² but the distinction dependent upon this difference alone is said to be an inaccurate one,³ and it is at least too broad in the sense that the proceedings of a court of record always carry the presumption attendant on the exercise of general and unlimited jurisdiction.⁴

jurisdiction ought to appear in order to show that the proceedings are *coram judice*. *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

The District Courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. If jurisdiction do not appear upon their proceedings their judgments will be reversed on error or appeal; but they are not nullities, which may be disregarded in a collateral proceeding. *M'Cormick v. Sullivan*, 10 Wheat. (U. S.) 192. In this respect the District Courts stand on the same footing as courts of general jurisdiction; and the authority of such courts is always to be presumed until the contrary is shown. *Ruckman v. Cowell*, 1 N. Y. 505; *Kempe v. Kennedy*, 5 Cranch (U. S.) 185; *Skillern v. May*, 6 Cranch (U. S.) 267; *Börs v. Preston*, 111 U. S. 255; *Thompson v. Lyle*, 3 W. & S. (Pa.) 166; *Reed v. Vaughn*, 10 Mo. 447; *Morse v. Presby*, 25 N. H. 301.

1. *Williams v. Ball*, 52 Tex. 607, wherein the court, quoting *Bumpus v. Fisher*, 21 Tex. 568, points out that the rule "with respect to courts of limited jurisdiction, that everything must appear upon the record strictly and affirmatively which will give them jurisdiction to hear and determine, is rapidly giving way by the application to our courts, as they are actually constituted, of the same principles which originally formed the rule with reference to their own courts in England."

2. *Swift v. Wayne Circuit Judges*, 64 Mich. 480. See also *Fisher v. Bassett*, 9 Leigh (Va.) 119; *Coughran v. Gilman*, 81 Iowa 442; *Doran v. Davis*, 43 Iowa 86.

In *Beaubien v. Brinckerhoff*, 3 Ill. 274, citing 3 Black. Com. 24, it is said that at common law courts are divided into superior and inferior courts, or

courts of record and those not of record.

3. *Swift v. Wayne Circuit Judges*, 64 Mich. 480. But see *Hahn v. Kelly*, 34 Cal. 391.

4. One of the attributes of a court of general jurisdiction is, unquestionably, its character as a court of record. *Simons v. De Bare*, 4 Bosw. (N. Y.) 547 [citing *Foot v. Stevens*, 17 Wend. (N. Y.) 483; *Hart v. Seixas*, 21 Wend. (N. Y.) 40]; *Taylor v. Barron*, 30 N. H. 78; *Grignon v. Astor*, 2 How. (U. S.) 319; *Anderson v. Gray*, 134 Ill. 554, wherein it was held that the County Courts, in the exercise of the common-law jurisdiction conferred upon them, are entitled to the same presumptions in favor of their jurisdiction as Circuit Courts, and the court said that "they are courts of record." * * * These characteristics distinguish them from courts of inferior limited jurisdiction, in which jurisdiction in every case must affirmatively appear."

In *Sheldon v. Newton*, 3 Ohio St. 500, the court whose action was in question was one of general common-law and chancery jurisdiction, though it was exercising a particular authority, and in this view it was said that the court might be regarded as a tribunal of special and limited powers prescribed by the statute, but the court added: "It is still to be remembered that it was the tribunal created by the constitution, with exclusive jurisdiction over probate and testamentary matters, and had no one single characteristic of those inferior courts and commissions to which the rule insisted upon has been applied by the English and American courts. All its proceedings are recorded, and constitute records, in the highest sense of the term, importing absolute verity, not to be impugned by averment or proof to the contrary, and conclusively binding the

VI. RETENTION OF JURISDICTION FOR COMPLETE RELIEF—

1. **Statement of the Rule.**—When a court of equity obtains jurisdiction of an action for any purpose for which it is authorized to render a decree, it will hold such jurisdiction for every purpose and for a complete determination of all the rights of the parties involved in the subject-matter of the cause before it,¹ and will

parties and all who stand in privity with them. The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity, and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them."

But the inaccuracy in stating that all courts of record are courts of general jurisdiction, for the purpose of applying the principle of presumptions as to jurisdiction, lies, in part at least, in the fact that such courts may be clothed with summary powers; and, when exercising their functions in regard to such powers, they seem to be entitled to no greater presumptions than a court of special or inferior jurisdiction. See *infra*, IX. *General Rule of Presumptions as to Jurisdiction*.

By the Term Court of Record, the legislature is understood as intending to describe a higher court than that of a justice of the peace; a court with a common seal, *whose proceedings are according to the course of the common law*, where the proceedings are in writing, and where a full final record of the judgments is made. *Hubbel v. Baldwin*, Wright (Ohio) 87.

In England, speaking of certain courts acting under a statute in question, the court said that although it was unnecessary to decide the point, there were strong reasons for saying that the courts were inferior courts. "Although courts of record, they are still in their nature County Courts, which are undoubtedly inferior. Their jurisdiction is limited to the nature of the causes to be tried and the ambit within which the cause of action must have arisen." *Levy v. Moylan*, 10 C. B. 209, 70 E. C. L. 209.

1. *Alabama*.—*Boyd v. Hunter*, 44 Ala. 705; *Vick v. Beverly*, 112 Ala. 458; *Kilgore v. Kilgore*, 103 Ala. 614; *Stow v. Bozeman*, 29 Ala. 397; *Masterson v. Masterson*, 32 Ala. 437.

Colorado.—*Danielson v. Gude*, 11 Colo. 88.

Florida.—*Fries v. Griffin*, 35 Fla. 212.

Georgia.—*Pope v. Solomons*, 36 Ga. 545; *Walker v. Morris*, 14 Ga. 323; *Martin v. Tidwell*, 36 Ga. 345; *Mays v. Taylor*, 7 Ga. 244; *Bivins v. Marvin*, 96 Ga. 268.

Illinois.—*Wilson v. Dresser*, 152 Ill. 387; *Griffin v. Griffin*, 163 Ill. 216; *Grand Tower, etc., R. Co. v. Walton*, 150 Ill. 428; *People v. Chicago*, 53 Ill. 424; *Stickney v. Goudy*, 132 Ill. 213.

Indiana.—*Blair v. Smith*, 114 Ind. 114.

Iowa.—*Franklin Ins. Co. v. McGrea*, 4 Greene (Iowa) 229; *Green Bay Lumber Co. v. Miller*, (Iowa 1895) 62 N. W. Rep. 742.

Kentucky.—*Semon v. Freitag*, (Ky. 1895) 29 S. W. Rep. 320; *Handley v. Fitzhugh*, 1 A. K. Marsh. (Ky.) 24.

Maine.—*Gamage v. Harris*, 79 Me. 531.

Maryland.—*Middle States Loan, etc., Co. v. Hagerstown Mattress, etc., Co.*, 82 Md. 506.

Michigan.—*Chase v. Boughton*, 93 Mich. 285; *George v. Wyandotte Electric Light Co.*, 105 Mich. 1.

Mississippi.—*Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 408; *Parker v. Kelly*, 10 Smed. & M. (Miss.) 184; *Hunt v. Knox*, 34 Miss. 655; *Graves v. Hull*, 27 Miss. 419.

Missouri.—*Clem v. German Ins. Co.*, 29 Mo. App. 666; *Corby v. Bean*, 44 Mo. 379; *State v. McKay*, 43 Mo. 598; *Keeton v. Spradling*, 13 Mo. 321.

Nebraska.—*Disher v. Disher*, 45 Neb. 103; *Morrissey v. Broomal*, 37 Neb. 766.

New Jersey.—*Vreeland v. Vreeland*, 49 N. J. Eq. 322; *Terhune v. Sibbald*, (N. J. 1897) 37 Atl. Rep. 454; *Jersey City v. Gardner*, 33 N. J. Eq. 632; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Brown*

exercise its power in this regard to prevent a multiplicity of suits,¹ and especially for the purpose of giving effect to its own decree.²

- v. Edsall*, 9 N. J. Eq. 256; *Little v. Cooper*, 10 N. J. Eq. 275.
- New York*. — *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587, 596; *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517; *De Bemer v. Drew*, 39 How. Pr. (N. Y. Supreme Ct.) 466; *Cuff v. Dorland*, 55 Barb. (N. Y.) 481; *Carpenter v. Osborn*, 102 N. Y. 561; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Bradley v. Bosley*, 1 Barb. Ch. (N. Y.) 125; *Crane v. Bunnell*, 10 Paige (N. Y.) 333; *Adee v. Hallett*, 3 N. Y. App. Div. 308.
- North Carolina*. — *Balsley v. Balsley*, 116 N. Car. 472; *Love v. Neilson*, 1 Jones Eq. (N. Car.) 339; *Currie v. Clark*, 101 N. Car. 321.
- Oregon*. — *Heatherly v. Hadley*, 4 Oregon 1; *Salem Imp. Co. v. McCourt*, 26 Oregon 93; *Haynes v. Whitsett*, 18 Oregon 454; *Fleischner v. Citizens' Invest. Co.*, 25 Oregon 119.
- Pennsylvania*. — *Souder's Appeal*, 57 Pa. St. 502.
- South Dakota*. — *Probert v. McDonald*, 2 S. Dak. 495.
- Tennessee*. — *Allen v. Baugus*, 1 Swan (Tenn.) 404.
- Texas*. — *Willis v. Gordon*, 22 Tex. 243; *Bourke v. Vanderlip*, 22 Tex. 221; *Witt v. Kaufman*, 25 Tex. Supp. 384; *Chambers v. Cannon*, 62 Tex. 293; *Banton v. Wilson*, 4 Tex. 400; *Hickman v. White*, (Tex. Civ. App. 1895) 29 S. W. Rep. 692.
- Utah*. — *Bullion, etc., Min. Co. v. Eureka Hill Min. Co.*, 5 Utah 3.
- Vermont*. — *Sanborn v. Kittredge*, 20 Vt. 632; *Day v. Cummings*, 19 Vt. 496.
- Virginia*. — *Rison v. Moon*, 91 Va. 384; *Smith v. Smith*, 92 Va. 696; *Bil-lups v. Sears*, 5 Gratt. (Va.) 31, 50 Am. Dec. 105; *Zetelle v. Myers*, 19 Gratt. (Va.) 62; *Rust v. Ware*, 6 Gratt. (Va.) 50, 52 Am. Dec. 100; *Walters v. Farmers' Bank*, 76 Va. 12.
- West Virginia*. — *Hanly v. Watter-son*, 39 W. Va. 214.
- Wisconsin*. — *Tinkum v. Eau Claire*, 81 Wis. 301; *Turner v. Pierce*, 34 Wis. 658; *Cole v. Getzinger*, (Wis. 1897) 71 N. W. Rep. 75.
- United States*. — *U. S. v. Union Pac. R. Co.*, 160 U. S. 1; *Leighton v. Young*, 52 Fed. Rep. 439, 10 U. S. App. 298; *U. S. v. Guglard*, 79 Fed. Rep. 21; *Brooks v. Stolley*, 3 McLean (U. S.) 527; *Clarke v. White*, 12 Pet. (U. S.) 188; *Oelrichs v. Spain*, 15 Wall. (U. S.) 228.
- England*. — *Pearce v. Creswick*, 2 Hare 286; *Mackensie v. Johnston*, 4 Madd. 373; *Jesus College v. Bloome*, 3 Atk. 263, Amb. 54; *Ryle v. Haggie*, 1 Jac. & W. 237; *Carlisle v. Wilson*, 13 Ves. Jr. 278; *Adley v. Whitstable Co.*, 17 Ves. Jr. 324.
1. *Martin v. Martin*, 44 Kan. 295; *Jersey City v. Gardner*, 33 N. J. Eq. 632; *Chambers v. Cannon*, 62 Tex. 295; *Beecher v. Lewis*, 84 Va. 633; *Chrislip v. Teter*, (W. Va. 1897) 27 S. E. Rep. 288; *Pinkum v. Eau Claire*, 81 Wis. 301; *U. S. v. Union Pac. R. Co.*, 160 U. S. 1.
2. *De Bemer v. Drew*, 39 How. Pr. (N. Y. Supreme Ct.) 466.
- Illustrations of the Rule.** — The following may be taken as ordinary illustrations of the rule stated in the text, though they are not intended as statements of the law controlling the particular subject-matter of each case, that being a question referable to the concrete titles throughout this work.
- Reformation of Insurance Policy — Payment of Amount Due.* — In a suit to reform a policy of insurance the court has ordered payment of the amount due upon the policy after the reformation, *Franklin Ins. Co. v. McCrea*, 4 Greene (Iowa) 229; under proper allegations and prayer, *Clem v. German Ins. Co.*, 29 Mo. App. 666; or awarded damages for the breach of the contract reformed, *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263. See also article INSURANCE, vol. II, p. 375.
- Specific Performance — Damages.* — A court of equity has awarded damages in a suit for specific performance. *Zetelle v. Myers*, 19 Gratt. (Va.) 62. See article SPECIFIC PERFORMANCE.
- Injunction to Stay Sale — Judgment for Money Secured.* — So it has been held that when an injunction to stay sale of property under a deed of trust is dissolved, it is proper for the court to render judgment for the money secured by the deed. *Bourke v. Vanderlip*, 22 Tex. 221.
- Injunction Against Sale under Junior Execution — Order of Sale to Satisfy*

2. Effect of Character of Subject to be Adjudicated. — In order that a court of equity may act under the rule of retaining jurisdiction for full relief, the subject to be adjudicated must be something incidental to the cause of action which originally gave the court jurisdiction, or so closely connected therewith as to render its determination necessary to the final decision of the whole controversy between the parties.¹

Necessity for Equitable Grounds — Legal Remedy. — The cause must be one presenting matters for equitable cognizance in the first

Prior Equitable Lien. — Where a court of equity takes jurisdiction to enjoin a sale under an execution at law, upon the application of an equitable incumbrancer who has a prior equitable lien, it will adjust all the rights of the parties. *Parker v. Kelly*, 10 Smed. & M. (Miss.) 184.

Injunction Against Trespass. — Where trespasses are enjoined the court may assess damages resulting therefrom. *Semon v. Freitag*, (Ky. 1895) 29 S. W. Rep. 320.

Restraining Nuisance and Awarding Damages. — A court of equity may restrain a nuisance and award damages resulting from the nuisance. *Fleischer v. Citizens' Invest. Co.*, 25 Oregon 119.

Annulling Conveyances and Granting Other Relief. — Where a deed is set aside as having been fraudulently recorded, the court may retain jurisdiction and adjudicate the title and make partition of the lands. *Vreeland v. Vreeland*, 49 N. J. Eq. 322.

A court of equity, having taken jurisdiction at the instance of a judgment creditor to annul a fraudulent conveyance of the judgment debtor's property, will grant full relief to the complainant by decreeing a sale of the property for the payment of the debt. *Hunt v. Knox*, 34 Miss. 681.

A Court May Declare a Contract Void and order an accounting of moneys paid under it. *George v. Wyandotte Electric Light Co.*, 105 Mich. 1.

Annulling Void Judgment and Rendering Proper Judgment. — Where the defendant in a judgment obtains an injunction to have the judgment declared void, it has been held that the court will retain jurisdiction and render judgment on the original cause of action if the plaintiff in execution is legally entitled thereto on the merits. *Witt v. Kaufman*, 25 Tex. Supp. 384.

Suit to Quiet Title — Settling Bound-

ary. — Ejectment is the proper remedy for settling questions of disputed boundaries, but equity, having obtained jurisdiction for the purpose of quieting the title to the disputed tract, will retain it for the purpose of ascertaining the extent of the accretions thereto when controverted by others. *Salem Imp. Co. v. McCourt*, 26 Oregon 106.

Transfer of Jurisdiction. — In *Crane v. Bunnell*, 10 Paige (N. Y.) 340, the court said: "It is true, in cases of fraud, this court has concurrent jurisdiction with courts of law. And where a party comes into this court, in the first instance, to be relieved from a fraudulent contract, especially where a discovery is necessary to establish the fraud, this court, having obtained jurisdiction of the cause for one purpose, may proceed and make a final decree therein between the parties, after such discovery has been obtained. But even in cases of that kind this court does not grant an injunction for the mere purpose of transferring the jurisdiction from a court of law to this court, after the commencement of a suit there, except to stay the trial in a suit at law until the defendant in this court has fully answered the complainant's bill."

1. *Martin v. Martin*, 44 Kan. 295; *Chambers v. Cannon*, 62 Tex. 295.

Judgment for Damages — Amount under Jurisdiction of Court. — It is not material that the amount assessed as damages is below the jurisdiction of the court where the damages allowed do not constitute the cause of action, the equitable relief constituting the major feature of the judgment rendered and the damages awarded being minor and incidental, though essential to a full judicial determination and adjustment of the matters in dispute between the parties. *Andrew v. Babcock*, 63 Conn. 109; *Gulf, etc., R. Co. v. Schneider*, (Tex. Civ. App. 1894) 28 S. W. Rep. 260.

instance, however; that is to say, the court must hold the cause under some ground of equity;¹ but when the court has once acquired jurisdiction upon equitable grounds it may go on to a complete adjudication, even to establishing legal rights and granting legal remedies which would otherwise be beyond the scope of its authority.² This may be done either at the instance of the complainant under the cause made out by the bill or at the instance of the defendant under a cross-bill.³

Failure of Equities.—It is held, however, that mere statements in a bill upon which chancery jurisdiction might be maintained, but which are not proved, and upon which no relief is decreed, will not authorize a decree upon such parts of the bill as, if standing alone, would not give the court jurisdiction.⁴

1. *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Towns v. Smith*, 115 Ind. 480.

2. *Kilgore v. Kilgore*, 103 Ala. 614; *Scruggs v. Driver*, 31 Ala. 274; *Brown v. Solary*, 37 Fla. 102; *Pence v. Sweeney*, 2 Idaho 914; *Hawley v. Simons*, (Ill. 1887) 14 N. E. Rep. 7; *Biegler v. Merchants' L. & T. Co.*, 62 Ill. App. 560; *Towns v. Smith*, 115 Ind. 480; *Martin v. Martin*, 44 Kan. 295; *Quest v. Johnson*, 58 Mo. App. 54; *Collins v. Colley*, (N. J. 1887) 11 Atl. Rep. 118; *Trotter v. Heckscher*, 42 N. J. Eq. 254; *Stiefel v. New York Novelty Co.*, 14 N. Y. App. Div. 371; *Barnes v. Dow*, 59 Vt. 530; *Walters v. Farmers' Bank*, 76 Va. 12; *Beecher v. Lewis*, 84 Va. 632 [*citing Parker v. Dee*, 2 Ch. Ca. 200, wherein the court said: "When this court can determine the matter, it shall not be a handmaid to the other courts, nor beget a suit to be ended elsewhere"]; *Gormley v. Clark*, 134 U. S. 338; *Wallis v. Shelly*, 30 Fed. Rep. 747; *Waite v. O'Neil*, 76 Fed. Rep. 408.

Joinder of Actions for Legal and Equitable Relief.—The objection that a complaint improperly joined two causes of action, one for damages at law and one for equitable relief, cannot prevail, against the principle that equity has jurisdiction to entertain the action for the equitable relief, and will therefore take cognizance of the controversy in all its branches. *Pinkum v. Eau Claire*, 81 Wis. 301.

Remedies Ordinarily Granted in Special Proceedings.—The court, having once taken rightful cognizance of a cause, is empowered and required to afford complete relief, even though it incidentally involves the granting of a remedy ordinarily administered by the court in

a special proceeding. *Balsley v. Balsley*, 116 N. Car. 472.

3. *Grand Tower, etc., R. Co. v. Walton*, 150 Ill. 428; *Osborne v. Barge*, 30 Fed. Rep. 805.

4. *Collier v. Collier*, (N. J. 1895) 33 Atl. Rep. 193; *Hawes v. Dobbs* (C. Pl.) 18 N. Y. Supp. 123, *affirmed* in 137 N. Y. 465; *W. J. Johnston Co. v. Hunt*, 66 Hun (N. Y.) 504; *Lochmann v. Meehan*, (Supreme Ct.) 21 N. Y. Supp. 389, 66 Hun (N. Y.) 633; *Dudley v. Congregation, etc.*, 138 N. Y. 451; *Appeal of Ahl*, 129 Pa. St. 49; *Kinsey v. Bennett*, 37 S. Car. 319; *Pratt v. Lamson*, 6 Allen (Mass.) 457; *McGuire v. Caruthers*, 5 Humph. (Tenn.) 414.

But in *Green Bay Lumber Co. v. Miller*, (Iowa 1895) 62 N. W. Rep. 742, which was an action under the code to recover judgment for the balance of account for material furnished and also for the foreclosure of mechanics' liens, it was held that the court acquired jurisdiction notwithstanding the liens turned out to be invalid, and could therefore render judgment for the balance of account.

In *Milkman v. Ordway*, 106 Mass. 232, it was held that where a plaintiff in good faith brings a suit seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief, even though at the time when the bill was brought he had no right to relief purely equitable, yet the court will afford relief by awarding compensation.

Changing Form of Action by Amendment.—In *Dudley v. Congregation, etc.*, 138 N. Y. 458, it was held to be unnecessary to inquire how far or under what circumstances it was within the power of the trial court to permit the

VII. JURISDICTION FRAUDULENTLY ACQUIRED — 1. Fictitious Issues and Collusion of Parties. — It is a firmly established principle that courts will refuse to hear causes which are not brought for direct results, but merely to establish precedents for subsequent cases of the same nature,¹ fictitious issues and the collusion of parties for the purpose of inducing a decision being a fraud upon the court.²

plaintiff to change the form of his action for the enforcement of a purely legal remedy after having failed to establish his equitable cause of action, the allowance of such an amendment being within the discretion of the trial court.

Right to Equitable Relief Lost Pendente Lite. — If, after the institution of a suit, the complainant loses his right to purely equitable relief, it is held that the court may proceed to enforce his legal remedies involved in the subject-matter. *Van Allen v. New York El. R. Co.*, 3 Misc. Rep. (N. Y. C. Pl.) 53; *Smith v. Ingersoll-Sergeant Rock Drill Co.*, 7 Misc. Rep. (N. Y. C. Pl.) 374; *Case v. Minot*, 158 Mass. 577. In this last case the decision is based upon a former ruling in *Milkman v. Ordway*, 106 Mass. 232, that where the plaintiff in good faith brings a suit seeking equitable relief, supposing and having reason to suppose himself entitled thereto, the court will afford relief by awarding damages, though at the time when the bill was filed the plaintiff had no right to purely equitable relief, and decides that, *a fortiori*, the plaintiff is entitled to the legal remedy if the reason for denying the purely equitable relief occurs pending the suit.

Suit to Set Aside Fraudulent Conveyance — Effect of Statute of Limitations upon Plaintiff's Judgment at Law. — Where a court of equity has taken jurisdiction to annul a fraudulent conveyance made by a debtor, if the complainant's judgment was valid and operative at the time of the filing of the bill, his relief will not be affected by reason of the statute of limitations subsequently and pending the litigation barring issuance of a new execution on the judgment. *Hunt v. Knox*, 34 Miss. 681.

Where Other Equities Arise. — As a general rule, it is said, if the court should find that the prayer for specific performance cannot be granted upon the pleadings and proof, the jurisdiction of equity terminates and the bill should be dismissed. But whenever a clear

equity is found to have arisen between the parties to the contract, growing out of its peculiar character, the chancellor is authorized to retain the bill for the purpose of having that equity properly adjusted. *Glinski v. Zawadski*, 8 Fla. 408.

1. But see articles *FRIENDLY SUITS*, vol. 9, p. 719; *AGREED Case*, vol. 1, p. 384.

2. **Real Issues.** — Courts of judicature are organized only to decide real controversies between actual litigants. When, therefore, it appears, no matter how or at what stage, that a pretended action is not a genuine litigation over a contested right between opposing parties, but is merely the proffer of a simulated issue by a person dominating both sides of the record, the court, from a sense of its own dignity, as well as from regard to the public interests, will decline a determination of the fabricated case so fraudulently imposed upon it. *Judson v. Flushing Jockey Club*, 14 Misc. Rep. (N. Y. C. Pl.) 350 [*citing* *Wood v. Nesbitt*, (Supreme Ct.) 19 N. Y. Supp. 423; *Lord v. Veazie*, 8 How. (U. S.) 255; *Cleveland v. Chamberlain*, 1 Black (U. S.) 419; *American Wood-paper Co. v. Heft*, 8 Wall. (U. S.) 333; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 135; *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138; *Washington Market Co. v. District of Columbia*, 137 U. S. 62; *South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.*, 145 U. S. 300; *Singer Mfg. Co. v. Wright*, 141 U. S. 700; *California v. San Pablo, etc.*, R. Co., 149 U. S. 314; *Hoskins v. Berkeley*, 4 T. R. 402; *Matter of Elsam*, 3 B. & C. 597, 10 E. C. L. 193].

In *Fletcher v. Peck*, 6 Cranch (U. S.) 147, the court said: "I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence upon the face of it of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations, of parties. My confidence, however, in the respectable gen-

Such a Suit Will Be Dismissed at the suggestion of either a party to the record or any person in interest or who may be prejudiced by the judgment, or even at the instance of a stranger who appears as *amicus curiæ*, or by the court upon its own motion when the fact appears.¹

plemen who have been engaged for the parties has induced me to abandon my scruples in the belief that they would never consent to impose a mere feigned case upon this court."

Contempt of Court.—In *Smith v. Brown*, 3 Tex. 371, a suit was instituted on an instrument in writing in the following words: "I hereby bind and obligate myself to pay Josiah Smith the sum of one hundred and fifty dollars, if he furnish at the town of New Braunfels, by the 6th day of November next, any law of the state of Texas showing that the next legislature of the said state will be composed of seventy members in both branches, this the 6th day of September, 1848." The plaintiff alleged that he had performed the condition of the instrument by the production of the law, and the defendant denied the constitutionality of the act produced. The court held that it was manifestly the object of the parties to obtain a judicial decision on the constitutionality of the Apportionment Act in question, and that the suit was not founded on a *bona fide* transaction; that it was either an entire fiction or a wager designed to effect the same object, and that every fictitious case is a contempt of the court, and when known to be such has subjected the parties to the severe animadversion of the court. See also the *Matter of Elsam*, 3 B. & C. 597, 10 E. C. L. 193, wherein the attorney stating a fictitious case was fined by the court, and ordered to be imprisoned until the fine be paid, it appearing that the court had previously referred the matter to a master to inquire which of the facts stated in the special case were truly stated, and that the action of the court was based upon the report of the master that certain portions of the statement of the attorney were fictitious; *Cox v. Phillips*, Hardw. 237, wherein Lord Hardwicke held a fictitious action to be contempt of the court and committed the parties and their common attorney.

In *In re Burdick*, 162 Ill. 48, it was said that "it goes without saying that to present a fictitious case to the court for the purpose of obtaining its opinion,

or for other fraudulent purpose, is a contempt of its authority and dignity, and the court will in such case, under all proper circumstances, protect itself and litigants and the rights of third parties by the imposition of penalties for the contempt and by the dismissal of the fictitious suit or the appeal or writ of error therein, and even by setting aside or affording relief against a collusive and fraudulent judgment, either at or after the term at which it is entered."

1. *Judson v. Flushing Jockey Club*, 14 Misc. Rep. (N. Y. C. Pl.) 350; *In re Burdick*, 162 Ill. 52 [*citing* *Matter of Elsam*, 3 B. & C. 597, 10 E. C. L. 193; *Cox v. Phillips*, Hardw. 224; *Brewster v. Kitchin*, Comb. 424].

But Strangers whose rights or interests are not directly or injuriously affected by the judgment or decree will not be permitted to overturn adjudications to which parties and those in privity with them make no objection, as such a course would encourage litigation and disturb the peace of society. *In re Burdick*, 162 Ill. 53.

Fictitious Case in Court of Review.—The same rule applies where a false and fictitious case is pending in a court of review on appeal or writ of error, and such appeal or writ of error will be dismissed. *In re Burdick*, 162 Ill. 52 [*citing* *Lord v. Veazie*, 8 How. (U. S.) 251; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129]. And see article APPEALS, vol. 2, p. 342.

In *Smith v. Junction R. Co.*, 29 Ind. 546, an opinion had been filed settling the questions raised on the appeal, but the court, upon petition, entered an order granting a rehearing and ruling the appellee to show cause why the appeal should not be dismissed. It was then made to appear that the suit was fictitious, and was intended to affect a real litigation then pending between the party to the affidavit in support of the petition for a rehearing and the defendant railroad company, and the appeal was thereupon dismissed at the cost of the appellee. See also *Judson v. Flushing Jockey Club*, 14 Misc. Rep. (N. Y. C. Pl.) 562.

2. Fraudulent Statement of Cause of Action. — If a plaintiff falsely states facts, either as constituting his cause of action or in regard to the amount in controversy, for the purpose of conferring jurisdiction, and this manifestly appears to the court, it is said that it is the duty of the court to interfere *ex mero motu* and prevent a fraud on its jurisdiction,¹ though if the fact of an intentional fraud is not apparent it is held that the matter must be specially pleaded.² The subject has some-

Postponement upon Statement of Members of the Bar. — The statement of reputable members of the bar that an action is false and fictitious, if not to be accepted as assurance of the fact, suffices at all events for a postponement of the decision until the court shall be satisfied that it has to do with a legitimate forensic discussion. *Judson v. Flushing Jockey Club*, 14 Misc. Rep. (N. Y. C. Pl.) 562.

One Party Becoming Sole Party in Suit Pendente Lite. — The rule applicable where both parties collude to get up a case for the opinion of the court is applicable to a case where one of the parties becomes owner of the whole opposing interests and sole party in interest and is *dominus litis* on both sides. *In re Burdick*, 162 Ill. 53 [citing *Cleveland v. Chamberlain*, 1 Black (U. S.) 419; *American Wood-paper Co. v. Heft*, 131 U. S., app. xcii; *Dakota County v. Glidden*, 113 U. S. 222].

Cases Which May Not Be Within the General Rule. — An act providing for the judicial examination, approval, and confirmation of bonds of irrigation districts by the Superior Court was objected to as unconstitutional because it authorized a court to hear and determine "what will be the rights of parties interested in those bonds, in advance of any controversy as to such rights." Without indicating any provision of the constitution claimed to be violated, it was contended that in all the different species of jurisdiction conferred upon Superior Courts by the constitution "it is presupposed that somebody is prosecuting somebody else to enforce or protect some right or to redress or to prevent some wrong." The court held that "this is not true of actions or special proceedings *in rem*, of which Superior Courts are expressly given jurisdiction. For example, there can be no such presupposition in proceedings for the probate and confirmation of wills, nor in insolvency proceedings, since they may be, and often are,

prosecuted to final and conclusive judgments without any controversy whatever. In all this class of cases, however, the petition or complaint contemplates a controversy and tenders issues which may be accepted and joined by any person interested who has been actually or constructively served with any kind of lawful process; and so it often happens in actions *in personam* that issues are tendered by pleadings in advance of any actual controversy, and before it is known whether or not any averment in the pleading will be controverted." *Cullen v. Glendora Water Co.*, 113 Cal. 503.

1. *Wiseman v. Witherow*, 90 N. Car. 141; *Froelich v. Southern Express Co.*, 67 N. Car. 1; *Fix v. Sissung*, 83 Mich. 562.

This question should be considered in connection with the doctrine prevailing in the several states with regard to the question of jurisdiction dependent upon the amount in controversy. See article AMOUNT IN CONTROVERSY, vol. 1, p. 702.

2. *Neale v. Smith*, 61 Ark. 564; *Hoffman v. Cleburne Bldg., etc., Assoc.*, 85 Tex. 409; *International, etc., R. Co. v. Nicholson*, 61 Tex. 550; *Dwyer v. Bassett*, 63 Tex. 274; *Bates v. Van Pelt*, 1 Tex. Civ. App. 185; *Roper v. Brady*, 80 Tex. 588; *Beville v. Rush*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1022.

Province of Jury. — The question on the plea is one to be submitted to the jury. *Beville v. Rush*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1022; *Roper v. Brady*, 80 Tex. 588; *International, etc., R. Co. v. Nicholson*, 61 Tex. 550; *Gulf, etc., R. Co. v. Wilm*, 9 Tex. Civ. App. 161; *Harrell v. Hill*, 15 Tex. 270.

Where there is evidence before the jury to establish a plea that the amount sued for was fictitiously stated for the purpose of conferring jurisdiction, the court should instruct the jury that if the allegation of amount was so made they should find in favor of the plea.

times been regulated by express statute.¹

3. Fraudulent Use of Process. — It is equally well settled that courts will never permit the fraudulent use of their process,² and when it appears that the defendant has been inveigled into the jurisdiction of the court for the purpose of service of process, or that jurisdiction has been obtained by a trick or device at the instigation of the adverse party, the court will, on motion, set aside such service, and refuse to entertain jurisdiction.³ But the

Little v. Woodbridge, 1 Tex. App. Civ. Cas., § 154.

A finding by the jury for the plaintiff in a sum larger than the minimum jurisdiction of the court is equivalent to a verdict in favor of such jurisdiction. *International, etc., R. Co. v. Nicholson*, 61 Tex. 550.

There Is No Prima Facie Presumption of Bad Faith by reason of the fact that the amount alleged is larger than that actually due, but, on the contrary, the presumption is in favor of good faith. *Fortescue v. Spencer*, 2 Ired. L. (N. Car.) 63; *Worcester v. Lampson*, 55 Vt. 350.

Amendment of Answer. — If the defendant goes to trial upon the merits, the court is not bound to permit him to amend his answer and set up a fraudulent allegation of amount to confer jurisdiction because the plaintiff swears to an indebtedness less than the amount laid in his complaint, such circumstances not being conclusive of fraud. *Johnson v. Borden*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1131.

Cummings v. Edmunson, 5 Port. (Ala.) 148, decided under a statute providing that "if any suit shall be commenced in any court for a less sum than such court can legally take cognizance of, or if any person shall demand a greater sum than is due, on purpose to evade this act, in either case the plaintiff shall be nonsuited," etc., and providing further that a plaintiff may prevent the operation of the latter part of the enacting clause by making an affidavit that the sum for which the suit is brought is really due, etc. It was held that the statute contemplated two distinct classes of cases, in one of which the court trying the cause had no jurisdiction, but must nonsuit the plaintiff, and that in the other it is not made obligatory so to proceed unless it shall appear that a sum is demanded beyond what is due, purposely to evade the act, and further that if such an affidavit is made, the trial court has no

discretion, but it would be error to enter nonsuit, while, on the other hand, the discretion of the court in entering a nonsuit in the absence of such an affidavit would not be disturbed. Under a similar act, see *Parham v. Hardin*, 11 Ired. L. (N. Car.) 219.

2. See article SERVICE OF PROCESS. As to trial for an offense other than the one for which the prisoner was extradited, see the title *Extradition*, Am. and Eng. Encyc. of Law. See also article EXTRADITION, vol. 8, p. 798.

3. *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523; *Williams v. Reed*, 29 N. J. L. 385; *Steiger v. Bonn*, 3 N. J. L. J. 370; *Wanzer v. Bright*, 52 Ill. 40; *Carpenter v. Spooner*, 2 Sandf. (N. Y.) 717; *Metcalf v. Clark*, 41 Barb. (N. Y.) 45; *Baker v. Wales*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 332; *Hevener v. Heist*, 9 Phila. (Pa.) 274; *Fitzgerald, etc., Constr. Co. v. Fitzgerald*, 137 U. S. 104; *Stein v. Valkenhuisen*, El. Bl. & El. 65, 96 E. C. L. 65. See in general article SERVICE OF PROCESS.

Reason of the Rule. — This remedy is not given upon the ground that, by reason of the fraud, the court did not get jurisdiction of the person of the defendant by the service, but upon the ground that the court will not exercise its jurisdiction in favor of a plaintiff who has obtained service of his summons by unlawful means. When that fact is made to appear — especially if the defendant has been guilty of no laches — the court should vindicate the integrity of its process by setting aside the service and turning the plaintiff out of court as a punishment for his gross fraud. *Townsend v. Smith*, 47 Wis. 626; *Hurlburt v. Palmer*, 39 Neb. 158.

Burden to Show Good Faith. — Where it appeared that the defendant was brought within the jurisdiction of the process by a bogus telegram, and was met by the sheriff with process to be served upon him, it devolves upon the plaintiff to show how it came to pass

rule has been made subject to the restriction that the fraudulent device must be chargeable to the plaintiff.¹

VIII. DIVESTITURE OF JURISDICTION — 1. Divestiture by Implication. — When jurisdiction is once conferred, it cannot be taken away by implication, but such a result can only be reached by express negative words or by irresistible implication from the terms of the statute.²

that the sheriff knew of the defendant's arrival, if the telegram in question was not sent at the instigation of the plaintiff. *Hevener v. Heist*, 9 Phila. (Pa.) 274.

Arrest as Pretext. — Where a criminal proceeding is begun for the purpose of seizing the body of the defendant and detaining him until civil process can be served upon him, he will be discharged on habeas corpus, *Williams v. Bacon*, 10 Wend. (N. Y.) 636; even though the offense was actually committed. *Wells v. Gurney*, 8 B. & C. 769, 15 E. C. L. 336, wherein the defendant was discharged on a rule to show cause. Or the order of arrest in such a case will be set aside. *Benninghoff v. Oswell*, 37 How. Pr. (N. Y. Supreme Ct.) 235.

General Issue with Notice of Defense. — In *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, the court said that while it was of opinion that a plea in abatement would have been the better practice for the purpose of raising the objection of a fraudulent abuse of process, yet it was not prepared to hold that such an objection could not be set up, as in this case, in a notice of defense under the general issue. See further *Steele v. Bates*, 2 Aik. (Vt.) 338, where it was intimated that a plea in abatement is the appropriate remedy.

Defense in Answer. — The objection is not that the court has not jurisdiction of the person, but that it ought not, by reason of the alleged fraud, to take or hold jurisdiction of the action, and the objection may be set up in an answer. *Hurlburt v. Palmer*, 39 Neb. 158; *Chubbuck v. Cleveland*, 37 Minn. 467 [citing *Higgins v. Beveridge*, 35 Minn. 285; *Sullivan v. Frazee*, 4 Robt. (N. Y.) 616; *Wheelock v. Lee*, 74 N. Y. 495].

Waiver of Objection. — By demurrer, petition for removal, answer and amended answer, and participation in the trial, the defendant waives all questions of the service of process. *Fitzgerald, etc., Constr. Co. v. Fitzgerald*, 137 U. S. 105.

But, on the other hand, it has been

held that an action could be maintained against persons who fraudulently procured the presence of the plaintiff so that he could be arrested for the purpose of compelling a settlement of a claim, notwithstanding the plaintiff submitted without raising the question. *Cook v. Brown*, 125 Mass. 503.

Collateral Attack. — The effect of fraud in collateral attack is not treated in this article. See *infra*, X. 3. *c. Fraud*. But see *Wood v. Wood*, 78 Ky. 628; *Dunlap v. Cody*, 31 Iowa 260; *Duringer v. Moschino*, 93 Ind. 495, in which cases the right is upheld to set up fraudulent use of process in defense to actions on judgments.

In *Arkansas*, under the Constitution of the United States, touching the faith and credit to be given records and judicial proceedings when called in question in other states, the court refused to allow such an objection, holding that there was fraud upon the jurisdiction of the court upon which the judgment was rendered which would have availed the party had he brought it to the attention of the court of the other state, or by a proceeding in equity to set aside the judgment, either in Arkansas or in the other state, but that such a fraud was no defense to an action at law on the judgment in Arkansas. *Peel v. January*, 35 Ark. 331.

1. *Steiger v. Bonn*, 3 N. J. L. J. 370.

2. *Alabama*. — *Gould v. Hayes*, 19 Ala. 438; *State v. Moore*, 19 Ala. 514.

Iowa. — *Wright v. Marsh*, 2 Greene (Iowa) 94.

Maryland. — *Rawlings v. State*, 2 Md. 201.

Michigan. — *Crane v. Reeder*, 28 Mich. 527.

Missouri. — *State v. County Ct.*, 38 Mo. 403.

North Carolina. — *Griffin v. Ing*, 3 Dev. L. (N. Car.) 358; *State v. Perry*, 71 N. Car. 526.

Pennsylvania. — *Burginhofen v. Martin*, 3 Yeates (Pa.) 479; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 363; *Kline v. Wood*, 9 S. & R. (Pa.) 294.

2. Effect of Subsequent Events. — As hereinbefore stated, the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked,¹ and if the jurisdiction once attaches to the person and subject-matter of the litigation, the subsequent happening of events, though they are of such a character as would have prevented jurisdiction from attaching in the first instance,² will not operate to oust the jurisdiction already attached. This

Tennessee. — *Murfree v. Leeper*, 1 Overt. (Tenn.) 1.

England. — *Rex v. Rochdale Canal Co.*, 6 Eng. L. & Eq. 241.

Under the constitution and laws of *Wisconsin*, the Circuit Courts had jurisdiction of all crimes and misdemeanors committed within the state which were not exclusively cognizable by a justice of the peace, and it was held that nothing but a clear declaration that it should be cognizable by some inferior court could deprive the Circuit Courts of jurisdiction of any offense created by statute. *Faust v. State*, 45 Wis. 273.

If Jurisdiction Is Conferred in All Cases, some special or particular law is requisite to exclude it in any particular case. *Boone v. Poindexter*, 12 Smed. & M. (Miss.) 648; *Com. v. White*, 8 Pick. (Mass.) 453.

Special Provisions Limiting the Power of a Court can be repealed by a general act only by the use of express words or by necessary implication, where the two acts are so manifestly repugnant to each other that both cannot stand. *People v. Board of Excise*, (City Ct.) 3 N. Y. St. Rep. 254 [*citing Callahan v. New York*, 66 N. Y. 656; *People v. Campbell*, 22 Hun (N. Y.) 574].

1. That is to say, if the court has no jurisdiction at the time, after-acquired jurisdiction will not support its action. See *supra*, II. 6. *After-acquired Jurisdiction*.

Ouster of Acquired Jurisdiction — Confusion of Principles. — In *State v. County Ct.*, 38 Mo. 402, a petition was filed in the St. Louis County Court at a time when that court had jurisdiction of the subject-matter involved. By a subsequent act another court was given jurisdiction over the particular subject-matter, but there were no express words withdrawing the jurisdiction from the court in which it first resided. The jurisdiction of the court in which the petition was filed was upheld upon the principle that the jurisdiction will not be overturned or impaired by any

legislative enactment unless prohibitory words are used. The court said: "Indeed, it has been held by high authority, and the doctrine is well supported by reason, that jurisdiction depends on the state of things at the time the action is brought; and if the circumstances be such then as to vest jurisdiction, the same cannot be ousted by any subsequent event" [*citing Koppel v. Heinrichs*, 1 Barb. (N. Y.) 449; *Mollan v. Torrance*, 9 Wheat. (U. S.) 537]. The decision is well founded on the principle first stated. See *supra*, VIII. 1. *Divestiture by Implication*. But the last principle stated is not applicable to the case presented, as the doctrine that acquired jurisdiction cannot be ousted by subsequent events has no application to the enactment of statutes depriving the courts of jurisdiction. See the next succeeding section.

2. Change of Conditions. — If the person or property over which the jurisdiction of the court has once attached is removed from that jurisdiction it will not have the effect of defeating the jurisdiction acquired. *Taylor v. Carney*, 4 Kan. 542; *Read v. Renaud*, 6 Smed. & M. (Miss.) 79; *Vicksburgh Bank v. Jennings*, 5 How. (Miss.) 425; *Tapley v. Martin*, 116 Mass. 275; *Up-ton v. New Jersey Southern R. Co.*, 25 N. J. Eq. 372; *Wilson v. Bridgeman*, 24 Tex. 615; *Whiting v. Briscoe*, Dall. (Tex.) 540; *Burns v. Belknap*, 22 Vt. 419; *Morgan v. Morgan*, 2 Wheat. (U. S.) 290; *Mollan v. Torrance*, 9 Wheat. (U. S.) 537; *Dunn v. Clarke*, 8 Pet. (U. S.) 1; *Conolly v. Taylor*, 2 Pet. (U. S.) 556; *U. S. v. Dawson*, 15 How. (U. S.) 467; *Culver v. Woodruff County*, 5 Dill. (U. S.) 392; *Gilmer v. Grand Rapids*, 16 Fed. Rep. 708.

Necessity of Pendency of Action. — In order that the rule stated in the text should apply there must be an action pending over which jurisdiction has actually vested. *Thaxter v. Hatch*, 6 McLean (U. S.) 68.

is the statement of the rule that subsequent events will never defeat jurisdiction already acquired.¹

3. By Repeal of Statute.—If an act conferring jurisdiction is repealed and the repealing act contains no saving clause, the authority of the court ceases even over cases pending.²

4. Division of County.—Where suit is properly commenced in one county, the subsequent division of that county will not divest the jurisdiction.³

1. *Estes v. Martin*, 34 Ark. 410; *Price v. State Bank*, 14 Ark. 50; *Heilman v. Martin*, 2 Ark. 168; *Koppel v. Heinrichs*, 1 Barb. (N. Y.) 449; *Robertson v. Thompson*, 3 Ind. 190; *Rhoades v. Selin*, 4 Wash. (U. S.) 725.

Nonresidence of Personal Representative.—The death of a party after jurisdiction acquired and the substitution of his representative, though such representative be a nonresident, will not affect the jurisdiction. *Upton v. New Jersey Southern R. Co.*, 25 N. J. Eq. 372; *Trigg v. Conway*, Hempst. (U. S.) 711; *Clarke v. Mathewson*, 12 Pet. (U. S.) 164.

Appointment of the Defendant as Consul to a foreign power will not operate to divest jurisdiction of his person which attached previously to his appointment. *Koppel v. Heinrichs*, 1 Barb. (N. Y.) 449.

Agreement of Parties cannot divest a court of its jurisdiction. *Muldrow v. Norris*, 2 Cal. 74; *Fahs v. Darling*, 82 Ill. 142; *Kistler v. Indianapolis*, etc., R. Co., 88 Ind. 460; *Supreme Council, etc. v. Garrigus*, 104 Ind. 133; *Louisville, etc., R. Co. v. Donnegan*, 111 Ind. 179; *Bauer v. Samson Lodge*, 102 Ind. 262; *Supreme Council, etc. v. Forsinger*, 125 Ind. 52; *Eaton*, etc., R. Co. v. Hunt, 20 Ind. 457. See further the title *Arbitration and Award*, Am. and Eng. Encyc. of Law (2d ed.), vol. 2, p. 570.

Consolidation of Suits will not defeat jurisdiction. *Mohrhardt v. S. P. & T. N. Co.*, 2 Tex. App. Civ. Cas., § 323.

Improper Amendment will not defeat jurisdiction. *Ross v. Anderson*, 1 Tex. App. Civ. Cas., § 1032.

2. *Colorado*.—*Smith v. District Ct.*, 4 Colo. 235.

Illinois.—*Kruse v. Wilson*, 79 Ill. 233.

Indiana.—*Sprigs v. State*, 2 Ind. 75; *Taylor v. State*, 7 Blackf. (Ind.) 93; *Smith v. State*, 4 Ind. 500; *Sumpter v. State*, 4 Ind. 605; *Spencer v. State*, 5 Ind. 41; *Langdon v. Applegate*, 5 Ind.

327; *Whitehurst v. State*, 43 Ind. 473; *Joseph v. Burk*, 46 Ind. 59.

Louisiana.—*Todd v. Landry*, 5 Martin (La.) 463; *Knox v. Gurnett*, 28 La. Ann. 601; *Hoyle v. New Orleans City R. Co.*, 23 La. Ann. 502; *State v. Judge*, 22 La. Ann. 565.

Massachusetts.—*Springfield v. Highway Com'rs*, 6 Pick. (Mass.) 501.

North Carolina.—*State v. Perry*, 71 N. Car. 522; *Carson v. Cleveland County*, 64 N. Car. 566.

Texas.—*Neill v. Brown*, 11 Tex. 17.

England.—*Miller's Case*, 1 W. Bl.

451.

Action Begun on Day Statute Passed.—If there be a saving clause, an action begun on the day the act was approved will be discontinued only on proof that it was begun at a later hour than that at which the act was approved. *Kennedy v. Palmer*, 6 Gray (Mass.) 316.

Divestiture of Jurisdiction After Rendition and Before Entry of Judgment.—In *Hoyle v. New Orleans City R. Co.*, 23 La. Ann. 502, it was held that the divestiture of jurisdiction on the day of the rendition of the judgment deprived the court of authority to sign the judgment.

Substantial Re-enactment of Repealed Statute.—Pending suits have been held not to be affected where the repealing act contains a substantial re-enactment of the provisions under which the suits were brought. *McMullen v. Guest*, 6 Tex. 275.

3. *Barnes v. Underwood*, 54 Ga. 87; *Buckinghouse v. Gregg*, 19 Ind. 401; *Lindsay v. McCormack*, 2 A. K. Marsh. (Ky.) 229; *U. S. v. Dawson*, 15 How. (U. S.) 486; *Culver v. Woodruff County*, 5 Dill. (U. S.) 392.

In *Hosie v. McCann*, 2 Penny. (Pa.) 133, it was held that an act which provided "that, upon the erection of any new county, as provided in said act to which this is a supplement, all local actions, originally commenced in the county from which said new county shall have been taken, but which after

IX. GENERAL RULE OF PRESUMPTIONS AS TO JURISDICTION — 1.
Courts of General Jurisdiction — a. STATEMENT OF THE RULE. —
 The general rule is that nothing shall be intended to be out of
 the jurisdiction of courts of superior general jurisdiction but that
 which especially appears to be so;¹ with such courts the record
 need not affirmatively show jurisdiction, and when silent upon
 the point, every intendment is in favor of their jurisdiction.²

the division appertain and belong to
 the territory embraced within the said
 new county, shall, upon application of
 any of the parties thereto, and the order
 of the court of the original county, or
 of a law judge thereof, be removed to
 the said new county," was not impera-
 tive in requiring any cases to be
 removed.

1. *Alabama*. — Commissioners' Ct. v.
 Thompson, 18 Ala. 694.

Georgia. — Kelsey v. Wyley, 10 Ga.
 371.

Illinois. — Nickrans v. Wilk, 161 Ill.
 76; Kenney v. Greer, 13 Ill. 441; Hunt-
 ington v. Metzger, 158 Ill. 272; Swear-
 ingen v. Gulick, 67 Ill. 208; Benefield
 v. Albert, 132 Ill. 665.

Minnesota. — Holmes v. Campbell, 12
 Minn. 221.

Missouri. — Gates v. Tusten, 89 Mo. 13.

New Hampshire. — Wingate v. Hay-
 wood, 40 N. H. 437.

North Carolina. — State v. Ledford,
 6 Ired. L. (N. Car.) 5.

Tennessee. — Hopper v. Fisher, 2
 Head (Tenn.) 253; Robertson v. Win-
 chester, 85 Tenn. 171; Posey v. Eaton,
 9 Lea (Tenn.) 500; Harris v. Hadden,
 7 Lea (Tenn.) 216; Kilcrease v. Blythe,
 6 Humph. (Tenn.) 389.

United States. — Galpin v. Page, 18
 Wall. (U. S.) 350; U. S. Bank v. Moss,
 6 How. (U. S.) 31.

England. — Peacock v. Bell, 1 Saund.
 74.

2. *California*. — Hahn v. Kelly, 34
 Cal. 402; Mahoney v. Middleton, 41
 Cal. 51; Carpentier v. Oakland, 30 Cal.
 440; Drake v. Duvenick, 45 Cal. 455;
 Matter of Eichhoff, 101 Cal. 600.

Connecticut. — Coit v. Haven, 30
 Conn. 198; Sears v. Terry, 26 Conn.
 280; Stone v. Hawkins, 56 Conn. 115.

Illinois. — The Tug Montauk v.
 Walker, 47 Ill. 336; Anderson v. Gray,
 134 Ill. 550; Nickrans v. Wilk, 161 Ill.
 76; Dunbar v. Hallowell, 34 Ill. 168;
 Pensoneau v. Heinrich, 54 Ill. 271; Os-
 good v. Blackmore, 59 Ill. 261; Wells
 v. Mason, 5 Ill. 84; Wallace v. Cox, 71
 Ill. 548.

Indiana. — Shoemaker v. South Bend
 Spark Arrester Co., 135 Ind. 471; Houk
 v. Barthold, 73 Ind. 21; Sites v. Miller,
 120 Ind. 19; Sims v. Gay, 109 Ind. 501;
 Pickering v. State, 106 Ind. 228; Mc-
 Cormick v. Webster, 89 Ind. 105;
 Walker v. Hill, 111 Ind. 223; Coan v.
 Clow, 83 Ind. 417; Iles v. Watson, 76
 Ind. 359; Anderson v. Spence, 72 Ind.
 315; Abdil v. Abdil, 33 Ind. 460; Hor-
 ner v. Doe, 1 Ind. 130; Jackson v.
 State, 104 Ind. 516; Crane v. Kimmer,
 77 Ind. 215; Young v. Wells, 97 Ind.
 410; Ragan v. Haynes, 10 Ind. 348;
 Waltz v. Borroway, 25 Ind. 380; Kin-
 naman v. Kinnaman, 71 Ind. 417;
 Bloomfield R. Co. v. Burress, 82 Ind.
 83; Bateman v. Miller, 118 Ind. 345;
 Langsdale v. Woollen, 120 Ind. 16; Ex-
 change Bank v. Ault, 102 Ind. 322;
 O'Brien v. State, 125 Ind. 38; Cassady
 v. Miller, 106 Ind. 69; Nichols v. State,
 127 Ind. 406; Quarl v. Abbett, 102
 Ind. 240; Cavanaugh v. Smith, 84 Ind.
 380; Royse v. Turnbaugh, 117 Ind.
 539.

Iowa. — Bridgman v. Wilcut, 4
 Greene (Iowa) 563; Coughran v. Gil-
 man, 81 Iowa 442; Hunger v. Barlow,
 39 Iowa 539; Seely v. Reid, 3 Greene
 (Iowa) 374; Weider v. Overton, 47 Iowa
 538; State v. Winstrand, 37 Iowa 110;
 State v. Clark, 30 Iowa 168; Cooper v.
 Sunderland, 3 Iowa 114; Morrow v.
 Weed, 4 Iowa 77. See also American
 Emigrant Co. v. Fuller, 83 Iowa 599.

Kansas. — Matter of Dill, 32 Kan.
 691; Butcher v. Brownsville Bank, 2
 Kan. 70; Dexter v. Cochran, 17 Kan.
 450; Haynes v. Cowen, 1 Kan. 637.

Michigan. — Arnold v. Nye, 23 Mich.
 286.

Minnesota. — Nye v. Swan, 42 Minn.
 243; Hersey v. Walsh, 38 Minn. 521;
 Holmes v. Campbell, 12 Minn. 221.

Missouri. — Hamer v. Cook, 118 Mo.
 476; McClanahan v. West, 100 Mo.
 309; St. Louis v. Lanigan, 97 Mo. 175;
 Schad v. Sharp, 95 Mo. 573; State v.
 Williamson, 57 Mo. 192; Schell v.
 Leiland, 45 Mo. 289; Gates v. Tusten,
 89 Mo. 13.

b. RESTRICTION TO SILENT RECORD.—This rule as to presumption of jurisdiction does not apply against an affirmative showing in the record of an entire want of jurisdiction, but is applicable only when the record is silent upon the question.

New Hampshire.—*Wingate v. Haywood*, 40 N. H. 437.

New York.—*Ray v. Rowley*, 1 Hun (N. Y.) 614; *Maples v. Mackey*, 89 N. Y. 146; *Bearns v. Gould*, 77 N. Y. 455; *Foot v. Stevens*, 17 Wend. (N. Y.) 483; *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Hart v. Seixas*, 21 Wend. (N. Y.) 40; *Wheeler v. Raymond*, 8 Cow. (N. Y.) 311; *Bolton v. Jacks*, 6 Robt. (N. Y.) 198, citing *Davis v. Packard*, 6 Wend. (N. Y.) 332.

Ohio.—*Morgan v. Burnet*, 18 Ohio 535.

Oregon.—*GrosLouis v. Northcut*, 3 Oregon 394; *Fulton v. Earhart*, 4 Oregon 61; *Tustin v. Gaunt*, 4 Oregon 305; *Strong v. Barnhart*, 6 Oregon 103.

Pennsylvania.—*Wetherill v. Stillman*, 65 Pa. St. 105.

Rhode Island.—*Slocum v. Providence Steam, etc., Co.*, 10 R. I. 112.

Tennessee.—*Pope v. Harrison*, 16 Lea (Tenn.) 82.

Texas.—*Williams v. Ball*, 52 Tex. 603; *Lawler v. White*, 27 Tex. 250; *Horan v. Wahrenberger*, 9 Tex. 314.

Vermont.—*Huntington v. Charlotte*, 15 Vt. 46.

Virginia.—*Pulaski County v. Stuart*, 28 Gratt. (Va.) 872; *Cox v. Thomas*, 9 Gratt. (Va.) 323.

Wisconsin.—*Falkner v. Guild*, 10 Wis. 563.

United States.—*Galpin v. Page*, 18 Wall. (U. S.) 350; *Harvey v. Tyler*, 2 Wall. (U. S.) 328.

England.—*Peacock v. Bell*, 1 Saund. 74.

But there are some cases which seem to hold to a narrower policy. See *Gwin v. McCarroll*, 1 Smed. & M. (Miss.) 351; *Root v. McFerrin*, 37 Miss. 45. But see further *infra*, X. 4. *c. Domestic Judgments of Courts of General Jurisdiction.*

Presumption of Notice—Jurisdiction of Person.—*Benefield v. Albert*, 132 Ill. 665; *Hawkins v. Hawkins*, 28 Ind. 66; *Quarl v. Abbett*, 102 Ind. 233; *Exchange Bank v. Ault*, 102 Ind. 322; *Waltz v. Borroway*, 25 Ind. 380; *Crane v. Kimmer*, 77 Ind. 215; *State v. Elgin*, 11 Iowa 216; *Arnold v. Nye*, 23 Mich. 286; *Hamer v. Cook*, 118 Mo. 476; *Sommermeier v. Schwartz*, 89 Wis. 66.

Presumption of jurisdiction of the person is extended so as to embrace the intendment that a party resided in a particular place. *Doran v. Davis*, 43 Iowa 86; *Barrett v. Carney*, 33 Cal. 537.

For irregularity in service of process, see article SERVICE OF PROCESS.

Publication—Personal Judgment.—

When it appears from the record that the defendants are nonresidents and have not entered an appearance or been otherwise brought before the court, personal judgments are void. *Hunt v. Ellison*, 32 Ala. 173; *Rand v. Hanson*, 154 Mass. 87; *Kimball v. Merrick*, 20 Ark. 12; *Barkman v. Hopkins*, 11 Ark. 157; *Iglehart v. Moore*, 16 Ark. 55; *McVicker v. Beedy*, 31 Me. 314; *Woodward v. Tremere*, 6 Pick. (Mass.) 354; *Wright v. Andrews*, 130 Mass. 149; *State v. Armington*, 25 Minn. 29; *Whittier v. Wendell*, 7 N. H. 257; *Downer v. Shaw*, 22 N. H. 277; *Arndt v. Arndt*, 15 Ohio 33; *Barrett v. Oppenheimer*, 12 Heisk. (Tenn.) 298; *Furgeson v. Jones*, 17 Oregon 211, holding that whenever it appears from an inspection of the record of a court of general jurisdiction that a defendant against whom a personal judgment or decree is rendered was at the time of the alleged service outside the territorial limits of the court and beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases and the burden of establishing jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree; *Stewart v. Anderson*, 70 Tex. 588.

It has also been said that proceedings by publication are not in accordance with the course of the common law, and that judgments founded on such service stand upon the same footing as those of courts of inferior and limited jurisdiction. *Bradley v. Jamison*, 46 Iowa 68; *Miller v. Corbin*, 46 Iowa 150. While, on the other hand, it is said that the question whether jurisdiction is general or special cannot be made to depend upon the character of the process. *Stewart v. Anderson*, 70 Tex. 588. See also *Hardy v. Beatty*, 84 Tex.

Therefore, if from the record it appears that the court had not jurisdiction, its action is void.¹ If the record on the whole shows that something was done to acquire jurisdiction, which was insufficient, it will not be presumed that some other thing, not shown by the record, was done which would confer jurisdiction.²

562; *Holmes v. Buckner*, 67 Tex. 107; *Williams v. Williams*, 53 Mo. App. 617. See, in general, article PUBLICATION.

The Code Has Not Changed the Rule that presumptions will be indulged in favor of the jurisdiction of courts of general jurisdiction. *Butcher v. Brownsville Bank*, 2 Kan. 70.

Location of Land in Ejectment. — The presumption has been indulged where the record in an ejectment suit did not show that the land was situated in the county where the action was brought. *Schad v. Sharp*, 95 Mo. 573. To the same effect, *Foster v. Givens*, 67 Fed. Rep. 684, 31 U. S. App. 626.

1. *California.* — *Matter of Eichhoff*, 101 Cal. 600; *Hyde v. Redding*, 74 Cal. 493; *Smith v. Los Angeles, etc., R. Co.*, (Cal. 1893) 34 Pac. Rep. 242; *Junkans v. Bergin*, 64 Cal. 203; *Pioneer Land Co. v. Maddux*, 109 Cal. 633; *Arroyo Ditch, etc., Co. v. Superior Ct.*, 92 Cal. 47; *Hahn v. Kelly*, 34 Cal. 391, which, though supporting the text, has been overruled in its broad application.

Colorado. — *Atchison, etc., R. Co. v. Nicholls*, 8 Colo. 189; *Clayton v. Clayton*, 4 Colo. 416.

Connecticut. — *Morey v. Hoyt*, 62 Conn. 554.

Georgia. — *Head v. Bridges*, 67 Ga. 238; *Hobby v. Bunch*, 83 Ga. 13.

Illinois. — *Senichka v. Lowe*, 74 Ill. 274; *Benefield v. Albert*, 132 Ill. 671; *Goudy v. Hall*, 30 Ill. 109; *Whitney v. Porter*, 23 Ill. 445; *Osgood v. Blackmore*, 59 Ill. 261; *Swearengen v. Gulick*, 67 Ill. 208.

Indiana. — *Pressley v. Harrison*, 102 Ind. 23; *White County v. Gwin*, 136 Ind. 562; *Thompson v. McCorkle*, 136 Ind. 484.

Iowa. — *Seely v. Reid*, 3 Greene (Iowa) 374.

Kansas. — *Matter of Dill*, 32 Kan. 691; *Pray v. Jenkins*, 47 Kan. 599, citing *Mastin v. Gray*, 19 Kan. 458.

Massachusetts. — *Martin v. Com.*, 1 Mass. 359; *Peters v. Peters*, 8 Cush. (Mass.) 543; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87; *Mercier v. Chace*, 9 Allen (Mass.) 242.

Michigan. — *Greenvault v. Farmers'*

etc., Bank, 2 Dougl. (Mich.) 498; *Wilson v. Arnold*, 5 Mich. 98.

Missouri. — *Presbyterian Church v. McElhinney*, 61 Mo. 540; *McClanahan v. West*, 100 Mo. 309; *Laney v. Garbee*, 105 Mo. 355; *Laney v. Sweeney*, 105 Mo. 360; *Russell v. Grant*, 122 Mo. 161.

Nebraska. — *Lininger v. Glenn*, 33 Neb. 187.

New Mexico. — *Smith v. Montoya*, 3 N. Mex. 40.

New York. — *Hart v. Seixas*, 21 Wend. (N. Y.) 40; *Corwithe v. Griffing*, 21 Barb. (N. Y.) 9; *Risley v. Phenix Bank*, 83 N. Y. 318; *Kamp v. Kamp*, 59 N. Y. 212; *Sloane v. Martin*, (Supreme Ct.) 24 N. Y. Supp. 672; *Savage v. Olmstead*, 2 Redf. (N. Y.) 478.

North Carolina. — *Williams v. Whitaker*, 110 N. Car. 393; *State v. Ridley*, 114 N. Car. 827.

Oregon. — *Hunsaker v. Coffin*, 2 Oregon 107; *Tustin v. Gaunt*, 4 Oregon 305; *Nothcut v. Lemery*, 8 Oregon 316.

Pennsylvania. — *Gordon's Appeal*, 93 Pa. St. 361.

South Carolina. — *Martin v. Bowie*, 37 S. Car. 102; *Turner v. Malone*, 24 S. Car. 401.

Tennessee. — *Pope v. Harrison*, 16 Lea (Tenn.) 82.

Texas. — *Stewart v. Anderson*, 70 Tex. 588; *Kramer v. Breedlove*, (Tex. 1887) 3 S. W. Rep. 561; *Treadway v. Eastburn*, 57 Tex. 209; *Lyne v. Sanford*, 82 Tex. 58; *Bohl v. Brown*, 2 Tex. App. Civ. Cas., § 538; *Wright v. Cullers*, 2 Tex. App. Civ. Cas., § 751; *Fitzhugh v. Custer*, 4 Tex. 301; *Parker v. Spencer*, 61 Tex. 155; *Paul v. Willis*, 69 Tex. 261; *Martin v. Cobb*, 77 Tex. 544; *Murchison v. White*, 54 Tex. 78; *Withers v. Patterson*, 27 Tex. 491.

Vermont. — *Atkinson v. Allen*, 12 Vt. 619; *Ingals v. Brooks*, 29 Vt. 401.

Virginia. — *Dillard v. Central Virginia Iron Co.*, 82 Va. 734; *Wade v. Hancock*, 76 Va. 620.

West Virginia. — *Fowler v. Lewis*, 36 W. Va. 112.

Wisconsin. — *Matter of Booth*, 3 Wis. 157; *Falkner v. Guild*, 10 Wis. 563; *Blodgett v. Hitt*, 29 Wis. 169; *Ely v. Tallman*, 14 Wis. 28.

2. *Galpin v. Page*, 18 Wall. (U. S.) 366.

the whole record being taken together for this purpose.¹

c. COURTS OF GENERAL JURISDICTION EXERCISING SPECIAL POWER. — Where a special limited jurisdiction, distinct and not embraced in the general jurisdiction — some extraordinary power not exercised according to the course of the common law — is conferred by legislation upon any tribunal, its power to act must appear upon the face of the proceedings.²

2. Courts of Inferior Jurisdiction. — No presumption is indulged in favor of the jurisdiction of inferior courts exercising special statutory powers not according to the course of the common law, but their records must affirmatively show the facts which confer jurisdiction.³

1. *Lusk v. Perkins*, 48 Ark. 238; *Bell v. Brinkmann*, 123 Mo. 271; *Rumfelt v. O'Brien*, 57 Mo. 569; *Cloud v. Pierce City*, 86 Mo. 357; *Mayfield v. Bennett*, 48 Iowa 194, holding that if the record showed only service by publication, a recital in the judgment that notice had been served upon the defendant would be regarded as meaning the service of process by publication, and the judgment would be *in rem* only, and not against the person.

Simple Extracts from the Record are not to be taken for the purpose of showing the want of jurisdiction, but the whole record must be introduced. *Howard v. Thornton*, 50 Mo. 291.

2. *Alabama*. — *Foster v. Glazener*, 27 Ala. 391; *Gunn v. Howell*, 27 Ala. 663. *California*. — *Hahn v. Kelly*, 34 Cal. 391.

Illinois. — *Haywood v. Collins*, 60 Ill. 328; *Joiner v. Drainage Com'rs*, 17 Ill. App. 607; *Gibbon v. Bryan*, 3 Ill. App. 298; *Burns v. Nash*, 23 Ill. App. 552.

Maryland. — *Boarman v. Patterson*, 1 Gill (Md.) 372; *Risewick v. Davis*, 19 Md. 91; *Bend v. Susquehanna Bridge, etc., Co.*, 6 Har. & J. (Md.) 130; *Mears v. Adreon*, 31 Md. 232.

Mississippi. — *Root v. McFerrin*, 37 Miss. 1.

Missouri. — *Sedalia v. Missouri, etc.*, R. Co., 17 Mo. App. 105; *Werz v. Werz*, 11 Mo. App. 26.

New Hampshire. — *Morse v. Presby*, 25 N. H. 299; *Eaton v. Badger*, 33 N. H. 228.

New York. — *Foot v. Stevens*, 17 Wend. (N. Y.) 488, *distinguishing* *Denning v. Corwin*, 11 Wend. (N. Y.) 647.

Ohio. — *Adams v. Jeffries*, 12 Ohio 272.

Oregon. — *Johns v. Marion County*, 4 Oregon 46; *Odell v. Campbell*, 9 Ore-

gon 298; *Northcut v. Lemery*, 8 Oregon 316.

Texas. — *Williams v. Ball*, 52 Tex. 603.

Virginia. — *Pulaski County v. Stuart*, 28 Gratt. (Va.) 874.

United States. — *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

See *supra*, V. 2. *Distinction Between Courts of General and Inferior Jurisdiction*.

On the other hand, it is held that a judgment is not void if the subject-matter of the suit is one of the class over which the court has jurisdiction, though not all statutory requirements are complied with. *Jackson v. Smith*, 120 Ind. 520. See also *Diehl v. Page*, 3 N. J. Eq. 143; *Maxwell v. Pittenger*, 3 N. J. Eq. 156.

Special Jurisdiction Confided to a Judge.

— Although the judge may preside over a court of general jurisdiction, he must strictly pursue the special jurisdiction, and the facts which justify its exercise must appear upon the face of the warrant issued thereunder. *McCoy v. Zane*, 65 Mo. 11.

Distinction Between Judicial and Ministerial Acts.

— In *Pulaski County v. Stuart*, 28 Gratt. (Va.) 874, a distinction is drawn between ministerial and judicial acts, recognizing a like distinction made in *Dinwiddie County v. Stuart*, 28 Gratt. (Va.) 530, and *Ballard v. Thomas*, 19 Gratt. (Va.) 14. See also *Chesterfield County v. Hall*, 80 Va. 322.

3. *Alabama*. — *Commissioner's Ct. v. Thompson*, 18 Ala. 694; *Bates v. Planters', etc., Bank*, 8 Port. (Ala.) 99; *Levert v. Planters', etc., Bank*, 8 Port. (Ala.) 104; *Lister v. Vivian*, 8 Port. (Ala.) 375; *Taliferro v. Bassett*, 3 Ala. 670; *Owen v. Jordan*, 27 Ala. 608; *Nowlin v. McCalley*, 31 Ala. 678.

Arkansas. — *McClure v. Hill*, 36 Ark. 268.

3. Pleading Jurisdictional Facts — Same Distinctions. — A declaration or complaint in a court of general jurisdiction need not bring the case within the jurisdiction of the court or allege facts showing jurisdiction of such a court rendering a judgment pleaded,

California. — *Keybers v. McComber*, 67 Cal. 395; *Jolley v. Foltz*, 34 Cal. 321; *King v. Randlett*, 33 Cal. 318; *Swain v. Chase*, 12 Cal. 285; *Van Etten v. Jilson*, 6 Cal. 19; *Whitwell v. Barbier*, 7 Cal. 54; *Hahn v. Kelly*, 34 Cal. 409; *Doll v. Feller*, 16 Cal. 432; *Lowe v. Alexander*, 15 Cal. 296.

Connecticut. — *Sears v. Terry*, 26 Conn. 282.

Delaware. — *Carey v. Russel*, 2 Harr. (Del.) 280.

Florida. — *McGehee v. Wilkins*, 31 Fla. 83; *Hays v. McNealy*, 16 Fla. 409; *Donald v. McKinnon*, 17 Fla. 746; *Jacksonville v. L'Engle*, 20 Fla. 344; *Epping v. Robinson*, 21 Fla. 36.

Georgia. — *Gray v. McNeal*, 12 Ga. 424; *Perkins v. Attaway*, 14 Ga. 27.

Illinois. — *Kenney v. Greer*, 13 Ill. 441; *Dowling v. Stewart*, 4 Ill. 193; *Trader v. McKee*, 2 Ill. 558; *Wells v. Mason*, 5 Ill. 84; *Galena, etc., R. Co. v. Pound*, 22 Ill. 399; *White v. Prim*, 36 Ill. 416; *Shufeldt v. Buckley*, 45 Ill. 223; *Spooner v. Warner*, 2 Ill. App. 240.

Indiana. — *Smith v. Clausmeier*, 136 Ind. 115; *Jolly v. Ghering*, 40 Ind. 139; *Nicholson v. Stephens*, 47 Ind. 186; *Wilkinson v. Moore*, 79 Ind. 400; *Newman v. Manning*, 89 Ind. 422.

Iowa. — *Mills County v. Hamaker*, 11 Iowa 206; *State v. Waterman*, 79 Iowa 360; *Rowan v. Lamb*, 4 Greene (Iowa) 468; *Goodrich v. Brown*, 30 Iowa 291; *Tiffany v. Glover*, 3 Greene (Iowa) 387; *Cooper v. Sunderland*, 3 Iowa 114; *Morrow v. Weed*, 4 Iowa 77.

Maryland. — *Fahey v. Mottu*, 67 Md. 250.

Michigan. — *Goodrich v. Burdick*, 26 Mich. 39; *Platt v. Stewart*, 10 Mich. 260; *Chandler v. Nash*, 5 Mich. 409; *Gadsby v. Stimer*, 79 Mich. 260; *Denison v. Smith*, 33 Mich. 155; *Rash v. Whitney*, 4 Mich. 495; *Weight v. Warner*, 1 Dougl. (Mich.) 384; *Saunders v. Tioga Mfg. Co.*, 27 Mich. 520.

Minnesota. — *Ullman v. Lion*, 8 Minn. 381.

Mississippi. — *Saffarans v. Terry*, 12 Smed. & M. (Miss.) 690; *Byrd v. State*, 1 How. (Miss.) 163.

Missouri. — *Wise v. Loring*, 54 Mo. App. 258; *McCloon v. Beattie*, 46 Mo. 391; *Edmonson v. Kite*, 43 Mo. 176;

State v. Metzger, 26 Mo. 65; *Hansberger v. Pacific R. Co.*, 43 Mo. 196; *Schell v. Leland*, 45 Mo. 289; *Iba v. Hannibal, etc., R. Co.*, 45 Mo. 469; *State v. St. Louis*, 1 Mo. App. 503; *Cunningham v. Pacific R. Co.*, 61 Mo. 33; *Gibson v. Vaughan*, 61 Mo. 418; *Haggard v. Atlantic, etc., R. Co.*, 63 Mo. 302; *Rohland v. St. Louis, etc., R. Co.*, 89 Mo. 180.

Montana. — *Deer Lodge County v. At*, 3 Mont. 171.

New Hampshire. — *Eastern R. Co. v. Concord, etc., R. Co.*, 47 N. H. 111; *Manning v. Cogan*, 49 N. H. 338; *Goulding v. Clark*, 34 N. H. 148.

New Jersey. — *State v. Van Geison*, 15 N. J. L. 339; *New-Jersey R., etc., Co. v. Suydam*, 17 N. J. L. 25; *State v. Williamstown, etc., Turnpike Co.*, 24 N. J. L. 547; *State v. Van Winkle*, 25 N. J. L. 73; *Bergen Turnpike Co. v. State*, 25 N. J. L. 554; *State v. Lord*, 26 N. J. L. 140; *Nixon v. Ruple*, 30 N. J. L. 58; *State v. Jersey City*, 36 N. J. L. 188; *State v. Union*, 32 N. J. L. 343; *Hopper v. Chamberlain*, 34 N. J. L. 220; *Perrine v. Farr*, 22 N. J. L. 356; *Snediker v. Quick*, 13 N. J. L. 306.

New York. — *Jones v. Reed*, 1 Johns. Cas. (N. Y.) 20; *Brown v. Cady*, 19 Wend. (N. Y.) 477; *Frees v. Ford*, 6 N. Y. 176; *Mills v. Martin*, 19 Johns. (N. Y.) 33.

North Carolina. — *State v. Magness*, 4 Ired. L. (N. Car.) 217.

Ohio. — *Edmiston v. Edmiston*, 2 Ohio 251.

Oregon. — *State v. Officer*, 4 Oregon 183; *Thompson v. Multnomah County*, 2 Oregon 35; *Johns v. Marion County*, 4 Oregon 46; *Dick v. Wilson*, 10 Oregon 490.

Tennessee. — *Hopper v. Fisher*, 2 Head (Tenn.) 253; *Brien v. Hart*, 6 Humph. (Tenn.) 131; *Kilcrease v. Blythe*, 6 Humph. (Tenn.) 378.

Texas. — *Bohl v. Brown*, 2 Tex. App. Civ. Cas., § 539; *Walker v. Myers*, 36 Tex. 203 [citing *Horan v. Wahrenberger*, 9 Tex. 313; *Mitchell v. Runkle*, 25 Tex. Supp. 136; *Easley v. McClinton*, 33 Tex. 288; *Withers v. Patterson*, 27 Tex. 491].

Utah. — *Matter of Wiseman*, 1 Utah

courts of this character having cognizance of all causes not shown to be within the exclusive jurisdiction of other courts;¹ but it is otherwise when the proceeding is in an inferior court of limited jurisdiction.²

Facts to Be Averred. — Where the gist of an action or defense depends upon the proceedings of an inferior court of limited jurisdiction, it is not sufficient to aver generally that such court had jurisdiction, but such facts must be averred and set forth as will show upon the record that jurisdiction existed,³ except where by statute it is sufficient to aver jurisdiction generally or that the judgment was duly rendered.⁴

Vermont. — *Hewes v. Andover*, 16 Vt. 510.

Virginia. — *Western Union Tel. Co. v. Bright*, 90 Va. 778.

West Virginia. — *Mayer v. Adams*, 27 W. Va. 245.

Wisconsin. — *Crawford County v. Le Clerc*, 4 Chand. (Wis.) 56.

United States. — *Galpin v. Page*, 18 Wall. (U. S.) 350; *U. S. Bank v. Moss*, 6 How. (U. S.) 31; *Kemp v. Kennedy*, Pet. (C. C.) 30, 5 Cranch (U. S.) 173.

This statement of the general rule should also be considered in connection with the section *supra*, V. 2. *Distinction Between Courts of General and Inferior Jurisdiction.*

In an early case in *Mississippi* it was indicated that the rule requiring the record of courts of special jurisdiction to contain the facts which show the jurisdiction applies only to the subject-matter, and not to the jurisdiction of the person. *Cason v. Cason*, 31 Miss. 578. But this distinction does not seem to have been recognized in other cases. *Gray v. McNeal*, 12 Ga. 424; *Denison v. Smith*, 33 Mich. 155; *Fahey v. Mottu*, 67 Md. 250, and see cases cited generally in this note.

How Made to Appear. — The jurisdiction may appear in any part of the record, *Galena, etc., R. Co. v. Pound*, 22 Ill. 414; and there is no particular form in which it should be made to appear. *Rowan v. Lamb*, 4 Greene (Iowa) 475.

1. *California.* — *Doll v. Feller*, 16 Cal. 432; *Campe v. Lassen*, 67 Cal. 139.

Indiana. — *Bass Foundry, etc., Works v. Parke County*, 115 Ind. 240; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Hancock County v. Leggett*, 115 Ind. 547; *Brownfield v. Weicht*, 9 Ind. 394; *Ragan v. Haynes*, 10 Ind. 348; *Godfrey v. Godfrey*, 17 Ind. 6; *Loeb v.*

Mathis, 37 Ind. 306; *Hyatt v. Cochran*, 69 Ind. 436; *Shewalter v. Bergman*, 123 Ind. 157; *Chapell v. Shuee*, 117 Ind. 485.

Kansas. — *Bohart v. Republic Invest. Co.*, 49 Kan. 94; *Butcher v. Brownsville Bank*, 2 Kan. 76.

New Hampshire. — *Flanders v. Atkinson*, 18 N. H. 167.

Pennsylvania. — *Grier's Appeal*, 25 Pa. St. 352.

New York. — *Spencer v. Rogers Locomotive, etc., Works*, 8 Bosw. (N. Y.) 612; *Wheeler v. Raymond*, 8 Cow. (N. Y.) 314.

2. *Doll v. Feller*, 16 Cal. 432; *Lowe v. Alexander*, 15 Cal. 296; *Learned v. Tritch*, 6 Colo. 433; *Haggard v. Atlantic, etc., R. Co.*, 63 Mo. 302; *Judge v. Hall*, 5 Lans. (N. Y.) 69; *Frees v. Ford*, 6 N. Y. 176; *Hill v. Pride*, 4 Call. (Va.) 107; *Coningsby's Case*, 9 Mod. 95.

Everything which the statute prescribes must be alleged. *In re Grove St.*, 61 Cal. 453; *People v. Spencer*, 55 N. Y. 1; *Avery v. Hope*, 78 N. Y. 609; *People v. Smith*, 55 N. Y. 135; *Wellsborough v. New York, etc., R. Co.*, 76 N. Y. 182; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; *Craig v. Andes*, 93 N. Y. 405.

When a judicial tribunal has not general jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially pleaded and established. *Bumstead v. Read*, 31 Barb. (N. Y.) 661; *Stone v. Miller*, 62 Barb. (N. Y.) 430.

3. *Wells v. Mason*, 5 Ill. 89; *Clark v. Norton*, 6 Minn. 412; *Sears v. Terry*, 26 Conn. 282; *Barrett v. Crane*, 16 Vt. 246; *Ford v. Babcock*, 1 Den. (N. Y.) 158; *Turner v. Roby*, 3 N. Y. 193; *Van Etten v. Hurst*, 6 Hill (N. Y.) 311.

4. See article JUDGMENTS, vol. 11, p.

X. OBJECTIONS TO JURISDICTION — 1. Effect of Want of Jurisdiction in General — Abatement. — A writ which is insufficient to confer jurisdiction may be abated.¹

Judgments Absolutely Void. — It is an elementary principle, recognized in all the cases, that to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as of the subject-matter, and that a judgment which appears upon the face of the record to have been rendered without jurisdiction of the subject-matter or of the person, or which may be shown to have been so rendered in cases where evidence upon the question is admissible, is absolutely void, no matter in what proceeding or in what action it may thereafter be set up or relied upon.²

1. *Mansur v. Coffin*, 54 Me. 314.

So, if a writ issues from a court having no authority to issue it, it is void and will be abated, and the appearance and answer of the party cannot confer jurisdiction. *Osgood v. Thurston*, 23 Pick. (Mass.) 110. See also *Ingalls v. Richardson*, 3 Met. (Mass.) 340.

2. *Alabama*. — *McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504; *Lamar v. Commissioner's Ct.*, 21 Ala. 772.

Arkansas. — *Grimmett v. Askew*, 48 Ark. 151; *Jordan v. Jennings*, 7 Ark. 95; *Borden v. State*, 11 Ark. 519; *Hall v. Fowlks*, 8 Ark. 176; *Ex p. Pile*, 9 Ark. 337; *Danley v. Rector*, 10 Ark. 225; *McLain v. Taylor*, 9 Ark. 362; *Pelham v. Page*, 6 Ark. 148; *McKnight v. Smith*, 5 Ark. 409.

California. — *Ex p. Hollis*, 59 Cal. 407; *People v. O'Neil*, 47 Cal. 110; *Hahn v. Kelly*, 34 Cal. 391; *Fraser v. Freelon*, 53 Cal. 644; *Gray v. Hawes*, 8 Cal. 562; *McMinn v. Whelan*, 27 Cal. 300; *Whitwell v. Barbier*, 7 Cal. 54.

Colorado. — *Clayton v. Clayton*, 4 Colo. 410.

Connecticut. — *Holcomb v. Phelps*, 16 Conn. 137; *Sears v. Terry*, 26 Conn. 280; *Grummon v. Raymond*, 1 Conn. 44; *Strong v. Strong*, 8 Conn. 412; *Sears v. Terry*, 26 Conn. 280.

Florida. — *McGehee v. Wilkins*, 31 Fla. 83.

Georgia. — *Towns v. Springer*, 9 Ga. 130; *Beverly v. Burke*, 9 Ga. 440.

Illinois. — *Dickey v. Chicago*, 152 Ill. 468; *Johnson v. Logan*, 68 Ill. 313; *McCartney v. Osburn*, 118 Ill. 403; *Munroe v. People*, 102 Ill. 406; *Miller v. Handy*, 40 Ill. 448; *Huls v. Buntin*, 47 Ill. 396; *Bannon v. People*, 1 Ill. App. 497.

Indiana. — *Bliss v. Wilson*, 4 Blackf. (Ind.) 169; *Smith v. Myers*, 5 Blackf. (Ind.) 223; *Wort v. Finley*, 8 Blackf. (Ind.) 335; *Horner v. Doe*, 1 Ind. 130; *Mitchell v. Gray*, 18 Ind. 123; *Bryan v. Blythe*, 4 Blackf. (Ind.) 250; *Babbitt v. Doe*, 4 Ind. 355.

Iowa. — *Seely v. Reid*, 3 Greene (Iowa) 374; *Clark v. Little*, 41 Iowa 497; *Reed v. Wright*, 2 Greene (Iowa) 15; *Melhop v. Doane*, 31 Iowa 397; *Kline v. Kline*, 57 Iowa 386; *Scott v. Babcock*, 3 Greene (Iowa) 133; *Osborn v. Cloud*, 23 Iowa 104.

Kansas. — *Hargis v. Morse*, 7 Kan. 415; *Butcher v. Brownsville Bank*, 2 Kan. 70; *Matter of Dill*, 32 Kan. 691; *Looney v. Reeves*, 5 Kan. App. 279.

Kentucky. — *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453.

Louisiana. — *Edwards v. Edwards*, 21 La. Ann. 611.

Maine. — *Lovejoy v. Albee*, 33 Me. 414.

Maryland. — *Dorsey v. Garey*, 30 Md. 489; *Cockey v. Cole*, 28 Md. 276; *Clark v. Bryan*, 16 Md. 171; *Baltimore v. Porter*, 18 Md. 284.

Michigan. — *Greenvault v. Farmers', etc.*, Bank, 2 Dougl. (Mich.) 498; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Montgomery v. Henry*, 10 Mich. 19; *Ehlers v. Stoeckle*, 37 Mich. 260; *Willard v. Fralick*, 31 Mich. 431; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Buck v. Sherman*, 2 Dougl. (Mich.) 176; *Durfee v. Abbott*, 50 Mich. 279; *Eberstein v. Oswalt*, 47 Mich. 254; *Hamilton v. Rogers*, 67 Mich. 135; *Perkins v. Perkins*, 16 Mich. 162; *Jewett v. Morris*, 41 Mich. 689; *Noyes v. Hillier*, 65 Mich. 636; *Austin v. Curtis*, 41 Mich. 723.

Mississippi. — *Campbell v. Brown*, 6

There is no difference of opinion as to this general rule, but the point of difficulty is as to the manner in which this want of jurisdiction must be made to appear, especially in the case of a judgment of a domestic court of general jurisdiction, acting in the exercise of its general powers, when it comes in question in a collateral action.¹

2. Objections in the Action or Suit — a. ORIGINAL RIGHT AND DUTY TO DECIDE. — As a general rule, the right and duty to

How. (Miss.) 106, 230; *Brown v. Levee Com'rs*, 50 Miss. 468; *Ex p. Wimberly*, 57 Miss. 438; *Gwin v. McCarroll*, 1 Smed. & M. (Miss.) 351; *Ex p. Heyfron*, 7 How. (Miss.) 127; *Prentiss v. Mellen*, 1 Smed. & M. (Miss.) 521; *Zecharie v. Bowers*, 1 Smed. & M. (Miss.) 584, 3 Smed. & M. (Miss.) 641; *Enos v. Smith*, 7 Smed. & M. (Miss.) 85; *Jenkins v. State*, 33 Miss. 382; *Foute v. McDonald*, 27 Miss. 610; *Commercial Bank v. Martin*, 9 Smed. & M. (Miss.) 613.

Missouri. — *Stamps v. Bridwell*, 57 Mo. 22; *Brown v. Woody*, 64 Mo. 547; *Fischer v. Siekmann*, 125 Mo. 165; *Hewitt v. Weatherby*, 57 Mo. 276; *State v. St. Louis*, 1 Mo. App. 503.

New Hampshire. — *Smith v. Knowlton*, 11 N. H. 191; *Kittredge v. Emerson*, 15 N. H. 227; *Morse v. Presby*, 25 N. H. 299; *State v. Richmond*, 26 N. H. 232; *Nichols v. Smith*, 26 N. H. 300; *Gay v. Smith*, 38 N. H. 174; *Eastman v. Dearborn*, 63 N. H. 364.

New York. — *Bloom v. Burdick*, 1 Hill (N. Y.) 130; *Lange v. Benedict*, 73 N. Y. 12; *Mills v. Martin*, 19 Johns. (N. Y.) 33; *Latham v. Edgerton*, 9 Cow. (N. Y.) 227.

North Carolina. — *Armstrong v. Harshaw*, 1 Dev. L. (N. Car.) 187; *Skinner v. Moore*, 2 Dev. & B. L. (N. Car.) 138; *Burke v. Elliott*, 4 Ired. L. (N. Car.) 355; *Deaver v. Keith*, 5 Ired. L. (N. Car.) 374; *Stallings v. Gully*, 3 Jones L. (N. Car.) 344; *Spillman v. Williams*, 91 N. Car. 483; *Stancill v. Gay*, 92 N. Car. 462; *McKee v. Angel*, 90 N. Car. 60; *Matter of Ambrose*, Phil. L. (N. Car.) 91; *Perry v. Mendenhall*, 4 Jones Eq. (N. Car.) 157.

Ohio. — *Sheldon v. Newton*, 3 Ohio St. 499; *Gilliland v. Sellers*, 2 Ohio St. 223; *Dayton, etc., R. Co. v. Marshall*, 11 Ohio St. 501; *Buchanan v. Roy*, 2 Ohio St. 251; *Spoors v. Coen*, 44 Ohio St. 497.

Oregon. — *Woodward v. Baker*, 10 Oregon 493.

Pennsylvania. — *Fowler v. Eddy*, 110 Pa. St. 117.

South Carolina. — *Turner v. Malone*, 24 S. Car. 401; *James v. Smith*, 2 S. Car. 188.

Texas. — *Tulane v. McKee*, 10 Tex. 335; *Glass v. Smith*, 66 Tex. 548; *Mitchell v. Runkle*, 25 Tex. Supp. 132; *Fleming v. Nall*, 1 Tex. 250; *Horan v. Wahrenberger*, 9 Tex. 313; *Foster v. Andrews*, 4 Tex. Civ. App. 429; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Morris v. Halbert*, 36 Tex. 19; *Harris v. Graves*, 26 Tex. 577; *Galveston, etc., R. Co. v. McTigue*, 1 Tex. App. Civ. Cas., § 457; *Witt v. Kaufman*, 25 Tex. Supp. 384.

Utah. — *Ducheneau v. Ireland*, 5 Utah 110.

Vermont. — *Clark v. Freeman*, 5 Vt. 122; *Vaughn v. Congdon*, 56 Vt. 111, which is a very strong case; *Collamer v. Page*, 35 Vt. 387.

Virginia. — *Wade v. Hancock*, 76 Va. 620; *Dorr v. Rohr*, 82 Va. 359; *Blanton v. Carroll*, 86 Va. 539.

Wisconsin. — *Rape v. Heaton*, 9 Wis. 328; *Falkner v. Guild*, 10 Wis. 563; *Fladland v. Delaplaine*, 19 Wis. 460.

United States. — *Elliott v. Peirsol*, 1 Pet. (U. S.) 328; *Thompson v. Tolmie*, 2 Pet. (U. S.) 163; *Shriver v. Lynn*, 2 How. (U. S.) 43; *Westerwelt v. Lewis*, 2 McLean (U. S.) 511; *Lincoln v. Tower*, 2 McLean (U. S.) 473; *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 466; *Shelton v. Tiffin*, 6 How. (U. S.) 163; *Murray v. American Surety Co.*, 70 Fed. Rep. 341; *Moore v. Edgefield*, 32 Fed. Rep. 498.

England. — *Ex p. Kinning*, 4 C. B. 525, 56 E. C. L. 525; *Ferguson v. Mahon*, 11 Ad. & El. 179, 39 E. C. L. 38; *Buchanan v. Rucker*, 9 East 192; *Perkin v. Proctor*, 2 Wils. 383.

1. See *infra*, X. 4. *Conclusiveness of Presumption of Jurisdiction*; and X. 5. *Judgments of Sister States and Foreign Judgments*.

decide questions of jurisdiction rest in the first instance in the court whose powers are invoked.¹

b. NATURE OF PLEA. — A plea to the jurisdiction is the first plea in the regular order of pleading on the part of the defendant. It is analogous to a plea in abatement, and if the defendant files

1. *California*. — *Clary v. Hoagland*, 6 Cal. 685.

Indiana. — *Huber v. Beck*, 6 Ind. App. 47.

Louisiana. — *Brooks v. Montgomery*, 23 La. Ann. 450; *State v. Hudspeth*, 38 La. Ann. 97.

New York. — *King v. Poole*, 36 Barb. (N. Y.) 242.

Pennsylvania. — *Silver v. Schuylkill County*, 32 Pa. St. 356.

South Carolina. — *State v. Scott*, 1 Bailey L. (S. Car.) 294.

Tennessee. — *Kendrick v. M'Quary*, *Cooke* (Tenn.) 480.

Texas. — *Lindsey v. Lockett*, 20 Tex. 516; *Griffin v. Brown*, 1 Tex. App. Civ. Cas., § 1098.

Wisconsin. — *Matter of Booth*, 3 Wis. 1; *Pollard v. Wegener*, 13 Wis. 569.

See also *supra*, I. 1. *Definition*.

The First Point Decided by Any Court, although it may not be in terms, is that the court has jurisdiction, otherwise it would not proceed to determine the rights of the parties. *Clary v. Hoagland*, 6 Cal. 688. The same is true of a court of last resort. *Van Matre v. Sankey*, 148 Ill. 536.

Issue on Pleadings. — In *Burckle v. Eckhart*, 3 N. Y. 132, it is said that where a particular matter, essential to jurisdiction, is averred by one party, it may be admitted or denied by the other party. When denied, it must be determined by the court upon proof, like any other question of fact. It is the matter of which the record and proof are evidence which is the ground of jurisdiction. *Brown v. Snell*, 57 N. Y. 302.

When there is no issue, under the pleadings, which involves the question of the jurisdiction of the court, that question ought not to be left to the jury. As the pleadings stand, the verdict would operate as a complete bar to any subsequent action by the plaintiff; whereas, if, upon proper pleadings, the finding against him was the result of want of jurisdiction, he would still have his right of action in another court. *Fairbanks v. Woodhouse*, 6 Cal. 433.

By the Affirmation of a Decree a court of last resort thereby determines its own jurisdiction. *Van Matre v. Sankey*, 148 Ill. 536.

Statutory Provisions may change this rule in particular cases. For example, in *Yarborough v. Downes*, 1 Tex. App. Civ. Cas., § 675, it was held that the jurisdiction of the court to try the right of property is determined by the court from which the writ of execution issues. But, under Rev. Stat. Tex., § 4831, it is the assessed value of the property seized by the officer and claimed by the third party, as shown by the officer's return, which determines the jurisdiction. *Harris v. Hood*, 1 Tex. App. Civ. Cas., § 573.

Ecclesiastical Courts. — In *Chase v. Cheney*, 58 Ill. 509, it was held that the decision of an ecclesiastical court upon an ecclesiastical matter as to its own jurisdiction was conclusive upon the civil courts. Thornton, J., writing the opinion of the majority of the court, said: "The civil courts will interfere with churches or religious associations when rights of property or civil rights are involved; but they will not revise the decisions of such associations upon ecclesiastical matters, merely to ascertain their jurisdiction." See also *State v. Farris*, 45 Mo. 185. In *Watson v. Jones*, 13 Wall. (U. S.) 733, Mr. Justice Miller expresses the same opinion. Reviewing these decisions, Earl, C., in *Connitt v. Reformed Protestant Dutch Church*, 54 N. Y. 561, said: "While I am not prepared to assent fully to the views of these learned judges, yet I am of opinion that in all cases of doubt, when there is not clearly an absence of jurisdiction, the decisions of church judicatories as to their own jurisdiction in ecclesiastical matters should receive great weight." See also *Watson v. Avery*, 2 Bush (Ky.) 332.

On Appeal, the facts not appearing, the action of the court in determining a jurisdictional question will not be inquired into or disturbed. *Graves v. Bonham First Nat. Bank*, 77 Tex. 555; *Gouhenan v. Anderson*, 20 Tex. 459; *Chrisman v. Graham*, 51 Tex. 454;

any other plea, like the general issue, it is waived, as a plea of the general issue confesses jurisdiction.¹

Averments — Certainty. — It is a rule of pleading that a plea to the jurisdiction of a court of general jurisdiction must aver facts showing the absence of jurisdiction, and must be certain in every particular. In other words, the defendant must, by his plea, show that the court has no jurisdiction in any event.²

c. JURISDICTION OF THE PERSON — MANNER OF RAISING OBJECTION. — A general appearance confers jurisdiction of the person,³ and if the defendant would object to the jurisdiction of

Griffin v. Brown, 1 Tex. App. Civ. Cas., § 1098; *Knox County Mut. Ins. Co. v. Bowersox*, 6 Ohio Cir. Ct. Rep. 275; *Riggins v. O'Brien*, 34 Mo. App. 613; *Wright v. U. S.*, 158 U. S. 232.

1. *Lyman v. Central Vermont R. Co.*, 59 Vt. 167, citing *Gould's Pl.*, c. 5, § 13; c. 2, § 37. See also *Waterman v. Tuttle*, 18 Ill. 292; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 16.

Prayer. — A plea to the jurisdiction concludes with the prayer "whether the court will or ought to take further cognizance of the plea aforesaid," and in that respect it differs from those which are, strictly speaking, pleas in abatement for matters existing at the time of the action brought. *Mosely v. Hunter*, 3 Ired. L. (N. Car.) 543; *Hortons v. Townes*, 6 Leigh (Va.) 47; *State v. Scott*, 1 Bailey L. (S. Car.) 294.

Oath. — A plea to the jurisdiction is a dilatory plea, and, raising objections not appearing on the record, should be sworn to. *Bass v. Stevens*, 17 Ga. 573; *Storm v. Worland*, 19 Ind. 203; *Ludwick v. Beckamlre*, 15 Ind. 198.

Not by Attorney. — The plea should be by the defendant in his own proper person and not by attorney. *Hortons v. Townes*, 6 Leigh (Va.) 47.

2. *Diblee v. Davison*, 25 Ill. 486; *Moseley v. Hunter*, 3 Ired. L. (N. Car.) 543.

Necessity of Showing Court of Competent Jurisdiction. — It is said to be well settled in the courts of England and the United States that all pleas to the jurisdiction of a superior court must not only show such facts as take the case out of the jurisdiction, but also that there is some other court in which effective justice may be administered, because if there is no other place or mode of trial, that fact alone will give the superior courts jurisdiction. *Heilman v. Martin*, 2 Ark. 163 [citing *Law-*

rence v. Smith, 5 Mass. 362; *Rea v. Hayden*, 3 Mass. 24]; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718.

Jurisdiction of the Person. — A plea to the jurisdiction of the person need not show a court which has jurisdiction. *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170.

But the rule requiring a plea to give a better writ is applied where the jurisdiction is to the person in cases where the objection is based upon the place of bringing suit, dependent upon residence of the parties. *Lester v. Stevens*, 29 Ill. 155; *McKie v. Echols*, 1 Tex. App. Civ. Cas., § 1282; *Dunlap v. Turner*, 64 Ill. 47; *Jones v. Winchester*, 6 N. H. 497.

A plea to the jurisdiction that the defendant was an inhabitant of a county other than the one in which the suit was brought, is bad because it does not expressly aver that the defendant did not reside in the county in which the suit was brought, but only stated the fact argumentatively. *Moseley v. Hunter*, 3 Ired. L. (N. Car.) 543.

Several Causes of Action. — A plea in abatement should be directed only to the cause of which the court has no jurisdiction, because if several causes of action are stated in the different counts of the declaration, the court may proceed with those over which it has jurisdiction. *Diblee v. Davison*, 25 Ill. 486.

3. *Taggart v. Ratts*, 117 Ind. 138; *Kaw L. Assoc. v. Lemke*, 40 Kan. 142; *Meixell v. Kirkpatrick*, 29 Kan. 679; *Mahaney v. Penman*, 4 Duer (N. Y.) 603; *Reed v. Chilson*, (Supreme Ct.) 16 N. Y. Supp. 744, affirmed in 142 N. Y. 152; *Gray v. Gates*, 37 Wis. 614; *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556. See, for a full collection of cases upon this subject, article APPEARANCES, vol. 2, p. 639 et seq.

the court over his person, as for want of due service of process or irregularity therein, he must do so *in limine* by plea in abatement where it is necessary to plead any matter of fact on which his objection is founded, and before answering to the merits.¹

A General Demurrer, being regarded as a plea in bar to the action itself, precludes the privilege of pleading the jurisdiction of the court over the person. *Hellman v. Martin*, 2 Ark. 163; *Dillard v. Noel*, 2 Ark. 449; *Stevens v. Harris*, 99 Mich. 230; *Thompson v. Michigan Mut. Ben. Assoc.*, 52 Mich. 522; *Jolly v. Pryor*, 12 Tex. Civ. App. 149.

Demurrer to a Bill because it shows no equity waives objection to jurisdiction of the person, and such objection must be taken by plea. *Bellows Falls Bank v. Rutland, etc.*, R. Co., 28 Vt. 470.

Special Appearance. — In order to object to the want of jurisdiction over the person, the defendant should appear specially for that purpose. *Baily v. Schrader*, 34 Ind. 260; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 505; *Carver v. Shelly*, 17 Kan. 474; *Beckwith v. Douglas*, 25 Kan. 232; *Harkness v. Hyde*, 98 U. S. 476. See particularly, in connection with this question, article APPEARANCES, vol. 2, p. 620 *et seq.*

After Plea in Abatement on Other Grounds Withdrawn. — It has been held that a plea in abatement to the jurisdiction cannot be considered after a plea in abatement has been interposed for a nonjoinder of parties and thereafter withdrawn. *Peters v. Finney*, 12 Smed. & M. (Miss.) 449.

Judgment by Default. — Where a person is beyond the reach of the process of the court, and is exempt from the service of a civil process emanating from that court, he is not bound to appear and plead privilege in abatement. *Turrill v. Walker*, 4 Mich. 184, *citing* *Buchanan v. Rucker*, 9 East 192. And he is not chargeable on his default, and a judgment on such default is erroneous. *Brown v. Webber*, 6 Cush. (Mass.) 565; *Debs v. Dalton*, 7 Ind. App. 84. And he may have his remedy by error, certiorari, review, *audita querela*, or motion to quash or dismiss, according to the kind of action and form of proceeding. *Brown v. Webber*, 6 Cush. (Mass.) 563.

But, it was decided in *Heffner v. Lynch*, 21 Md. 552, that judgment by default is conclusive of the question

of jurisdiction and of the power of the court to enter final judgment for the amount ascertained by the inquisition to be due. That decision, however, did not proceed upon the idea that the parties can confer jurisdiction by consent, but that on judgment by default the question of jurisdiction is not open. Where the case, as presented by the *narr.*, is one within the jurisdiction of the court, and judgment by default for want of plea is properly entered, its binding force and effect cannot afterwards be questioned as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover. *Cited* in *Cooper v. Roche*, 36 Md. 566. See also *Green v. Hamilton*, 16 Md. 317.

1. *Brown v. Webber*, 6 Cush. (Mass.) 564; *Greer v. Young*, 120 Ill. 184; *Nabors v. Nabors*, 2 Port. (Ala.) 162; *Hughes v. Martin*, 1 Ark. 455; *Western Union Tel. Co. v. Claymore*, 2 Colo. 32; *Cody v. Raynaud*, 1 Colo. 272; *Mix v. His Creditors*, 39 La. Ann. 624; *Townsend v. Steward*, 4 Harr. (Del.) 94; *Heilman v. Martin*, 2 Ark. 163, wherein it is said that there is no proposition better settled by adjudication and supported by reason and justice than that a party, by inverting the established order of pleading, is "precluded from pleading any matter prior in point of order;" *citing* 1 Chitty Pl. 426.

Effect of Sustaining Plea in Abatement.

— When a plea in abatement to the jurisdiction of the court over the person of the defendant is sustained, the defendant is entitled to have the suit abated. *Simpson v. East Tennessee, etc., R. Co.*, 89 Tenn. 304.

A Motion to Quash for want of jurisdiction is never proper, unless the writ and service, both or one of them, show every fact necessary to establish the want of jurisdiction, so that the court can see of itself that it cannot entertain the cause for trial. If inquiry is to be made and the parties are to go to extraneous proof, a plea in abatement is the usual and only proper mode of raising the question, and a motion to quash will not be entertained. *Bishop v. Vose*, 27 Conn. 7.

Demurrer. — When the defect appears upon the face of the proceedings a demurrer may be interposed.¹

Motion to Dismiss. — In some jurisdictions the objection may be taken by motion to dismiss where the defect is apparent on the face of the proceedings.²

Raising Objection in Answer. — Under the statutes and practice in some states it is proper to raise the objection by pleading the defect or omission in the answer.³

1. *Gervais v. Chicago, etc., R. Co.*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 95; *Keiser v. Yandes*, 45 Ind. 174.

Objection Must Appear on Face of Pleading. — A bill is demurrable if want of jurisdiction appears upon the face thereof, otherwise a plea is proper. *Stephenson v. Davis*, 56 Me. 75.

When the want of jurisdiction of the person is apparent on the face of the bill, it must be taken advantage of by demurrer, and it is too late to object after answer and on the final hearing on appeal. *Kendrick v. Whitfield*, 20 Ga. 379.

Objection to jurisdiction may be raised by demurrer where it appears upon the face of the complaint that the court has no jurisdiction of the person or subject-matter; but unless want of jurisdiction appears upon the face of the complaint, the objection must be raised by a motion to set aside the summons, where an appearance would confer jurisdiction, or in cases where an appearance would not confer jurisdiction it may be raised by answer or at the trial, or upon appeal, or by the court itself. *Gurney v. Grand Trunk R. Co.*, (Supreme Ct.) 37 N. Y. St. Rep. 560, citing *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 316.

If the court is one of general jurisdiction, it has been held that the mere failure of the complaint affirmatively to show the residence of the plaintiff in the state, under the statute conferring jurisdiction in certain cases dependent upon the residence of the parties, is not demurrable. *Gervais v. Chicago, etc., R. Co.*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 95.

Special Demurrer, in the place of a verified plea, may reach the want of jurisdiction over the defendant when it appears on the record. *Bigham v. Talbot*, 51 Tex. 450; *Johnston v. Price*, 2 Tex. App. Civ. Cas., § 756.

Waiver by Failure to Demur. — *Boone v. Roberts*, 1 Tex. 147; *Hawkins v. Hughes*, 87 N. Car. 115; *Branch v.*

Houston, Busb. L. (N. Car.) 85; *Walton v. Walton*, 80 N. Car. 26; *Smith v. Moore*, 79 N. Car. 82; *Spyer v. Fisher*, 37 N. Y. Super. Ct. 93; *Bunker v. Langs*, 76 Hun (N. Y.) 543; *Miln v. Russell*, 3 E. D. Smith (N. Y.) 303; *Newell v. Gatling*, 7 Ind. 150; *Kendrick v. Whitfield*, 20 Ga. 379.

2. *Brown v. Webber*, 6 Cush. (Mass.) 564. See also *Forbes v. McHaffie*, 32 Neb. 742; *Bell v. White Lake Lumber Co.*, 21 Neb. 525; *Wells v. Patton*, 50 Kan. 732; *Cohen v. Trowbridge*, 6 Kan. 385. Compare *Cody v. Raymond*, 1 Colo. 272; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718.

Motion to Vacate Order of Publication. — A nonresident may move to vacate an order of publication as a method of objecting to the jurisdiction of the court over his person. *Von Hesse v. Mackaye*, 55 Hun (N. Y.) 365. See also *Reed v. Chilsom*, 142 N. Y. 152.

Where the Court Has Jurisdiction of neither the Person nor the Subject, it is held that the court will dismiss the suit on motion seasonably filed. *Cassidy v. Cota*, 54 Me. 380. See also article APPEARANCES, vol. 2, p. 588.

3. *Wells v. Patton*, 50 Kan. 732; *Bliss v. Burnes, McCahon (Kan.)* 91; *Bailey v. Spofford*, 14 Hun (N. Y.) 86; *Wheeler v. Lee*, 74 N. Y. 495; *Gervais v. Chicago, etc., R. Co.*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 95; *Anheuser-Busch Brewing Assoc. v. Peterson*, 41 Neb. 897; *Christian v. Williams*, 35 Mo. App. 297; *Keiser v. Yandes*, 45 Ind. 174.

If the question of jurisdiction can be raised by motion or plea in abatement, it should be so done; but if a fraudulent use of the process of the court has occurred, and its abuse can only be ascertained upon an answer fully setting forth the facts, the court would have ample power to settle the question of jurisdiction upon trial before a jury prior to the trial of the other issues in the case, but the issue as to jurisdiction must be first disposed of. *Wells*

Waiver. — Even if the objection has been taken in time, the defendant may by his own acts deprive himself of the benefit thereof,¹ it being sometimes stated that a party who invokes the jurisdiction of a court is not thereafter in a position to question the jurisdiction.²

When the Objection Is Founded upon the Privilege of the Defendant, the want of proper process or return, or any other circumstances not relating to the subject-matter of the suit, the facts must be specifically stated.³

v. Patton, 50 Kan. 736. In *Christian v. Williams*, 35 Mo. App. 297, the answer contained a plea to the jurisdiction, but the question of jurisdiction was disposed of before proceeding to trial on the merits.

Construction of Statute. — In *New York* it was held that the provision of the code allowing the objection to the jurisdiction of the court over the person of the defendant to be set up as a defense in the answer did not embrace the objection that process had been improperly served, but referred only to the jurisdiction of the court as the proper place where the action should be brought. *Nones v. Hope Mut. L. Ins. Co.*, 5 How. Pr. (N. Y. Supreme Ct.) 96; *Hankinson v. Page*, 19 Abb. N. Cas. (U. S. Cir. Ct.) 274. See also *Wheelock v. Lee*, 74 N. Y. 495.

1. See, in general, article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 169 *et seq.*

If the defendant, after a motion for a dismissal because the court has no jurisdiction by reason of the residence of parties, or the place where the action is brought, subsequently withdraws the motion, and consents to a trial on the merits, he waives the objection. *Luco v. Superior Ct.*, 71 Cal. 555. See also, to the same effect, *Ludwick v. Beckamire*, 15 Ind. 199; *Jolly v. Pryor*, 12 Tex. Civ. App. 149; *Douglas v. Baker*, 79 Tex. 505; *Rice v. Peteet*, 66 Tex. 569.

Plea Before Justice of the Peace Waived on Appeal. — A plea to the jurisdiction of the person, filed by the defendant before the justice of the peace, is waived by the failure of the defendant to bring it to the attention of the circuit judge on appeal until after the commencement of the trial and the introduction of all the plaintiff's proof and a part of the defendant's proof. *Eller v. Richardson*, 89 Tenn. 577.

Applying for Continuance. — If, after a special appearance and motion to set aside the summons, the defendant ap-

plies for a continuance for the purpose of answering, such an application recognizes the jurisdiction of the court over the person. *Yale v. Edgerton*, 11 Minn. 271.

Continuance of Trial of Issues on Plea in Abatement. — Consent to a continuance of the trial of the issues on a plea in abatement to the jurisdiction of the court over the person of the defendant does not waive the objection. *Simpson v. East Tennessee, etc., R. Co.*, 89 Tenn. 304.

Waiver of Plea by Motion. — A plea to the jurisdiction of the court over the person of the defendant is waived by motion to dismiss for want of jurisdiction. *Gomer v. Shiner*, 4 Colo. 246; *Simonds v. Parker*, 1 Met. (Mass.) 508.

2. *Powell v. Boon*, 43 Ala. 459; *Tygh v. Dolan*, 95 Ala. 269; *Smith v. Denman*, 48 Ind. 65; *Dufossat v. Berens*, 18 La. Ann. 340; *Thornton v. Leavitt*, 63 Me. 384; *Valentine v. McGrath*, 52 Miss. 112; *Wilson v. Wilson*, 30 Ohio St. 365; *Glass v. Smith*, 66 Tex. 548; *Sherman v. Kreul*, 42 Wis. 33; *Union Pac. R. Co. v. U. S.*, 2 Wyoming 170.

3. *Forbes v. McHaffie*, 32 Neb. 742; *Brown v. Goodyear*, 29 Neb. 376; *Bell v. White Lake Lumber Co.*, 21 Neb. 525; *Swartout v. Roddis*, 5 Hill (N. Y.) 119, *citing* *Rex v. Johnson*, 6 East 583.

A General Demurrer assigning for cause the lack of jurisdiction of the particular court over the subject-matter does not raise objections to the jurisdiction of the person, the statute requiring demurrers to be specific. *Whittaker v. Whittaker*, 10 Lea (Tenn.) 93.

How Insufficiency of Plea Reached. — To test the sufficiency of a plea to the jurisdiction in equity, the proper practice is to set it down for hearing, and not to demur. *Lester v. Stevens*, 29 Ill. 155, wherein the Supreme Court treated such a demurrer as setting the plea down for hearing because it was so treated in the lower court.

d. JURISDICTION OF THE SUBJECT-MATTER—(1) *Manner of Raising Objection Generally*.—Appearance having no effect to waive a want of judicial power,¹ the want of jurisdiction of the subject-matter may be raised by demurrer when such want appears on the face of the record,² by motion to dismiss,³ or by motion in arrest,⁴ or the want of jurisdiction may be a ground for reversal on appeal or error,⁵ and the question may be raised even for the first time on appeal.⁶ If the want of jurisdiction does not appear upon the face of the record, the objection should be taken by answer⁷ or plea in abatement.⁸

1. See *infra*, X. 2. *f. (1) Jurisdiction of the Subject-matter*. See also *supra*, II. 7. *Jurisdiction by Consent*.

2. *Doll v. Feller*, 16 Cal. 432; *Davis v. Wannamaker*, 2 Colo. 637; *Knight v. Ferris*, 6 Houst. (Del.) 283; *Grant v. Tams*, 7 T. B. Mon. (Ky.) 218; *Ryan v. Com.*, 80 Va. 386.

3. *Ferris v. Ferris*, 25 Vt. 100; *Stoughton v. Mott*, 13 Vt. 175; *Dillard v. St. Louis, etc.*, R. Co., 58 Mo. 69; *Wildman v. Rider*, 23 Conn. 172; *McClure v. Lay*, 30 Ala. 208; *Dartez v. Lége*, 28 La. Ann. 640; *Butler v. Wagner*, 35 Wis. 54; *Collins v. Collins*, 37 Pa. St. 387; *Billingsly v. State*, 3 Tex. App. 686.

A Plea in Abatement may be treated as a motion to dismiss. *Ferris v. Ferris*, 25 Vt. 100.

After the Pleadings Are Made Up, it is irregular to move to dismiss the complaint or bill for defects apparent upon the face of them while the trial is in progress, except where there is a manifest defect of jurisdiction in regard to the subject-matter as distinguished from a want of jurisdiction in respect to the person, or a statement of a defective cause of action as distinguished from a defective statement of a cause of action. *Mastin v. Marlow*, 65 N. Car. 695.

Absence of Necessary Defendant—Objection by Codefendant.—Where the jurisdiction of the court is materially affected by reason of the fact that relief cannot be granted in the absence of a defendant who cannot be reached by service of process, it is proper that the question should be raised by demurrer or motion to dismiss when the defect of jurisdiction appears on the face of the bill and is raised by the codefendant. *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498.

4. *Reams v. State*, 23 Ind. 111; *New Albany, etc., R. Co. v. Huff*, 19 Ind.

444; *Knight v. Ferris*, 6 Houst. (Del.) 283.

5. *Jordan v. Dennis*, 7 Met. (Mass.) 590; *Striker v. Mott*, 6 Wend. (N. Y.) 465; *Capron v. Van Noorden*, 2 Cranch (U. S.) 126.

In a Criminal Case it has been held proper to raise the objection by motion for instruction, by demurrer, by motion in arrest of judgment on general issue, or by writ of error. *Ryan v. Com.*, 80 Va. 386.

6. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

7. *Ragan v. Haynes*, 10 Ind. 348; *Brownfield v. Weicht*, 9 Ind. 394.

If a court is one of special and limited jurisdiction, the want of jurisdiction may be shown under the general issue. *M'Cormick v. Maxwell*, 4 Blackf. (Ind.) 168; *Brown v. McQueen*, 6 Blackf. (Ind.) 208; *Smith v. M'Cleod*, 1 Cranch (C. C.) 43.

8. When the want of jurisdiction of a superior court does not appear upon the face of the plaintiff's declaration, such want of jurisdiction can be taken advantage of only by plea in abatement, and if such plea be not pleaded, but the defendant pleads in bar, a judgment against him will not be reversed on a writ of error; but if the plaintiff himself shows by his declaration that the court had no jurisdiction to hear and determine the cause, objection to the jurisdiction may be made by demurrer, by motion for nonsuit, by motion in arrest of judgment, and will be cause of error for which the judgment below will be reversed. *Knight v. Ferris*, 6 Houst. (Del.) 327.

Plea Presenting Question of Guilt or Innocence.—A plea to the jurisdiction should be overruled when it presents the question of the guilt or innocence of the accused, and the matter can be shown on the trial. *Salina v. Cooper*, 45 Kan. 12.

(2) *Jurisdiction of Court of General Jurisdiction in Particular Case.* — The necessary presumption is that a court of general jurisdiction can act upon the given case when nothing appears to the contrary; hence a party wishing to oust the jurisdiction of such a court must make it apparent that the judicial determination of the case has been withdrawn from the court of general jurisdiction to some other tribunal.¹

1. *Webb v. Mann*, 3 Mich. 139; *Hawkins v. Hughes*, 87 N. Car. 115; *Perkins v. Hayward*, 132 Ind. 95; *Davis v. Packard*, 6 Wend. (N. Y.) 332; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718, cited in *Bolton v. Jacks*, 6 Robt. (N. Y.) 198. See also *State v. Ridley*, 114 N. Car. 828.

Matter to Be Specially Plead. — In a court of general jurisdiction, especially when proceeding according to the course of the common law, facts giving jurisdiction need not be pleaded, and therefore objection to the jurisdiction cannot be taken by demurrer or motion to dismiss when the facts which bring the particular case under the statute are not pleaded. *Kinnaman v. Kinnaman*, 71 Ind. 417. See also *Bass Foundry, etc., Works v. Parke County*, 115 Ind. 240; *Loeb v. Mathis*, 37 Ind. 306; *Hyatt v. Cochran*, 69 Ind. 436; *Brownfield v. Weicht*, 9 Ind. 394; *Godfrey v. Godfrey*, 17 Ind. 6; *Hancock County v. Leggett*, 115 Ind. 544.

Such matter must be shown in evidence. *Loeb v. Mathis*, 37 Ind. 306; *Hyatt v. Cochran*, 69 Ind. 436; *Brownfield v. Weicht*, 9 Ind. 394; *Godfrey v. Godfrey*, 17 Ind. 6; *Hancock County v. Leggett*, 115 Ind. 544. And it must be specially pleaded. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718.

In *Pennsylvania* it was said to be advisable to plead specially facts which take a particular case out of the general jurisdiction of the court. *Black v. Black*, 34 Pa. St. 354.

General Demurrer. — A general demurrer on the ground that the complaint does not state sufficient facts will not reach such an objection. *Whitewater R. Co. v. Bridgett*, 94 Ind. 216; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 505; *Saxton v. Seiberling*, 48 Ohio St. 554; *McKibbin v. Salinas*, 36 S. Car. 279; *Drake v. Drake*, 41 Hun (N. Y.) 366; *Doll v. Feller*, 16 Cal. 432.

But when the court is one of special and limited jurisdiction, the jurisdictional facts being required to appear,

the absence of them will justify a demurrer. *Doll v. Feller*, 16 Cal. 432.

When the want of jurisdiction is apparent upon the face of the declaration by reason of the omission of a statement of the facts requisite to bring the case within the cognizance of the court, it is said to be well settled that the defendant may take advantage of such omission either by demurrer or by motion, at any time before judgment, to dismiss the suit, or after verdict he may move in arrest of judgment, or after judgment he may bring a writ of error and have the judgment reversed. *Donaldson v. Hazen*, Hempst. (U. S.) 425 [citing *Lanning v. Dolph*, 4 Wash. (U. S.) 624; *Hope Ins. Co. v. Boardman*, 5 Cranch (U. S.) 57; *Abercrombie v. Dupuis*, 1 Cranch (U. S.) 343; *Jackson v. Twentymen*, 2 Pet. (U. S.) 136].

In *New York* it has been held that when it is necessary that the defendant be a resident of a particular territorial district in order to enable the court to assume jurisdiction, the complaint should allege the residence, and, failing to do so, the defendant may demur and decline to appear and answer to the complaint. *Dake v. Miller*, 15 Hun (N. Y.) 356; *McMahon v. Sherman*, (Supreme Ct.) 14 N. Y. St. Rep. 637; *Ross v. Konor*, (Supreme Ct.) 17 N. Y. St. Rep. 465; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 306; *Patten v. Neal*, 62 How. Pr. (Montgomery County Ct.) 158. But if he appears and answers without objection, he waives the defect. *Bunker v. Langs*, 76 Hun (N. Y.) 543; *Holbrook v. Baker*, 16 Hun (N. Y.) 176.

Not Available under General Issue. — In delivering the opinion of the court in the case of *Mostyn v. Fabrigas*, 1 Cowp. 172, Lord Mansfield remarked: "There is nothing more clear than that if the court [meaning a court of record] has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue." *Webb v. Mann*, 3 Mich. 141.

c. MOTION TO SET ASIDE JUDGMENT.—The judgment or proceeding of a court without jurisdiction of the person or subject-matter may be set aside and vacated on motion,¹ and such a motion need not be made at the term at which the judgment was rendered; the proceedings, if void, may be set aside at any time.² And what is generally said with regard to waiving jurisdiction of the person only applies to cases where the defendant comes into court and acquiesces, or otherwise waives the objection.³

f. EFFECT OF FAILURE TO RAISE OBJECTION—(1) *Jurisdiction of the Subject-matter*.—When the court has no lawful power

Discretion at Advanced Stage of Cause.

—An objection to the jurisdiction properly comes in the first instance, and the court may perhaps refuse to inquire into the matter at an advanced stage of the proceedings, upon the ground that the parties by appearing, making no objection to the jurisdiction, and proceeding to contest the case upon its merits, admit all the facts necessary to show jurisdiction. *Patten's Petition*, 16 N. H. 281, involving the filing of a petition in the Court of Common Pleas for the laying out, widening, and straightening of highways within the town, upon the refusal of the selectmen of the town to perform their duties in that regard, the jurisdiction of the Court of Common Pleas depending in such cases upon the refusal of the selectmen to act. But even in this case the court may receive evidence of the want of jurisdiction at any stage, and if such want of jurisdiction is made to appear the suit should be dismissed.

1. *Arkansas*.—*Baskins v. Wylds*, 39 Ark. 347.

Georgia.—*Crane v. Barry*, 47 Ga. 476.

Kansas.—*Foreman v. Carter*, 9 Kan. 674.

Minnesota.—*Covert v. Clark*, 23 Minn. 539; *Godfrey v. Valentine*, 39 Minn. 336.

Missouri.—*Graham v. Ringo*, 67 Mo. 324.

Nebraska.—*Cobbey v. Wright*, 23 Neb. 250.

New York.—*Holmes v. Honie*, 8 How. Pr. (N. Y. Supreme Ct.) 383; *Hallett v. Righters*, 13 How. Pr. (N. Y. Supreme Ct.) 43.

North Carolina.—*Keaton v. Banks*, 10 Ired. L. (N. Car.) 381; *Hervey v. Edmunds*, 68 N. Car. 243.

Rhode Island.—*In re College St.*, 11 R. I. 472.

Vermont.—*Franks v. Locky*, 45 Vt. 395.

Virginia.—*Hooe v. Barber*, 4 Hen. & M. (Va.) 439.

Washington.—*Paxton v. Daniell*, 1 Wash. 19.

Wisconsin.—*Sayles v. Davis*, 20 Wis. 302; *Mathie v. McIntosh*, 40 Wis. 120.

United States.—*Shuford v. Cain*, 1 Abb. (U. S.) 302; *Ex p. Crenshaw*, 15 Pet. (U. S.) 119; *Harris v. Hardeman*, 14 How. (U. S.) 334. See generally article OPENING, AMENDING, AND VACATING JUDGMENTS.

Right to Plead Want of Jurisdiction After Default Set Aside for Want of Jurisdiction.—After a judgment by default is set aside for the want of jurisdiction of the person of the defendant, such defendant may appear and plead the want of jurisdiction over his person. *Cobbey v. Wright*, 23 Neb. 250.

2. **At Subsequent Term.**—If a judgment is void for want of jurisdiction, it may be set aside on motion at a subsequent term. *In re College St.*, 11 R. I. 472; *Crane v. Barry*, 47 Ga. 476; *Shuford v. Cain*, 1 Abb. (U. S.) 302; *Weatherbee v. Weatherbee*, 20 Wis. 500. See also *Cannan v. Reynolds*, 5 El. & Bl. 301, 85 E. C. L. 301.

Judgments have been set aside on motion after the term at which they were rendered, when they were rendered against defendants after their death. *Hooe v. Barber*, 4 Hen. & M. (Va.) 439; *Holmes v. Honie*, 8 How. Pr. (N. Y. Supreme Ct.) 384. Or against defendants over whom the court had no jurisdiction for want of service of process. *Baskins v. Wylds*, 39 Ark. 347; *Franks v. Locky*, 45 Vt. 395; *Ex p. Crenshaw*, 15 Pet. (U. S.) 119; *Harris v. Hardeman*, 14 How. (U. S.) 334; *Wood v. Luse*, 4 McLean (U. S.) 254; *Hallett v. Righters*, 13 How. Pr. (N. Y. Supreme Ct.) 43.

3. *Gray v. Hawes*, 8 Cal. 568; *Reed v. Chilson*, 142 N. Y. 152. See *infra*, X. 2. *f.* (2) *Jurisdiction of the Person*.

to act, by reason of the fact that such power either is not conferred or is expressly withheld, with regard to the subject-matter of the suit, the parties thereto cannot be said to have waived their objection to this want of power because it is not made at the proper time. Such an objection cannot be waived, and is fatal at any stage of the proceedings.¹

1. *Alabama*. — Wyatt v. Judge, 7 Port. (Ala.) 37; Merrill v. Jones, 8 Port. (Ala.) 554; Winn v. Freele, 19 Ala. 171; Fields v. Walker, 23 Ala. 155; Jeffries v. Harbin, 20 Ala. 387; Benford v. Daniels, 20 Ala. 445; Harrison v. Harrison, 20 Ala. 629; Taliferro v. Bassett, 3 Ala. 670; McClure v. Lay, 30 Ala. 208; Little v. Fitts, 33 Ala. 343.
California. — People v. O'Neil, 47 Cal. 109; *In re* Grove St., 61 Cal. 438; Mastick v. Superior Ct., 94 Cal. 347.
Colorado. — Derry v. Ross, 5 Colo. 295.
Connecticut. — Wildman v. Rider, 23 Conn. 172.
Dakota. — Murry v. Burris, 6 Dak. 170.
Florida. — Livingston v. Webster, 26 Fla. 325.
Georgia. — Crane v. Barry, 47 Ga. 476.
Idaho. — People v. Du Rell, 1 Idaho 44; Tootle v. French, 2 Idaho 745.
Illinois. — Richards v. Lake Shore, etc., R. Co., 124 Ill. 519; Way v. Way, 64 Ill. 406; Stout v. Cook, 41 Ill. 447.
Indiana. — Riley v. Butler, 36 Ind. 51; Brownfield v. Weicht, 9 Ind. 395; Lane v. Taylor, 40 Ind. 495; Justice v. State, 17 Ind. 56; McCoy v. Able, 131 Ind. 419.
Iowa. — Orcutt v. Hanson, 71 Iowa 514; Marquardt v. Thompson, 78 Iowa 158; Walters v. The Steamboat Molly Dozier, 24 Iowa 192.
Kansas. — Rice v. State, 3 Kan. 141; Foreman v. Carter, 9 Kan. 674.
Kentucky. — Fidler v. Hall, 2 Metc. (Ky.) 461; Lindsey v. McClelland, 1 Bibb (Ky.) 262.
Louisiana. — Dupey v. Greffin, 1 Martin N. S. (La.) 200; Greiner v. Thielen, 6 Rob. (La.) 365; Dartez v. Légé, 28 La. Ann. 640; Fleming v. Hiligsberg, 11 Rob. (La.) 77.
Maine. — Chase v. Palmer, 25 Me. 341.
Massachusetts. — Martin v. Com., 1 Mass. 347; Simonds v. Parker, 1 Met. (Mass.) 508; Richardson v. Welcome, 6 Cush. (Mass.) 333; Elder v. Dwight Mfg. Co., 4 Gray (Mass.) 201; Riley v. Lowell, 117 Mass. 76; Custy v. Lowell, 117 Mass. 78; Cheshire v. Adams, etc., Reservoir Co., 119 Mass. 356.
Michigan. — Atty.-Gen. v. Moliter, 26 Mich. 444; Woodruff v. Ives, 34 Mich. 320; Thomson v. Michigan Mut. Ben. Assoc., 52 Mich. 522; Farrand v. Bentley, 6 Mich. 281; Moore v. Ellis, 18 Mich. 77.
Mississippi. — Green v. Creighton, 10 Smed. & M. (Miss.) 163; Yalabusha County v. Carbry, 3 Smed. & M. (Miss.) 529; Bell v. Tombigbee R. Co., 4 Smed. & M. (Miss.) 549; Buckingham v. Bailey, 4 Smed. & M. (Miss.) 538; Holloman v. Holloman, 5 Smed. & M. (Miss.) 559.
Missouri. — Henderson v. Henderson, 55 Mo. 534; Graves v. McHugh, 58 Mo. 499; Davis v. Jacksonville Southeastern Line, 126 Mo. 69; Bray v. Marshall, 66 Mo. 122.
Nebraska. — Brondberg v. Babbott, 14 Neb. 517; Union Pac. R. Co. v. Ogilvy, 18 Neb. 639.
New Jersey. — School Dist. No. 28 v. Stocker, 42 N. J. L. 115; Collins v. Keller, 58 N. J. L. 429.
New York. — Garcie v. Sheldon, 3 Barb. (N. Y.) 232; Feist v. Third Ave. R. Co., 25 Civ. Pro. Rep. (N. Y. C. Pl.) 257, 13 Misc. Rep. (N. Y.) 240; McCarty v. Parker, 26 Abb. N. Cas. (N. Y. Super. Ct.) 235; Pitt v. Davison, 37 Barb. (N. Y.) 97; Delafield v. Illinois, 2 Hill (N. Y.) 159.
North Carolina. — Hawkins v. Hughes, 87 N. Car. 115; Randleman Mfg. Co. v. Simmons, 97 N. Car. 89; Whitehurst v. Pettipher, 105 N. Car. 40.
Ohio. — State v. Turner, Wright (Ohio) 21; Thompson v. Steamboat Julius D. Morton, 2 Ohio St. 26; Hamilton v. Merrill, 37 Ohio St. 684; Evans v. Iles, 7 Ohio St. 233; Steamboat Gen. Buell v. Long, 18 Ohio St. 521.
Pennsylvania. — Collins v. Collins, 37 Pa. St. 387; Stearly's Appeal, 3 Grant's Cas. (Pa.) 270; Musselman's Appeal, 101 Pa. St. 169; Taylor v. Knipe, 2 Pearson (Pa.) 151.
South Carolina. — Ware v. Henderson, 25 S. Car. 385; State v. Penny, 19

Action by Court of Its Own Motion. — When it appears that the court has no jurisdiction over the subject-matter of the suit, it will take notice of the defect, whether objection is made or not, and will dismiss or stay the proceedings *ex mero motu*,¹ and it is its duty to do so² without determining any other matter involved in the litigation.³

S. Car. 218; Segler v. Coward, 24 S. Car. 122.

South Dakota. — Wayne v. Caldwell, 1 S. Dak. 486.

Tennessee. — Agee v. Dement, 1 Humph. (Tenn.) 332; Dixon v. Caruthers, 9 Yerg. (Tenn.) 30.

Texas. — Able v. Bloomfield, 6 Tex. 263; Hardeman v. Morgan, 48 Tex. 103; Heidenheimer v. Marx, 1 Tex. App. Civ. Cas., § 171; Mawthe v. Crozier, 50 Tex. 153; Billingsly v. State, 3 Tex. App. 686.

Vermont. — Lamson v. Worcester, 58 Vt. 381; French v. Holt, 57 Vt. 187; Niles v. Howe, 57 Vt. 388; Chittenden v. Hurlbut, 1 D. Chip. (Vt.) 384; Shepherd v. Beede, 24 Vt. 40; Glidden v. Elkins, 2 Tyler (Vt.) 218; Thayer v. Montgomery, 26 Vt. 491; Southwick v. Merrill, 3 Vt. 320; Eaton v. Houghton, 1 Aik. (Vt.) 380; Stoughton v. Mott, 13 Vt. 175.

Virginia. — Poindexter v. Burwell, 82 Va. 507; Beckley v. Palmer, 11 Gratt. (Va.) 625.

Washington. — Tolmie v. Dean, 1 Wash. Ter. 46.

Wisconsin. — Pollard v. Wegener, 13 Wis. 569; Henckel v. Wheeler, etc., Mfg. Co., 51 Wis. 363; Damp v. Dane, 29 Wis. 419; Dewey v. Hyde, 1 Pin. (Wis.) 469; Mathie v. McIntosh, 40 Wis. 120; Butler v. Wagner, 35 Wis. 54.

Relaxation of the Rule. — In Boone v. Shackelford, 66 Mo. 493, it was held that where the question is not raised until the case is before the Supreme Court the second time and the result of a ruling adverse to the jurisdiction would be to enable the defendant to interpose the statute of limitations, barring the demand in a new action, the Supreme Court will refuse to examine the question.

1. *California.* — People v. Hodges, 27 Cal. 340.

Colorado. — Denver, etc. R. Co. v. Church, 7 Colo. 143.

Indiana. — Huber v. Beck, 6 Ind. App. 47.

Maryland. — Berrett v. Oliver, 7 Gill & J. (Md.) 191.

Massachusetts. — Lawrence v. Smith, 5 Mass. 362; Osgood v. Thurston, 23 Pick. (Mass.) 110.

Mississippi. — Stamps v. Newton, 3 How. (Miss.) 34.

New York. — Heyer v. Burger, Hoffm. Ch. (N. Y.) 1.

North Carolina. — Clark v. Cameron, 4 Ired. L. (N. Car.) 161; Branch v. Houston, Busb. L. (N. Car.) 85.

Oregon. — McKay v. Freeman, 6 Oregon 449; Evans v. Christian, 4 Oregon 375; State v. McKinnon, 8 Oregon 487.

Vermont. — Chittenden v. Hurlbut, 1 D. Chip. (Vt.) 384.

Virginia. — Poindexter v. Burwell, 82 Va. 507.

Washington. — Tolmie v. Dean, 1 Wash. Ter. 46.

2. Chipman v. Waterbury, 59 Conn. 496; Olmstead's Appeal, 43 Conn. 114.

Notwithstanding Consent, it is the duty of the court to decide the question of its jurisdiction. Phillips v. Welch, 11 Nev. 187; Evans v. Iles, 7 Ohio St. 233. See *supra*, II. 7. *Jurisdiction by Consent.*

Matters of Discretion. — In an action *ex delicto* by one nonresident against another for a cause of action arising in the state of the residence of the parties, the question whether or not the court should entertain jurisdiction was raised after the action had been pending for a year, by request for a charge to the jury, and had not been previously raised by answer or special motion or during the trial. It was held that while the court might, in the exercise of its discretion, have refused to entertain the action, or might have dismissed it on its own motion, yet the defendant ought not to be entitled to a dismissal as a matter of right, and ought not to be permitted to lie by until the close of the trial, when the probable result could be inferred, and then successfully invoke the exercise of the discretion of the court in his favor. Burdick v. Freeman, 120 N. Y. 420. See *supra*, III. 2. *e. Jurisdiction of the Person in Transitory Actions.*

3. Stough v. Chicago, etc., R. Co., 71

In Order that the Objection May Be Taken at Any Time it must go to the entire want of authority in the court to proceed with the particular matter.¹

(2) *Jurisdiction of the Person.*—The jurisdiction of courts over the persons of the parties is another matter. The question is regarded as one of personal privilege in the party, and therefore if, by reason of a mere irregularity in the commencement of the proceedings, defective process, or even an entire absence of process, the objection that the parties are not properly brought before the court might lie, such an objection must be raised *in limine* or it will be waived.² This is the meaning of many of the cases

Iowa 641. See article Costrs, vol. 5, p. 400.

Courts of Last Resort.—The same rules apply when the question of jurisdiction arises in a court of last resort. *Martin v. Martin*, 3 Martin N. S. (La.) 48; *Edwards v. Edwards*, 21 La. Ann. 611; *Lansing v. Chicago, etc., R. Co.*, 85 Iowa 215.

Wrongful Seizure of Personalty—Disposition on Dismissal—Exception.—The general rule is that if a court is without jurisdiction to hold litigated property seized under writ of replevin, it can only dismiss the case, and cannot proceed to render judgment for the return of the goods or for their value; but where property has been wrongfully taken out of the possession of the officer of another court, which held it rightfully at the time of the seizure, the case furnishes an exception to the general rule, and it is held in such a case that the first officer must be placed in the same position with respect to the property in which he stood before he was wrongfully dispossessed and the process of his court wrongfully interfered with. *Parks v. Wilcox*, 6 Colo. 492; *Feusier v. Lammon*, 6 Nev. 209; *Booth v. Ableman*, 18 Wis. 495; *Lewis v. Buck*, 7 Minn. 104; *Talbott v. Gere*, 8 Minn. 85.

Jurisdiction Exceeded in Part—Reversal as to the Excess.—Where the judgment of the trial court partially exceeds its jurisdiction, the judgment will be reversed as to the excess and affirmed as to that part which it had power to render. *Wright v. Cullers*, 2 Tex. App. Civ. Cas., § 751.

1. **The Form of the Proceeding** will not affect the jurisdiction if objection is not seasonably made. *Creager v. School Dist. No. 9*, 62 Mich. 101; *Cushing v. Miller*, 62 N. H. 517; *Matter of Foster*, 15 Hun (N. Y.) 387; *Shuster v.*

Finan, 19 Kan. 114; *Ex p. Davidson*, 57 Fed. Rep. 883.

2. **Alabama.**—*Harrison v. Harrison*, 20 Ala. 629; *Hatter v. Eastland*, 22 Ala. 688; *Walker v. Chapman*, 22 Ala. 116; *Stanley v. Mobile Bank*, 23 Ala. 652; *Lampley v. Beavers*, 25 Ala. 534; *Gager v. Gordon*, 29 Ala. 341; *Merrill v. Jones*, 8 Port. (Ala.) 554; *Wyatt v. Judge*, 7 Port. (Ala.) 37; *Aderhold v. Anniston*, 99 Ala. 521.

Arkansas.—*Heilman v. Martin*, 2 Ark. 163; *Ex p. Woods*, 3 Ark. 532; *Frank v. Hedrick*, 18 Ark. 308.

Colorado.—*Smith v. District Ct.*, 4 Colo. 235.

Connecticut.—*Payne v. Farmers', etc., Bank*, 29 Conn. 416; *Haussman v. Burnham*, 59 Conn. 136; *Hotchkiss's Appeal*, 32 Conn. 355.

Delaware.—*Townsend v. Steward*, 4 Harr. (Del.) 94.

Florida.—*Jackson v. Relf*, 26 Fla. 465.

Georgia.—*Perseverance Min. Co. v. Bisaner*, 87 Ga. 193.

Illinois.—*Callender v. Gates*, 45 Ill. App. 374; *Baldwin v. Murphy*, 82 Ill. 485; *Kreitz v. Behrensmeyer*, 125 Ill. 141; *Vaeger v. Henry*, 39 Ill. App. 22.

Indiana.—*Mayes v. Goldsmith*, 58 Ind. 94; *Nesbit v. Long*, 37 Ind. 300; *Jocelyn v. Barrett*, 18 Ind. 128; *Beddinger v. Jocelyn*, 18 Ind. 325; *Test v. Small*, 21 Ind. 127; *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Garner v. Board*, 27 Ind. 323; *Smith v. Jeffries*, 25 Ind. 376; *Cox v. Pruitt*, 25 Ind. 90; *Judah v. Vincennes University*, 23 Ind. 272; *Clark v. State*, 4 Ind. 268; *Brady v. Richardson*, 18 Ind. 1; *Ringle v. Bickle*, 17 Ind. 325; *Davis v. Brinker*, 50 Ind. 25; *Templeton v. Hunter*, 10 Ind. 380; *Indianapolis, etc., R. Co. v. Renner*, 17 Ind. 135; *Ledgerwood v. State*, 134 Ind. 81; *Harbin v. State*, 133 Ind. 698.

asserting the principle that consent may give jurisdiction of the person, though it cannot give jurisdiction of the subject-matter, and it is said that if a party fails to make an objection to the

- Iowa*. — *Schrader v. Hoover*, 87 Iowa 654; *German Bank v. American F. Ins. Co.*, 83 Iowa 491; *Marquardt v. Thompson*, 78 Iowa 158.
- Kentucky*. — *Howe v. Stevenson*, 84 Ky. 576.
- Louisiana*. — *Marqueze v. Le Blanc*, 29 La. Ann. 194; *Mix v. His Creditors*, 39 La. Ann. 624.
- Maine*. — *Buckfield Branch R. Co. v. Benson*, 43 Me. 374.
- Massachusetts*. — *Carlisle v. Weston*, 21 Pick. (Mass.) 535.
- Michigan*. — *Thompson v. Michigan Mut. Ben. Assoc.*, 52 Mich. 522; *Pardee v. Smith*, 27 Mich. 33; *Greeley v. Stillson*, 27 Mich. 153; *Maxwell v. Deens*, 46 Mich. 35; *Manhard v. Schott*, 37 Mich. 235; *Crane v. Hardy*, 1 Mich. 56; *Payment v. Church*, 38 Mich. 776.
- Minnesota*. — *State v. Fitzgerald*, 51 Minn. 534; *Anderson v. Southern Minnesota R. Co.*, 21 Minn. 30; *In re Ellis*, 55 Minn. 401.
- Mississippi*. — *Kincaid v. Storz*, 52 Mo. App. 564; *Sheehan, etc., Transp. Co. v. Sims*, 36 Mo. App. 224; *Snitjer v. Downing*, 80 Mo. 588; *Henderson v. Henderson*, 55 Mo. 534; *Leonard v. Sparks*, 117 Mo. 103.
- Nebraska*. — *Gandy v. Jolly*, 35 Neb. 711; *Johnson v. Jones*, 2 Neb. 135.
- New Jersey*. — *Funck v. Smith*, 46 N. J. L. 484; *North Hudson County R. Co. v. Flanagan*, 57 N. J. L. 236.
- New York*. — *People v. Brennan*, 3 Hun (N. Y.) 666; *Cushing v. Phillips*, 1 E. D. Smith (N. Y.) 416; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Clapp v. Graves*, 26 N. Y. 418; *Davis v. Packard*, 6 Wend. (N. Y.) 327; *Burling v. Freeman*, 2 Hun (N. Y.) 661; *Hovey v. McDonald*, 45 N. Y. Super. Ct. 606; *Crowley v. Royal Exch. Shipping Co.*, 10 Daly (N. Y.) 409; *Matter of Blum*, 9 Misc. Rep. (N. Y. Supreme Ct.) 571; *Bunker v. Langs*, 76 Hun (N. Y.) 543; *Matter of Budlong*, 54 Hun (N. Y.) 131, 18 Civ. Pro. Rep. (N. Y.) 18; *Ross v. Konor*, (Supreme Ct.) 17 N. Y. St. Rep. 465.
- Ohio*. — *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; *Steamboat Gen. Buell v. Long*, 18 Ohio St. 521.
- Oregon*. — *White v. Northwest Stage Co.*, 5 Oregon 99.
- Pennsylvania*. — *Schenley v. Com.*, 36 Pa. St. 29; *Larkin v. Scranton City*, 162 Pa. St. 289; *Dewart v. Purdy*, 29 Pa. St. 113.
- South Dakota*. — *Wayne v. Caldwell*, 1 S. Dak. 483.
- Tennessee*. — *Agee v. Dement*, 1 Humph. (Tenn.) 332; *Hartley v. U. S.* 3 Hayw. (Tenn.) 45; *Chester v. Embree*, Peck (Tenn.) 370; *Holcomb v. Canady*, 2 Heisk. (Tenn.) 610.
- Texas*. — *Brooks v. Chatham*, 57 Tex. 31; *Douglas v. Baker*, 79 Tex. 505.
- Vermont*. — *Lyman v. Central Vermont R. Co.*, 59 Vt. 167; *Eaton v. Houghton*, 1 Aik. (Vt.) 380, 25 Vt. 349, note; *Blood v. Crandall*, 28 Vt. 396.
- Wisconsin*. — *Atkins v. Fraker*, 32 Wis. 510; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 347; *Ruthe v. Green Bay, etc., R. Co.*, 37 Wis. 344; *Blackwood v. Jones*, 27 Wis. 498.
- United States*. — *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718; *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Eddy v. Lafayette*, 49 Fed. Rep. 807; *Harkness v. Hyde*, 98 U. S. 476.
- Appearance.** — As to what constitutes an appearance and the effect of a general appearance as a waiver of jurisdiction over the person, see the article *APPEARANCES*, vol. 2, pp. 632, 639.
- Exemption from Process.** — An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought is a personal privilege which may be waived by not taking advantage thereof at the proper time. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718; *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; *Central Bank v. Gibson*, 11 Ga. 453; *Adams v. Lamar*, 8 Ga. 83.
- Nonresidents.** — The following cases illustrate the application of this rule to jurisdiction over the person of nonresidents: *German Bank v. American F. Ins. Co.*, 83 Iowa 491; *Sheehan, etc., Transp. Co. v. Sims*, 36 Mo. App. 224; *Kincaid v. Storz*, 52 Mo. App. 564; *Monroe v. Redman*, 2 Munf. (Va.) 240; *Campbell v. Wilson*, 6 Tex. 379; *Thompson v. Michigan Mut. Ben. Assoc.*, 52 Mich. 522; *Hausman v. Burnham*, 59 Conn. 136; *Templeton v. Hunter*, 10 Ind. 380; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y.

jurisdiction over his person at the proper time, he, in a certain sense, consents to such jurisdiction.¹

g. CHANCERY JURISDICTION — (1) *Equity upon the Face of the Bill* — *Objections*. — The dismissal of a bill on demurrer for want of equity practically amounts to the same thing as dismissing it for want of jurisdiction,² because a court of equity grants relief only in cases and under circumstances falling within its peculiar province, and a bill or complaint must necessarily state facts which confer jurisdiction in stating a case for equitable relief or interference.³ If a court of equity has no jurisdiction, and this con-

306; *Bunker v. Langa*, 76 Hun (N. Y.) 543; *McMahon v. Sherman*, (Supreme Ct.) 14 N. Y. St. Rep. 637.

Service Out of County, if unauthorized, must be objected to or the objection will be waived. *Callender v. Gates*, 45 Ill. App. 374; *Marquardt v. Thompson*, 78 Iowa 158.

The Effect of Sustaining a Demurrer to an Answer After Voluntary Appearance will not be to oust the jurisdiction of the court over the person which attached by reason of the appearance and answer. *Brooks v. Chatham*, 57 Tex. 31.

Right of Codefendant to Object. — One defendant cannot take advantage of the personal privilege of his codefendant to object to the jurisdiction of the court over the person of the latter. *Rice v. Tarver*, 4 Ga. 571.

Effect of Answering Over. — By answering over after demurrer to a plea in abatement sustained, the defendant does not waive the objection. *Grand Lodge Brotherhood, etc. v. Cramer*, 164 Ill. 13; *Galveston City R. Co. v. Hook*, 40 Ill. App. 547; *Union Mut. Acc. Assoc. v. Riel*, 38 Ill. App. 414; *Delahay v. Clement*, 4 Ill. 201; *Weld v. Hubbard*, 11 Ill. 574; *Harkness v. Hyde*, 98 U. S. 476, wherein a motion to set aside an illegal service was overruled and the same effect was given to the action of the defendant in answering over. But as to other rulings upon this question, see article APPEARANCES, vol. 2, p. 629.

Distinction Between Practice at Law and in Equity. — In *Railway Pass., etc., Mut. Aid, etc., Assoc. v. Robinson*, 38 Ill. App. 112, affirmed in 147 Ill. 138, it was held that an answer in chancery after demurrer to a plea to the jurisdiction sustained waived the objection, the court saying: "In *Delahay v. Clement*, 4 Ill. 201, and *Weld v. Hubbard*, 11 Ill. 574, it was held that

when a demurrer to a plea in abatement as to the jurisdiction of the court over the defendant was sustained, and the defendant required to answer over to the declaration, he did not, by complying with such order of the court, waive the objection raised by the plea. It was given as the reason that he was by the court required to plead over, and that he was not in the position of one who asks leave to amend his plea after it is held bad on demurrer, and who thereby waives the point presented by the plea. These were cases at law, and the rule seems to be confined to practice at law, and is based upon considerations peculiar to pleas in abatement, and the effect of sustaining a demurrer thereto. The doctrine is quite technical, and is not, so far as we are advised, applicable in chancery. It seems not very important, as a matter of principle, whether a defendant is ruled to plead over or pleads over upon his own request; the consequence of not so pleading would, in either case, merely be to give the plaintiff a judgment. We are disposed to hold that in chancery practice the defendant should not be allowed to experiment in this way, and that if he chooses to answer after his plea is disallowed, and is defeated on the merits, he cannot, on appeal, raise anew the question of jurisdiction of his person."

1. *Brown v. Webber*, 6 Cush. (Mass.) 564; *Smiths v. Dubuque County*, 1 Iowa 494. See *supra*, II. 7. *Jurisdiction by Consent*.

2. *Richards v. Lake Shore, etc., R. Co.*, 124 Ill. 521; *Winkler v. Winkler*, 40 Ill. 179.

Nature of Demurrer. — See article DEMURRERS IN CHANCERY, vol. 6, p. 410.

3. *Connecticut*. — *Griswold v. Mather*, 5 Conn. 435.

Illinois. — *Richards v. Lake Shore, etc., R. Co.*, 124 Ill. 519.

dition appears on the face of the bill, it is proper to demur,¹ though if no objection has been taken, the court may dismiss the bill at the hearing if it does not state a proper cause for relief.²

Waiver. — If the subject-matter of the litigation be outside the pale of equity jurisdiction, the objection will not be waived by failure to take it at an early stage or in a particular manner; it is the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel.³

Iowa. — Kriechbaum v. Bridges, 1 Iowa 14.

Kentucky. — Pennebaker v. Wathan, 2 A. K. Marsh. (Ky.) 315.

Maine. — Stephenson v. Davis, 56 Me. 73.

Maryland. — Estep v. Watkins, 1 Bland (Md.) 486; Ridgeway v. Toram, 2 Md. Ch. 303; Townshend v. Duncan, 2 Bland (Md.) 45; Tomlinson v. McKaig, 5 Gill (Md.) 276; Berrett v. Oliver, 7 Gill & J. (Md.) 191; Gregory v. Lenning, 54 Md. 51.

Missouri. — State v. Circuit Ct., 41 Mo. 574; Rutherford v. Williams, 42 Mo. 18; Humphreys v. Atlantic Milling Co., 98 Mo. 552, holding that the distinction between suits in equity and actions at law, so far as the trial is concerned, must be maintained, so long as the parties have a constitutional right to a jury trial in actions at law.

1. Anthony v. Valentine, 130 Mass. 119; Poindexter v. Burwell, 82 Va. 513; Nash v. Smith, 6 Conn. 422.

Objection to the Jurisdiction is raised by demurrer. Boston Water Power Co. v. Boston, etc., R. Corp., 16 Pick. (Mass.) 520; May v. Parker, 12 Pick. (Mass.) 35. See the cases last above cited. See also article DEMURRERS IN CHANCERY, vol. 6, p. 410.

The True Test of jurisdiction has been said to be found in the determination of the question whether a demurrer will lie. Tomlinson v. McKay, 5 Gill (Md.) 256; Davis v. Helbig, 27 Md. 465; Bolgiano v. Cooke, 19 Md. 394; Gregory v. Lenning, 54 Md. 56.

2. Berrett v. Oliver, 7 Gill & J. (Md.) 191; Poindexter v. Burwell, 82 Va. 513; Green v. Massie, 21 Gratt. (Va.) 356; Salamone v. Keiley, 80 Va. 86; Arnold v. Middletown, 39 Conn. 401; Grandin v. Le Roy, 2 Paige (N. Y.) 509; Pittsburgh, etc., Drove Yard Co.'s Appeal, 123 Pa. St. 252; Lehigh Zinc, etc., Co. v. Trotter, 43 N. J. Eq. 204.

Where the legal remedy is obvious, and it is apparent to the court that there is a defect of power to proceed in

equity, the court may, of its own motion, dismiss the bill. When the question is in doubt, and there has been a trial upon the merits, the court will not, of its own motion, dismiss the bill for that cause, nor will the objection then taken for the first time by the respondent be regarded with favor. Hine v. New Haven, 40 Conn. 478. See in general article REMEDY AT LAW.

3. *Colorado.* — Derry v. Ross, 5 Colo. 295.

Connecticut. — Smith v. Lawrence, 26 Conn. 479; Niles v. Williams, 24 Conn. 279.

Florida. — Griffin v. Orman, 9 Fla. 22.

Illinois. — Magee v. Magee, 51 Ill. 500; Prettyman v. Irwin, 29 Ill. App. 122; Stout v. Cook, 41 Ill. 447; Knox County v. Davis, 63 Ill. 405; Hickey v. Forristal, 49 Ill. 255.

Iowa. — Keokuk, etc., R. Co. v. Donnell, 77 Iowa 221.

Maine. — Chase v. Palmer, 25 Me. 341; Woodman v. Treeman, 25 Me. 531.

Massachusetts. — Russell v. Loring, 3 Allen (Mass.) 121.

Mississippi. — Green v. Creighton, 10 Smed. & M. (Miss.) 159; Lester v. Harris, 41 Miss. 668.

Missouri. — Rutherford v. Williams, 42 Mo. 35.

Nebraska. — Sherwin v. Gagghagen, 39 Neb. 238.

New York. — Heyer v. Burger, Hoffm. Ch. (N. Y.) 1; Grandin v. Le Roy, 2 Paige (N. Y.) 509; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 369.

Ohio. — Culver v. Rodgers, 33 Ohio St. 537.

Pennsylvania. — Edgett v. Douglass, 144 Pa. St. 95.

South Carolina. — M'Donald v. Crockett, 2 McCord Eq. (S. Car.) 130; Wilson v. Cheshire, 1 McCord Eq. (S. Car.) 233.

Virginia. — Pollard v. Patterson, 3 Hen. & M. (Va.) 67; Boston Blower

But in other cases, as where the matter falls under equitable jurisdiction subject to be defeated by something not appearing,¹ or where the subject-matter, though not within the ordinary jurisdiction of a court of equity, only wants some equitable element to bring it within such jurisdiction,² if the party sub-

Co. v. Carman Lumber Co., (Va. 1896) 26 S. E. Rep. 390.

United States.—Allen v. Pullman's Palace Car Co., 139 U. S. 658; Lewis v. Cocks, 23 Wall. (U. S.) 466; Parker v. Winnipiseogee Lake Cotton, etc., Co., 2 Black (U. S.) 545; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205.

The rule that an objection to the jurisdiction of a court of equity to entertain a particular suit is waived, if not taken by demurrer, applies only to cases of concurrent jurisdiction. Green v. Creighton, 10 Smed. & M. (Miss.) 159; Bell v. Tombigbee R. Co., 4 Smed. & M. (Miss.) 549; Marsh v. Haywood, 6 Humph. (Tenn.) 213; Heyer v. Burger, Hoffm. Ch. (N. Y.) 1.

1. Smith v. Lawrence, 26 Conn. 479; Williams v. Detroit, 2 Mich. 586.

An Extreme Holding.—In one case the doctrine of waiver of objection to the jurisdiction of a court of equity was carried, it seems, to a very great length. The court stated that no ground of equitable jurisdiction had been suggested in the bill, unless perhaps one phase of the bill constituted such ground, upon which it expressed no opinion, and proceeded to say: "The question of jurisdiction in equity is as distinctly raised upon the face of the bill as it is upon the report of the referee. The defendants might have taken the objection to the jurisdiction by demurrer to the bill. Instead of doing so, they elected to join issue upon the facts. They have had a full hearing upon them without objection on their part to the form of the proceeding. They chose to contest the merits and take their chance of winning. After nearly sixteen years of litigation they are defeated. It would be a practical denial of justice to the plaintiff to permit them now to turn him out of court upon this objection. All the facts upon which the rights of the parties depend have been fully tried and determined. It does not appear that in this form of proceeding the defendants have lost any advantage which they would have had in an action of trespass or in a writ of entry.

Under these circumstances, if for any reason the bill could not be maintained, the plaintiff would be permitted to amend by filing a declaration at law, and take judgment thereon without any further hearing or trial." Cushing v. Miller, 62 N. H. 527.

2. Distinction Drawn.—In Richards v. Lake Shore, etc., R. Co., 124 Ill. 519, the court adverts to the rule laid down in Story's Equity Pleading that "whatever may be the object of the bill, the first and fundamental rule, which is always indispensable, to be observed is that it must state a case within the appropriate jurisdiction of a court of equity. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured by any waiver or course of proceeding by the parties," in the following language: "The author is doubtless speaking here of jurisdiction in the strict sense in which it is understood in courts of law, and as applicable to a certain class of cases in equity which under no circumstances are ever cognizable in a court of equity, such as would be a bill to recover damages for slander, or for an assault and battery. In these and like cases the decree would be a nullity, although the jurisdiction of the court passed unchallenged. But there is another class of cases, involving matters of contract and the like, which, while they do not come within the ordinary jurisdiction of a court of equity, yet, inasmuch as these matters only want some equitable element to bring the case within such jurisdiction, the defendant, by answering to the merits instead of demurring, will not be permitted to afterwards raise the question of jurisdiction for the first time on the hearing, much less on appeal. In both classes of cases there is a want of jurisdiction. In the first there is a total want of power to hear or determine the case. In the other the want of power is not absolute, but qualified." Tubb v. Fort, 58 Ala. 277.

See also *supra*, I. 2. *Distinction Between Power and Jurisdiction.*

mits to the jurisdiction, he will not afterwards be heard to object.¹

False Allegations in Bill to Confer Jurisdiction. — If false allegations are inserted in a bill for the purpose of conferring jurisdiction upon the court, it has been held that the defendant may deny such allegations in his answer and insist that the court has no jurisdiction as to the other matters, and such answer will go in bar of the relief.²

(2) *Matters Beneath the Dignity of the Court.* — When the matter presented to a court of chancery is beneath the inherent jurisdiction of such a court,³ the bill may be dismissed on motion or the court may decline to entertain the suit although no specific objection on this ground is made by demurrer or otherwise.⁴

3. Collateral Impeachment of Judgments — *a. THE GENERAL RULE AGAINST.* — It is a general rule that judgments of courts which had jurisdiction of the subject-matter and of the persons of the parties to the litigation, stand of binding force and effect until reversed, vacated, or set aside in a direct proceeding for that purpose, and cannot be collaterally attacked.⁵

1. **Adequate Remedy at Law.** — Objection that the plaintiff has an adequate remedy at law should be set up by demurrer or answer. See article REMEDY AT LAW. See also article ANSWERS IN EQUITY PLEADING, vol. I, p. 883.

2. *Fulton Bank v. New York, etc., Canal Co.*, 4 Paige (N. Y.) 127.

3. See *supra*, II. 10. *Jurisdiction Dependent upon Amount in Controversy.*

4. *Chapman v. Banker, etc.*, Pub. Co., 128 Mass. 479; *Cummings v. Barrett*, 10 Cush. (Mass.) 190; *Smith v. Williams*, 116 Mass. 513; *Swedish Evangelical Lutheran Church v. Shivers*, 16 N. J. Eq. 453; *Steinbach v. Hill*, 25 Mich. 78; *Brace v. Taylor*, 2 Atk. 253; *Anonymous, Mosely* 47; *Creagh v. Nugent, Mosely* 356.

A bill beneath the dignity of the court may be dismissed on motion, and this is the most usual way of proceeding in such a case. *Cooper's Equity Pleading*, p. 166*.

Where the Amount Is Fixed by Statute. it was held in *New York*, that if it appears upon the face of the complainant's bill that the matter in dispute, exclusive of costs, does not exceed \$100, the defendant may either demur, or move to dismiss the bill with costs, but that if that fact does not appear upon the face of the bill it may be pleaded in bar of the suit. *Smets v. Williams*, 4 Paige (N. Y.) 364; *Bradt v. Kirkpatrick*, 7 Paige (N. Y.) 62. Because, as it seems to be held, the juris-

diction of the court does not depend upon the amount ultimately found due the complainant, but upon the claim actually made by him. *Smets v. Williams*, 4 Paige (N. Y.) 364.

5. *Alabama.* — *Cobb v. Garner*, 105 Ala. 467; *Wyman v. Campbell*, 6 Port. (Ala.) 237; *Nathan v. Tompkins*, 82 Ala. 437; *Comer v. Bray*, 83 Ala. 217.

Arkansas. — *Burcham v. Terry*, 55 Ark. 398; *MacCarter v. Neil*, 50 Ark. 188.

Colorado. — *Rawles v. People*, 2 Colo. App. 501; *Brown v. Tucker*, 7 Colo. 30; *People v. District Ct.*, 22 Colo. 422; *People v. Rio Grande County*, 7 Colo. App. 229.

Illinois. — *Buckmaster v. Carlin*, 4 Ill. 104; *Swiggart v. Harber*, 5 Ill. 364; *Rigg v. Cook*, 9 Ill. 336; *Young v. Lorain*, 11 Ill. 624; *Weiner v. Heintz*, 17 Ill. 259; *Buckmaster v. Ryder*, 12 Ill. 207; *Ralston v. Wood*, 15 Ill. 159; *Lane v. Bommelmenn*, 17 Ill. 95; *Cody v. Hough*, 20 Ill. 43; *Rockwell v. Jones*, 21 Ill. 279; *Galena, etc., R. Co. v. Pound*, 22 Ill. 399; *Eimer v. Richards*, 25 Ill. 289; *Wight v. Wallbaum*, 39 Ill. 554; *Elston v. Chicago*, 40 Ill. 514; *Huls v. Buntin*, 47 Ill. 396; *Conover v. Musgrave*, 68 Ill. 58; *Whitman v. Heneberry*, 73 Ill. 109; *McDaniel v. Fox*, 77 Ill. 343; *Prout v. People*, 83 Ill. 154; *Murphy v. Williamson*, 85 Ill. 149; *Spring v. Kane*, 86 Ill. 580; *Schill v. Reisdorf*, 88 Ill. 411; *Neff v. Smyth*, 111 Ill. 100; *McMillan v. Lovejoy*, 115

b. ERRORS OF JUDGMENT OR IRREGULARITY. — When jurisdiction has once attached, the court has a right to decide every question arising in the case, and errors of judgment or irregulari-

Ill. 498; *McCormick v. Bauer*, 122 Ill. 573; *Bannon v. People*, 1 Ill. App. 496; *Van Metre v. Sankey*, 148 Ill. 536; *Horton v. Critchfield*, 18 Ill. 133; *Lancaster v. Lane*, 19 Ill. 242; *Iverson v. Loberg*, 26 Ill. 179; *Stow v. Kimball*, 28 Ill. 93; *Bay v. Cook*, 31 Ill. 336; *Lawrence v. Jarvis*, 32 Ill. 304; *Mad-den v. Cooper*, 47 Ill. 359; *Feaster v. Fleming*, 56 Ill. 457; *Briscoe v. Lloyd*, 64 Ill. 33; *Hicks v. Chapin*, 67 Ill. 375; *Taylor v. Kearn*, 68 Ill. 339; *Stempel v. Thomas*, 89 Ill. 146; *Hopkins v. Medley*, 99 Ill. 509; *Allman v. Taylor*, 101 Ill. 185; *Chicago v. Hall*, 103 Ill. 342; *Jenkins v. International Bank*, 111 Ill. 462; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Atty.-Gen. v. Chicago, etc., R. Co.*, 112 Ill. 520; *Bowen v. Allen*, 113 Ill. 53; *Tunesma v. Schuttler*, 114 Ill. 156; *Cairo v. Campbell*, 116 Ill. 305; *Union Nat. Bank v. International Bank*, 123 Ill. 510; *Maloney v. Dewey*, 127 Ill. 395; *Ives v. Hulce*, 17 Ill. App. 35; *Fanning v. Russell*, 21 Ill. App. 220; *Brinton v. Einhaus*, 21 Ill. App. 328; *Jolly v. Fitzgerald*, 23 Ill. App. 514; *Pepper v. Pepper*, 24 Ill. App. 316; *Smith v. Luse*, 30 Ill. App. 37; *Webber v. Mackey*, 31 Ill. App. 369; *Telford v. Garrells*, 31 Ill. App. 441; *Culver v. Phelps*, 130 Ill. 217; *Paullissen v. Look*, 38 Ill. App. 510.

Indiana. — *Rubush v. State*, 112 Ind. 107; *Walker v. Hill*, 111 Ind. 232; *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240; *Harrod v. Dismore*, 127 Ind. 338.

Iowa. — *Bacoh v. Chase*, 83 Iowa 521; *Barney v. Chittenden*, 2 Greene (Iowa) 165.

Kentucky. — *Paul v. Smith*, 82 Ky. 451; *Gains v. Johnston*, (Ky. 1891) 15 S. W. Rep. 246.

Louisiana. — *Factors', etc., Ins. Co. v. De Blanc*, 31 La. Ann. 100; *Grevemberg v. Bradford*, 44 La. Ann. 400; *Jones v. Lake*, 43 La. Ann. 1024; *Kent v. Brown*, 38 La. Ann. 802.

Maine. — *Banister v. Higginson*, 15 Me. 73; *Smith v. Keen*, 26 Me. 411; *Granger v. Clark*, 22 Me. 128.

Maryland. — *Taylor v. State*, 73 Md. 208.

Massachusetts. — *Pearse v. Hill*, 163 Mass. 493; *Sylvester v. Boyd*, 166 Mass. 445.

Michigan. — *Pettiford v. Zoellner*, 45 Mich. 358; *Norman v. Olney*, 64 Mich. 553; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Holden v. Lathrop*, 65 Mich. 652.

Minnesota. — *Ferguson v. Kumler*, 25 Minn. 183.

Missouri. — *Martin v. McLean*, 49 Mo. 361; *Brown v. Covenant Mut. L. Ins. Co.*, 86 Mo. 51; *State v. Donegan*, 83 Mo. 374, 12 Mo. App. 190; *Hardin v. Lee*, 51 Mo. 241; *Holliday v. Jackson*, 21 Mo. App. 660; *Bent v. Alexander*, 15 Mo. App. 181; *Sedalia v. Mis-souri, etc., R. Co.*, 17 Mo. App. 105; *Scott v. Crews*, 72 Mo. 261; *Phelps County v. Bishop*, 68 Mo. 250; *Crews v. Mooney*, 74 Mo. 26; *Rolf v. Timmermeister*, 15 Mo. App. 249; *Duffy v. Joyal*, 5 Mo. App. 579; *State v. Donegan*, 12 Mo. App. 190; *Knoll v. Woel-ken*, 13 Mo. App. 275; *Murphy v. De France*, 105 Mo. 53; *Sherwood v. Baker*, 105 Mo. 472; *Perryman v. State*, 8 Mo. 208; *Bernecker v. Miller*, 44 Mo. 102; *Reed v. Vaughan*, 15 Mo. 137.

Nebraska. — *State v. Buffalo County*, 6 Neb. 454; *Bryant v. Estabrook*, 16 Neb. 217.

New Hampshire. — *Pendexter v. Cate*, 66 N. H. 270.

New Jersey. — *Stokes v. Middleton*, 28 N. J. L. 32; *Hartshorne v. Johnson*, 7 N. J. L. 108; *Den v. Gaston*, 24 N. J. L. 818; *Den v. Zellers*, 7 N. J. L. 153; *Maxwell v. Pittenger*, 3 N. J. Eq. 156; *Diehl v. Page*, 3 N. J. Eq. 143; *Den v. O'Hanlon*, 21 N. J. L. 582; *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. 58.

New York. — *Hawley v. Mancius*, 7 Johns. Ch. (N. Y.) 174; *Gomez v. Gomez*, 81 Hun (N. Y.) 566; *Germania F. Ins. Co. v. Francis*, 43 Hun (N. Y.) 621.

North Carolina. — *Smith v. Gray*, 116 N. Car. 314; *McLaurin v. McLaurin*, 106 N. Car. 331; *McGlawhorn v. Worthington*, 98 N. Car. 199; *Sumner v. Sessoms*, 94 N. Car. 371; *Hare v. Hollomon*, 94 N. Car. 14; *State v. Ridley*, 114 N. Car. 827.

Oregon. — *Morrill v. Morrill*, 20 Ore-gon 96.

Pennsylvania. — *Brooks's Estate*, 8 Pa. Co. Ct. Rep. 514; *Murray v. Weigle*, 118 Pa. St. 159; *Yaple v. Titus*, 41 Pa. St. 195; *McDonald v. Simcox*, 98 Pa. St. 619.

ties, however gross, which do not render the judgment absolutely void, are not available on collateral attack, but the judgment is valid until reversed or vacated by direct proceeding.¹ In such

Tennessee. — *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435.

Texas. — *Grassmeyer v. Beeson*, 18 Tex. 753; *McCreery v. Fortson*, 35 Tex. 641; *Grant v. McKinney*, 36 Tex. 62; *Wells v. Polk*, 36 Tex. 120; *Burford v. Rosenfield*, 37 Tex. 42; *Hutchins v. Lockett*, 39 Tex. 165; *Lockett v. Townsend*, 3 Tex. 119; *Sutherland v. De Leon*, 1 Tex. 250.

Vermont. — *Porter v. Gile*, 47 Vt. 620; *Nason v. Sewall, Brayt. (Vt.)* 119.

Virginia. — *Spotts v. Com.*, 85 Va. 531.

Washington. — *Baldwin v. Baer*, 10 Wash. 414.

United States. — *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Simmons v. Saul*, 138 U. S. 444; *McNitt v. Turner*, 16 Wall. (U. S.) 366; *Herron v. Dater*, 120 U. S. 464; *Needham v. Wilson*, 47 Fed. Rep. 97.

Prosecution for Perjury. — Where the jurisdiction of the court is voidable by matters not appearing upon the face of the record, trial, or conviction, such record cannot be collaterally impeached in a prosecution for perjury for taking a false oath in the course of the trial, by showing that the jurisdiction might have been ousted though it was not defeated. While it is necessary, to sustain an indictment for perjury, to show that the court had jurisdiction of the subject-matter of the inquiry in which the perjury is alleged to have been committed, the defendant cannot impeach the record by showing that the prosecution for the offense in the trial of which the false swearing occurred was barred by the statute of limitations. *State v. Ridley*, 114 N. Car. 829.

Equitable Defenses in Actions at Law. — A statute permitting equitable defenses in actions at law does not have the effect of permitting a collateral attack of an order or decree of a court of equity in an action at law. *Taylor v. State*, 73 Md. 220. But see *Clark v. Little*, 41 Iowa 497; *Ferguson v. Crawford*, 70 N. Y. 253.

1. *Arkansas*. — *Evans v. Percifull*, 5 Ark. 424; *Miller v. Barkeloo*, 8 Ark. 318; *Boyd v. Roane*, 49 Ark. 397; *Stuart v. Peay*, 21 Ark. 117; *Ex p. Woods*, 3 Ark. 532.

California. — *Hayward v. Pimental*,

107 Cal. 386; *Lynch v. Rooney*, 112 Cal. 279; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; *James's Estate*, 99 Cal. 374; *Rowe v. Blake*, 112 Cal. 637; *Keybers v. McComber*, 67 Cal. 398; *Sherer v. Superior Ct.*, 96 Cal. 653.

Delaware. — *Roach v. Martin*, 1 Harr. (Del.) 548.

Georgia. — *Tucker v. Harris*, 13 Ga. 1; *Wood v. Crawford*, 18 Ga. 526; *Kelsey v. Wyley*, 10 Ga. 371.

Illinois. — *Allman v. Taylor*, 101 Ill. 185; *Mulford v. Stalzenback*, 46 Ill. 305; *Hempstead v. Dickson*, 20 Ill. 193; *Fitzgibbon v. Lake*, 29 Ill. 165; *Chicago, etc., R. Co. v. Watson*, 113 Ill. 195; *Agnew v. Lichten*, 19 Ill. App. 79; *McCormack v. Kimmel*, 4 Ill. App. 121; *Schmidt v. Pierce*, 17 Ill. App. 523; *Dodge v. Cole*, 97 Ill. 348; *Vail v. Arkell*, 146 Ill. 363; *Kingsbury v. Powers*, 131 Ill. 182; *Hobson v. Ewan*, 62 Ill. 146; *Curtiss v. Brown*, 29 Ill. 201; *Shoemate v. Lockridge*, 53 Ill. 503; *Gardner v. Maroney*, 95 Ill. 552; *Van Metre v. Sankey*, 148 Ill. 536; *Burton v. Perry*, 146 Ill. 71; *Taylor v. Kearn*, 68 Ill. 339; *Jenkins v. International Bank*, 111 Ill. 462; *Maloney v. Dewey*, 127 Ill. 395; *Ives v. Hulce*, 17 Ill. App. 35; *Moffitt v. Moffitt*, 69 Ill. 641; *Lyons v. Cooledge*, 89 Ill. 529.

Indiana. — *Nesbit v. Miller*, 125 Ind. 106; *Davidson v. Koehler*, 76 Ind. 400; *Lantz v. Maffett*, 102 Ind. 28; *Indiana, etc., R. Co. v. Allen*, 113 Ind. 308; *Davis v. Lennen*, 125 Ind. 185; *Alexander v. Gill*, 130 Ind. 485; *State v. Rogers*, 131 Ind. 458; *State v. Tow*, 5 Ind. App. 261; *Harrod v. Dismore*, 127 Ind. 338; *Worthington v. Dunkin*, 41 Ind. 515; *Hawkins v. McDougal*, 126 Ind. 539; *Walker v. Hill*, 111 Ind. 223; *Evans v. Ashby*, 22 Ind. 15; *Waltz v. Borroway*, 25 Ind. 380; *Hawkins v. Hawkins*, 28 Ind. 66; *Comparet v. Hanna*, 34 Ind. 74; *Gavin v. Graydon*, 41 Ind. 559; *Britton v. State*, 54 Ind. 535; *Goar v. Maranda*, 57 Ind. 339; *Browning v. Smith*, 139 Ind. 280.

Iowa. — *Traer v. Whitman*, 56 Iowa 443; *Morrow v. Weed*, 4 Iowa 77; *Read v. Howe*, 39 Iowa 553; *Edmundson v. Independent School Dist.*, (Iowa 1896) 67 N. W. Rep. 671; *Ballinger v. Tarbell*, 16 Iowa 492; *Cursley v. Hayes*, 22

cases the only thing to be considered is whether the court whose proceedings are brought in question collaterally had jurisdiction

Iowa 11; Ketchum v. White, 72 Iowa 193; Parker v. Albee, 86 Iowa 46; Freeman v. Hart, 61 Iowa 525.

Kansas. — Rowe v. Palmer, 29 Kan. 337; Axman v. Dueker, 45 Kan. 179; Mills v. Ralston, 10 Kan. 206; Matter of Dill, 32 Kan. 691.

Kentucky. — Prince v. Antle, 90 Ky. 138.

Maine. — Boynton v. Fly, 12 Me. 17; Pease v. Whitten, 31 Me. 117; Footman v. Stetson, 32 Me. 17; Woodman v. Smith, 37 Me. 21; Smith v. Abbott, 40 Me. 442.

Maryland. — Dorsey v. Garey, 30 Md. 489; Percy v. Clary, 32 Md. 245; Morrill v. Gelston, 34 Md. 413; Powles v. Dilley, 9 Gill (Md.) 222; Ranoul v. Griffie, 3 Md. 54; Farmers' Bank v. Thomas, 37 Md. 246; Manton v. Hoyt, 43 Md. 254; Cockey v. Cole, 28 Md. 276; Clark v. Bryan, 16 Md. 171; Glenn v. Williams, 60 Md. 93; Groshon v. Thomas, 20 Md. 234.

Michigan. — Gill v. Backus, (Mich. 1896) 66 N. W. Rep. 347; Taylor v. Gladwin, 40 Mich. 232; Reeg v. Burnham, 55 Mich. 40; Bigalow v. Barre, 30 Mich. 1; Mitchell v. Chambers, 43 Mich. 150.

Mississippi. — A. B. Smith Co. v. Holmes County Bank, (Miss. 1895) 18 So. Rep. 847; Moore v. Ware, 51 Miss. 206.

Missouri. — Camden v. Plein, 91 Mo. 117; Castleman v. Relfe, 50 Mo. 583; Dilworth v. Rice, 48 Mo. 124; Yeoman v. Younger, 83 Mo. 424; Merrick v. Merrick, 5 Mo. App. 123; Robbins v. Foster, 20 Mo. App. 519; Miles v. Davis, 19 Mo. 408; State v. Hunter, 98 Mo. 386; Gibbs v. Southern, 116 Mo. 204; Rosenheim v. Hartsock, 90 Mo. 357; Lewis v. Morrow, 89 Mo. 174; Howard v. Still, 14 Mo. App. 584; Knoll v. Woelken, 13 Mo. App. 275; Colvin v. Six, 79 Mo. 198; Hardin v. Lee, 51 Mo. 241; State v. Six, 80 Mo. 61; Ellis v. Jones, 51 Mo. 180; Hagerman v. Sutton, 91 Mo. 528.

Nebraska. — Crowell v. Johnson, 2 Neb. 154; Trumble v. Williams, 18 Neb. 144; Brandhoefer v. Bain, 45 Neb. 781; Taylor v. Coots, 32 Neb. 30; Roberts v. Flanagan, 21 Neb. 503; Hilton v. Bachman, 24 Neb. 492; Williams v. Lowe, 4 Neb. 396.

Nevada. — State v. Blossom, 22 Nev. 71.

New Hampshire. — Blanchard v. Goss, 2 N. H. 491; Gorrell v. Whittier, 3 N. H. 265; Smith v. Smith, 15 N. H. 55; Kittredge v. Emerson, 15 N. H. 262; Morse v. Presby, 25 N. H. 303; Bedel v. Goodall, 26 N. H. 98; Lamprey v. Nudd, 29 N. H. 300; Keniston v. Little, 30 N. H. 318; Claggett v. Simes, 31 N. H. 22, 56; Brown v. Dudley, 33 N. H. 511; White v. Landaff, 35 N. H. 128; Moulton v. Wendell, 37 N. H. 410; State v. Weare, 38 N. H. 314; Wingate v. Haywood, 40 N. H. 437; Bruce v. Cloutman, 45 N. H. 37; Lawrence v. Smith, 45 N. H. 533.

New Jersey. — Manley v. Mickle, 53 N. J. Eq. 157; Munday v. Vail, 34 N. J. L. 418; Den v. Hammel, 18 N. J. L. 73.

New York. — Hunting v. Blun, 143 N. Y. 511; People v. Brooklyn, 49 Barb. (N. Y.) 136; De Bemer v. Drew, 39 How. Pr. (N. Y. Supreme Ct.) 472; Whiting v. Putnam, 16 Abb. Pr. (N. Y. C. Pl.) 382; Brooks v. New York, 57 Hun (N. Y.) 104; Cherry Creek v. Becker, 123 N. Y. 168; Schaettler v. Gardiner, 47 N. Y. 404; Anderson v. Carr, 65 Hun (N. Y.) 179, 137 N. Y. 565.

North Carolina. — Ward v. Lowndes, 96 N. Car. 367; Burke v. Elliott, 4 Ired. L. (N. Car.) 355; Springer v. Shavender, 116 N. Car. 12.

Ohio. — Paine v. Mooreland, 15 Ohio 435; Sheldon v. Newton, 3 Ohio St. 498.

Oregon. — McCulloch v. Estes, 20 Oregon 349; Cason v. Stone, 1 Oregon 41; Nicklin v. Hobin, 13 Oregon 406; Dolph v. Barney, 5 Oregon 192; Walker v. Goldsmith, 14 Oregon 125; Woodward v. Baker, 10 Oregon 491; Finley v. Houser, 22 Oregon 562.

Pennsylvania. — Gilmore v. Rodgers, 41 Pa. St. 120.

Rhode Island. — Hall v. Anthony, 13 R. I. 221.

Texas. — Roberts v. McCamant, 70 Tex. 743; Carter v. Roland, 53 Tex. 540; Mikeska v. Blum, 63 Tex. 44; Bordages v. Higgins, 1 Tex. Civ. App. 43; Caplen v. Compton, 5 Tex. Civ. App. 410; Odle v. Frost, 59 Tex. 684; Murchison v. White, 54 Tex. 78; Withers v. Patterson, 27 Tex. 491.

Utah. — Ducheneau v. House, 4 Utah 369; Ducheneau v. Ireland, 5 Utah 108.

Vermont. — Porter v. Gile, 47 Vt. 620; Holt v. Thacher, 52 Vt. 592.

and power to pass the judgment or decree,¹ and mere irregularities which do not affect the jurisdiction are no more available than erroneous judgments.²

- Virginia*. — Lemmon v. Herbert, 92 Va. 653; Pennybacker v. Switzer, 75 Va. 671; Pierce v. Graham, 85 Va. 236; Cotton v. Cotton, 4 Rand. (Va.) 192; Hitchcox v. Rawson, 14 Gratt. (Va.) 526.
- West Virginia*. — Hall v. Hall, 12 W. Va. 1.
- Wisconsin*. — Falkner v. Guild, 10 Wis. 572; Johnson v. Iron Belt Min. Co., 78 Wis. 159.
- United States*. — Pullman's Palace Car Co. v. Washburn, 66 Fed. Rep. 790; Griswold v. Hazard, 141 U. S. 260; Reinach v. Atlantic, etc., R. Co., 58 Fed. Rep. 33; Evers v. Watson, 156 U. S. 527; Cooper v. Reynolds, 10 Wall. (U. S.) 308; McNitt v. Turner, 16 Wall. (U. S.) 366; Simmons v. Saul, 138 U. S. 454; Grignon v. Astor, 2 How. (U. S.) 319.
- England*. — Rex v. Vincent, 1 Stra. 481.
1. Dorsey v. Gray, 30 Md. 489; Pettiford v. Zoellner, 45 Mich. 358; Bacon v. Chase, 83 Iowa 521; Paul v. Smith, 82 Ky. 451. See also the cases cited generally in this section, and *supra*, II. 8.
- Effect of Pleadings*.
- Test — Void or Voidable Proceedings*. — It is said that proceedings which are amendable are not void. The very fact that the court can make the amendment shows *ex vi termini* that the proceedings are merely erroneous, and that the court has jurisdiction. Johnson v. Jones, 2 Neb. 137; Hardin v. Lee, 51 Mo. 241 [citing Hunt v. Loucks, 38 Cal. 372; Parmelee v. Hitchcock, 12 Wend. (N. Y.) 96; Cooper v. Reynolds, 10 Wall. (U. S.) 308].
2. *Alabama*. — Wyman v. Campbell, 6 Port. (Ala.) 219; Lee v. Campbell, 6 Port. (Ala.) 249; Couch v. Campbell, 6 Port. (Ala.) 262; Moore v. Clay, 7 Ala. 742; Cox v. Davis, 17 Ala. 714.
- Arkansas*. — Conway v. Ellison, 14 Ark. 360.
- California*. — Scarf v. Aldrich, 97 Cal. 360.
- Connecticut*. — Morey v. Hoyt, 62 Conn. 542.
- Florida*. — Adams v. White, 23 Fla. 352.
- Illinois*. — Fitzpatrick v. Rutter, 160 Ill. 282; Wimberley v. Hurst, 33 Ill. 166; Maple v. Havenhill, 37 Ill. App. 311; Goodwin v. Mix, 38 Ill. 115; Wing v. Dodge, 80 Ill. 564; Nichols v. Mitchell, 70 Ill. 258.
- Indiana*. — Fruits v. Elmore, 8 Ind. App. 278; Woolery v. Grayson, 110 Ind. 149; Kleyla v. Haskett, 112 Ind. 515; Walker v. Hill, 111 Ind. 224.
- Iowa*. — Rotch v. Humboldt College, 89 Iowa 480; Parker v. Albee, 86 Iowa 46.
- Kansas*. — Matter of Dill, 32 Kan. 691.
- Kentucky*. — Benningfield v. Reed, 8 B. Mon. (Ky.) 102.
- Maryland*. — Powles v. Dilley, 9 Gill (Md.) 222; Simpson v. Bailey, 80 Md. 421.
- Michigan*. — Jenness v. Lapeer Circuit Judge, 42 Mich. 469; Torrans v. Hicks, 32 Mich. 307; Ruggles v. Centreville First Nat. Bank, 43 Mich. 192; Pardee v. Smith, 27 Mich. 33.
- Minnesota*. — Brown v. Atwater, 25 Minn. 520; Hennessy v. St. Paul, 54 Minn. 219; Hotchkiss v. Cutting, 14 Minn. 537; Vaule v. Miller, 64 Minn. 485.
- Missouri*. — Sims v. Gray, 66 Mo. 616; McNair v. Biddle, 8 Mo. 257; Johnson v. Beazley, 65 Mo. 250; Winston v. Affalter, 49 Mo. 263; Martin v. Barron, 37 Mo. 301; Exendine v. Morris, 76 Mo. 416; O'Reilly v. Nicholson, 45 Mo. 160; Brown v. Walker, 11 Mo. App. 226, 85 Mo. 262; Johnson v. Gage, 57 Mo. 160; Brackett v. Brackett, 53 Mo. 265; Perryman v. State, 8 Mo. 208; Bernecker v. Miller, 44 Mo. 102; Childs v. Shannon, 16 Mo. 331; Bailey v. McGinniss, 57 Mo. 362; Mann v. Schroer, 50 Mo. 306; Carson v. Sheldon, 51 Mo. 436; Chouteau v. Nuckolls, 20 Mo. 442; Dunn v. Miller, 8 Mo. App. 467, 75 Mo. 260; Bray v. Marshall, 75 Mo. 327.
- Nebraska*. — Connelly v. Egerton, 22 Neb. 82; Roberts v. Flanagan, 21 Neb. 503; Oakley v. Pegler, 30 Neb. 628; Larimer v. Wallace, 56 Neb. 444.
- New Jersey*. — Diehl v. Page, 3 N. J. Eq. 143.
- New York*. — Matter of Stilwell, 139 N. Y. 337; Bennett v. Couchman, 48 Barb. (N. Y.) 73; D. lafield v. Brady, 108 N. Y. 524; Hallock v. Dominy, 69 N. Y. 241.
- North Carolina*. — Burgess v. Kirby, 94 N. Car. 575; Keaton v. Banks, 10

Every Presumption Is in Favor of the Regularity of the proceedings of courts of general jurisdiction, even though the record is silent.¹

c. COURTS OF LIMITED AND INFERIOR JURISDICTION. — The foregoing rules generally apply to courts of limited and inferior jurisdiction as well as to those of general and unlimited jurisdiction; ² the only difference between courts of general and courts of

- Ired. L. (N. Car.) 381; Vick v. Pope, 81 N. Car. 22; Williamson v. Hartman, 92 N. Car. 236; Fowler v. Poor, 93 N. Car. 466; Stancill v. Gay, 92 N. Car. 455; Knott v. Taylor, 99 N. Car. 511.
- Ohio. — Root v. Davis, 51 Ohio St. 29; Spoons v. Coen, 44 Ohio St. 497.
- Oregon. — Woodward v. Baker, 10 Oregon 491; State v. Thompson, 28 Oregon 296.
- Pennsylvania. — Littleton's Appeal, 93 Pa. St. 177; West v. Cochran, 104 Pa. St. 482; Com. v. Royer, 161 Pa. St. 351.
- Texas. — McClesky v. State, 4 Tex. Civ. App. 322; Youngstown Bridge Co. v. North Galveston, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. Rep. 420.
- Vermont. — Wells v. Atkins, 68 Vt. 191.
- Washington. — Belles v. Miller, 10 Wash. 259; Munch v. McLaren, 9 Wash. 676.
- West Virginia. — North Western Bank v. Hays, 37 W. Va. 475.
- Wisconsin. — Falkner v. Guild, 10 Wis. 572.
- United States. — Bigelow v. Chatterton, 51 Fed. Rep. 614, 10 U. S. App. 267; Insley v. U. S., 150 U. S. 512.
1. Arkansas. — McKnight v. Smith, 5 Ark. 409.
- Florida. — Lee v. Patten, 34 Fla. 149.
- Illinois. — Wenner v. Thornton, 98 Ill. 156; Blair v. Ray, 5 Ill. App. 453; Riely v. Barton, 32 Ill. App. 524; Graham v. Dixon, 4 Ill. 115; Hough v. Baldwin, 16 Ill. 293; Cody v. Hough, 20 Ill. 43; Chapman v. Hurd, 67 Ill. 234; Bishop v. Morris, 22 Ill. App. 564; Seavey v. Seavey, 30 Ill. App. 625.
- Iowa. — Stevenson v. Bonesteel, 30 Iowa 286; Kennedy v. Independent School Dist., 48 Iowa 189; Hull v. Chicago, etc., R. Co., 65 Iowa 713; Lees v. Wetmore, 58 Iowa 170; Suiter v. Turner, 10 Iowa 517; Davenport Mut. Sav. Fund, etc., Assoc. v. Schmidt, 15 Iowa 213; Brown v. Davis, 59 Iowa 641; Indiana v. Helmer, 21 Iowa 370; Patterson v. Indiana, 2 Greene (Iowa) 492; Wright v. Marsh, 2 Greene (Iowa) 94; Campbell v. Ayres, 6 Iowa 339.
- Kansas. — Head v. Daniels, 38 Kan. 1.
- Missouri. — Sherwood v. Baker, 105 Mo. 472.
- New York. — Gridley v. St. Francis Xavier College, 137 N. Y. 327; Blake v. Lyon, etc., Mfg. Co., 77 N. Y. 626.
- Pennsylvania. — Lewis v. Rogers, 16 Pa. St. 18; Thompson's Appeal, 57 Pa. St. 175; Clark v. Douglass, 62 Pa. St. 408; Association v. Maguire, 1 W. N. C. (Pa.) 613; Meason's Estate, 4 Watts (Pa.) 341; Butterfield's Appeal, 77 Pa. St. 197; Lowber's Appeal, 8 W. & S. (Pa.) 387; Roemer v. Denig, 18 Pa. St. 482.
2. Arkansas. — Webster v. Daniel, 47 Ark. 131.
- Illinois. — Young v. Lorain, 11 Ill. 624; Payne v. Taylor, 34 Ill. App. 493.
- Indiana. — Stoddard v. Johnson, 75 Ind. 30; Featherston v. Small, 77 Ind. 144; Argo v. Barthand, 80 Ind. 66; Simonton v. Hays, 88 Ind. 72.
- Iowa. — Cooper v. Sunderland, 3 Iowa 114; Frazier v. Steenrod, 7 Iowa 339; Pursley v. Hayes, 22 Iowa 11.
- Kansas. — Bradford v. Larkin, 57 Kan. 90; Willis v. Sproule, 13 Kan. 269.
- Maryland. — Deal v. Harris, 8 Md. 40.
- Michigan. — Granger v. Judge, 44 Mich. 385; Chaddock v. Barry, 93 Mich. 542.
- Missouri. — Jeffries v. Wright, 51 Mo. 215; Kansas City v. Winner, 58 Mo. App. 299; McLaughlin v. Schultz, 125 Mo. 469.
- New York. — Stone v. Miller, 62 Barb. (N. Y.) 430; Hard v. Shipman, 6 Barb. (N. Y.) 623.
- Oregon. — Warner v. Myers, 3 Oregon 218; Canyonville, etc., Road Co. v. Douglas County, 5 Oregon 280.
- Pennsylvania. — Spade v. Bruner, 72 Pa. St. 57; Billings v. Russell, 23 Pa. St. 189.
- South Dakota. — Jewett v. Sundback, 5 S. Dak. 111.

special jurisdiction being that the record of the latter must show jurisdictional facts,¹ a presumption of regularity attaching as soon as the record shows that the court had jurisdiction, at least so far as subsequent proceedings in the action are concerned, to which extent every intendment is in favor of regularity.²

d. EXCEPTION IN FAVOR OF STRANGERS.—An exception to the rule is stated in favor of strangers to the record whose pre-existing rights are affected and who had no knowledge or notice of the proceedings; and such persons, having had no opportunity to reverse erroneous judgments, are accorded the privilege of calling them in question in collateral proceedings.³

1. See *supra*, IX. 2. *Courts of Inferior Jurisdiction.*

"The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void, in whatever court it was rendered." *Bloom v. Burdick*, 1 Hill (N. Y.) 130. Judge Paige held, in *Hard v. Shipman*, 6 Barb. (N. Y.) 621, that "the want of jurisdiction may always be set up against a judgment of a court, whether of general or of special and limited jurisdiction, whenever such judgment is sought to be enforced, or any benefit is claimed under it." *Bolton v. Jacks*, 6 Robt. (N. Y.) 198.

2. *Alabama.*—*Commissioners' Ct. v. Thompson*, 18 Ala. 694; *Key v. Vaughn*, 15 Ala. 497.

Connecticut.—*Raymond v. Bell*, 18 Conn. 89; *Fox v. Hoyt*, 12 Conn. 491.

Georgia.—*Gray v. McNeal*, 12 Ga. 424; *Tucker v. Harris*, 13 Ga. 1; *Wood v. Crawford*, 18 Ga. 526.

Illinois.—*Morgan v. Green*, 17 Ill. 395; *Kern v. Strasberger*, 71 Ill. 303; *Hermann v. Pardridge*, 79 Ill. 471; *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333.

Indiana.—*Stoddard v. Johnson*, 75 Ind. 30; *Featherston v. Small*, 77 Ind. 144; *Argo v. Barthand*, 80 Ind. 66; *Simonton v. Hays*, 88 Ind. 72.

Iowa.—*Rowan v. Lamb*, 4 Greene (Iowa) 475; *Cooper v. Sunderland*, 3 Iowa 114; *Morrow v. Weed*, 4 Iowa 77; *Pursely v. Hayes*, 22 Iowa 11; *Shawhan v. Loffer*, 24 Iowa 217; *Smith v. Engle*, 44 Iowa 265.

Kentucky.—*Hardin v. Smith*, 7 B. Mon. (Ky.) 390.

Michigan.—*Schlatterer v. Nickodemus*, 50 Mich. 315; *Saunders v. Tioga Mfg. Co.*, 27 Mich. 520.

Mississippi.—*Scott v. Porter*, 44

Miss. 364; *Cason v. Cason*, 31 Miss. 578; *Cannon v. Cooper*, 39 Miss. 784.

Missouri.—*Ellis v. Jones*, 51 Mo. 181; *Brooks v. Duckworth*, 59 Mo. 51; *State v. Lawrence*, 45 Mo. 492.

New Jersey.—*Reeves v. Townsend*, 22 N. J. L. 396.

Oregon.—*Dick v. Wilson*, 10 Oregon 490.

3. *Georgia.*—*Smith v. Cuyler*, 78 Ga. 654.

Maine.—*Sidensparker v. Sidensparker*, 52 Me. 481; *Buffum v. Ramsdell*, 55 Me. 252; *Gilbert v. Duncan*, 65 Me. 469; *Caswell v. Caswell*, 28 Me. 232.

Massachusetts.—*Safford v. Weare*, 142 Mass. 231; *Fall River v. Riley*, 140 Mass. 488; *Vose v. Morton*, 4 Cush. (Mass.) 31 [*citing Alexander v. Gould*, 1 Mass. 165; *Thorndike v. Bordman*, 4 Pick. (Mass.) 483; *Pond v. Makepeace*, 2 Met. (Mass.) 114; *Leonard v. Bryant*, 11 Met. (Mass.) 370]; *Lafin v. Field*, 6 Met. (Mass.) 287; *Downs v. Fuller*, 2 Met. (Mass.) 135.

Michigan.—*Eureka Iron, etc., Works v. Bresnahan*, 66 Mich. 489.

Minnesota.—*Hartman v. Weiland*, 36 Minn. 223; *Hunter v. Cleveland Co-operative Stove Co.*, 31 Minn. 505.

Missouri.—*State v. Stephenson*, 12 Mo. 178; *State v. Towl*, 48 Mo. 148; *Sims v. Gray*, 66 Mo. 616; *Golahar v. Gates*, 20 Mo. 236.

New Hampshire.—*Gurnsey v. Edwards*, 26 N. H. 224.

New York.—*Ashton v. Rochester*, 133 N. Y. 187.

Pennsylvania.—*Ogle v. Baker*, 137 Pa. St. 378.

Vermont.—*Atkinson v. Allen*, 12 Vt. 619; *Ingals v. Brooks*, 29 Vt. 398.

Virginia.—*Staunton Perpetual Bldg., etc., Co. v. Haden*, 92 Va. 201.

United States.—*Laing v. Rigney*, 160 U. S. 531.

c. FRAUD. — The authorities are not agreed upon the question whether a judgment can be attacked collaterally for fraud, but the general rule is that judgments obtained by the fraud of a party are binding upon the parties and privies thereto until im-

Proceedings in Rem. — In *Brigham v. Fayerweather*, 140 Mass. 413, the court applies the principle stated in the text to judgments *in rem*, reviewing the authorities, as follows: "If a competent court declares a vessel forfeited, or orders it sold free of all claims, or divorces a couple, or establishes a will under statutes like our Pub. Stat., c. 127, § 7, a paramount title is passed, the couple is divorced, the will is established, as against all the world, whether parties or not, because the sovereign has said that it shall be so. *Hughes v. Cornelius*, 2 Show. 232, T. Raym. 473, Skin. 59; *Noell v. Wells*, 1 Lev. 235; *Scott v. Shearman*, 2 W. Bl. 977; *The Helena*, 4 Rob. Adm. 3; *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *McClurg v. Terry*, 21 N. J. Eq. 225. But the same is true when the judgment is that A recover a debt of B. The public force is pledged to collect the debt from B, and no one within the jurisdiction can oppose it. And it does not follow in the former case any more than in the latter, nor is it true, that the judgment, because conclusive on all the world, in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments, such as sentences of prize courts, to which the greatest effect has been given in collateral proceedings, are said to be conclusive evidence of the facts upon which they proceed only against parties who were entitled to be heard before they were rendered. *The Mary*, 9 Cranch (U. S.) 146; *Salem v. Eastern R. Co.*, 98 Mass. 449; *Baxter v. New England Marine Ins. Co.*, 6 Mass. 286; *Whitney v. Walsh*, 1 Cush. (Mass.) 29. We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes. Still, the cases last cited show that some judgments

in rem are conclusive evidence of the facts adjudicated, in favor of a stranger as against a party. And if the analogy is to be applied to all judgments which create or change a status or a title, it would apply here. For the plaintiff was a party to the decree establishing the will, and that decree necessarily proceeded on the ground that the testator possessed sufficient capacity to make the will. But these cases cannot be taken to lay down a general principle. The reasons given for the decisions are not that the conclusion follows as a necessary effect of judgments *in rem* merely as such, but are special reasons of convenience or construction. In *The Mary*, 9 Cranch (U. S.) 145, the doctrine as to sentences of prize courts is said to rest on 'the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law; and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is coördinate throughout the world.' See also *Freeman v. Alderson*, 119 U. S. 187, wherein one of the distinctions between proceedings *in rem* and those *quasi in rem* is said to be that in the latter the judgment of the court is conclusive only upon parties and privies.

And see *Williams v. Lowe*, 4 Neb. 398, wherein it was apparent upon the face of the record that property sought to be condemned and sold was not seized and taken into the custody of the court. The court referred to and approved *Boswell v. Otis*, 9 How. (U. S.) 350, wherein it was held that jurisdiction is not to be presumed in such a case upon the general ground that the subject-matter of the suit is within the power of the court, but, on the contrary, that "no principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is sub-

peached by a direct proceeding for that purpose, but are not binding upon strangers, and the latter may set up the defense of fraud in obtaining a judgment whenever an attempt is made by such judgment to affect their rights.¹

4. Conclusiveness of Presumption of Jurisdiction — a. IN GENERAL. — Questions as to the force and effect of judgments of judicial tribunals depend much upon the form in which they arise, whether directly or collaterally, the subject to which they relate, whether of person or subject-matter, and the character of the tribunal, whether of general or special jurisdiction.²

b. INFERIOR COURTS. — The jurisdiction of inferior courts may be inquired into collaterally in respect to their authority over the person as well as the subject-matter, even in contradiction of the minutes or dockets which those tribunals may keep as records of their proceedings.³

stituted for a service on the party, should be subjected to a strict legal scrutiny."

1. For the effect of judgments, and of fraud as a defense, see article JUDGMENTS, AM. AND ENG. ENCYC. OF LAW (2d ed.). See also *supra*, VII. *Jurisdiction Fraudulently Acquired*.

2. *People v. County Jail*, 100 N. Y. 24.

Nonresidents. — When suit is brought on a judgment recovered against a party at a time when he was not a resident of the state, the defendant may show that the court had acquired no jurisdiction of his person. *Needham v. Thayer*, 147 Mass. 536, upon the authority of *Pennoyer v. Neff*, 95 U. S. 732, and *Freeman v. Alderson*, 119 U. S. 185, and reciting that in *McCormick v. Fiske*, 138 Mass. 379, the question of the effect of the fourteenth article of Amendments of the Constitution of the United States was not raised or suggested to the court; *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 148. See also *supra*, III. 3. *Nonresidents — Person or Property Within Jurisdiction*; IX. *General Rule of Presumptions as to Jurisdiction*; *infra*, X. 5. *Judgments of Sister States and Foreign Judgments*.

Formerly it was held otherwise. *Jones v. Ames, Brayt. (Vt.)* 189; *Cook v. Darling*, 18 Pick. (Mass.) 393; *Miller v. Dungan*, 35 N. J. L. 389.

Affirmative Showing of Record. — But it seems to be regarded that such an attack may be made only when the record does not show such service as will justify a personal judgment or appearance. *Stewart v. Anderson*, 70

Tex. 588. See also *Hunt v. Ellison*, 32 Ala. 173; *Zepp v. Hager*, 70 Ill. 223.

Prima Facie Sufficiency. — The record showing jurisdiction is *prima facie* sufficient for the purpose of showing jurisdiction. *Rugg v. Spencer*, 59 Barb. (N. Y.) 383; *Potter v. Merchants' Bank*, 28 N. Y. 641; *Bolton v. Jacks*, 6 Robt. (N. Y.) 166; *Bosworth v. Vandewalker*, 53 N. Y. 597.

3. *Coit v. Haven*, 30 Conn. 190; *Clark v. Holmes*, 1 Dougl. (Mich.) 400; *Smith v. Clausmeier*, 136 Ind. 115; *Salladay v. Bainhill*, 29 Iowa 555; *People v. County Jail*, 100 N. Y. 26; *Adams v. Washington, etc., R. Co.*, 10 N. Y. 328; *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Hard v. Shipman*, 6 Barb. (N. Y.) 623.

Prima Facie Evidence. — The recitals of jurisdictional facts set out in the records of courts of inferior jurisdiction are said to be not even *prima facie* evidence of jurisdiction, but will require proof, and when such proof is furnished it may be controverted. *People v. County Jail*, 100 N. Y. 25 [citing *Adams v. Washington, etc., R. Co.*, 10 N. Y. 328; *People v. Cassels*, 5 Hill (N. Y.) 164; *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Mills v. Martin*, 19 Johns. (N. Y.) 7]. But see, *contra*, *Cooper v. Sunderland*, 3 Iowa 114, as well as the following cases which place the records of justices of the peace upon the same footing with the records of other courts: *Payne v. Taylor*, 34 Ill. App. 491; *Tarbox v. Hays*, 6 Watts (Pa.) 400; *Pardon v. Dwire*, 23 Ill. 572, holding that the judgment of a justice may be collaterally impeached, but the impeach-

c. DOMESTIC JUDGMENTS OF COURTS OF GENERAL JURISDICTION. — While a judgment without jurisdiction of either the person or subject-matter is absolutely void, and may be assailed on that ground wherever it is brought in question or rights are claimed under it,¹ this general rule cannot be said to mean that all judgments may be impeached for want of jurisdiction, by extrinsic evidence.² On the contrary, the weight of

ment in this case was by the production of the summons itself showing the finding of jurisdiction of the person to be untrue. See also *supra*, V. 2. *Distinction Between Courts of General and of Inferior Jurisdiction*.

Evidence in Support of Record. — Where the record of a court of inferior jurisdiction omits to state jurisdictional facts, it has been held that they may not be supplied by evidence *aliunde*. *Cannon v. Wood*, 2 Sneed (Tenn.) 177; *Anderson v. Binford*, 2 Baxt. (Tenn.) 310; *Barron v. Dent*, 17 S. Car. 75. But it has also been held otherwise. *Smith v. Clausmeyer*, 136 Ind. 115; *Nicholson v. Stephens*, 47 Ind. 186. And where the statute in terms requires certain facts to be embodied in the record of such a court, it is held that other jurisdictional facts may be shown. *Schlisman v. Webber*, 65 Iowa 116. See also *Jolley v. Foltz*, 34 Cal. 327.

In *New York* it was held that in pleading the proceedings of an inferior court it is necessary to state facts sufficient to give jurisdiction to the court, and on the trial the party setting up such proceedings must prove the facts giving the court jurisdiction. It was further held that the statement or recital in a record of an inferior court, of facts constituting jurisdiction, may be received as *prima facie* evidence without proof of such facts *aliunde*. *Hard v. Shipman*, 6 Barb. (N. Y.) 623; *Barber v. Winslow*, 12 Wend. (N. Y.) 102. And it was further said in the first case that if the record omitted to state facts necessary to give jurisdiction, it was not evidence for any purpose without proof of such facts *aliunde*.

In *Van Deusen v. Sweet*, 51 N. Y. 378, an exception was taken to the admission of evidence in an action brought to recover the possession of land arising upon the introduction of a writ *de lunatico inquirendo* issued from a court of limited jurisdiction. Upon the insistence of counsel that the record of said inferior court should affirma-

tively show on its face that jurisdiction was acquired, and that it did not appear that there was an application in said inferior court invoking the exercise of its jurisdiction, nor that there was any evidence showing other necessary jurisdictional facts, the Court of Appeals said: "In answer to which it is sufficient and only necessary to say that the record is not required to show affirmatively and on its face those facts. It is enough that they did exist, and were properly shown to the court; and as it was not on the trial claimed in support of either the first or sixth objection that they were not established by proper proof, it is too late to raise the question on this appeal. If it had been raised at that time, the objection could have been obviated by competent testimony."

1. See *supra*, X. 1. *Effect of Want of Jurisdiction in General*.

The rule that "the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings of the former are relied upon and brought before the latter by the party claiming the benefit of such proceedings," is a rule of evidence, and a court so inquiring is not exercising an appellate or supervisory power. *Freeman v. Timanus*, 12 Fla. 393.

2. **Indiscriminate Application of General Expressions.** — Many of the cases contain general expressions which seem to sanction the doctrine that a want of jurisdiction over the person or subject-matter may in all cases be shown by extrinsic evidence, but an examination of them discloses that they all relate either to judgments of inferior courts or courts of limited jurisdiction, to courts of general jurisdiction acting in the exercise of special statutory powers, to courts of sister states, to cases where the want of jurisdiction appeared on the face of the record, or to direct proceedings to reverse or set aside judgments. *Ferguson v. Crawford*, 70 N. Y. 259. See also, as illustrating this

authority establishes the rule that where the record of a court of general superior jurisdiction recites, in its judgment or decree, that it had jurisdiction of the person of the defendant, such recitals are conclusive and cannot be collaterally attacked,¹ unless

statement, *Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 466; *Hickey v. Stewart*, 3 How. (U. S.) 750; *Shriver v. Lynn*, 2 How. (U. S.) 43; *Williamson v. Berry*, 8 How. (U. S.) 495; *Gwin v. McCarroll*, 7 Smed. & M. (Miss.) 351; *Enos v. Smith*, 7 Smed. & M. (Miss.) 85; *Campbell v. Brown*, 6 How. (Miss.) 106; *Miller v. Ewing*, 8 Smed. & M. (Miss.) 421; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Reinach v. Atlantic, etc., R. Co.*, 58 Fed. Rep. 43.

In *Blasdel v. Kean*, 8 Nev. 305, it was held that the finding in the judgment of a legal service of summons was as much a part of the record as the file mark of the clerk anterior to the service of the summons, and that if the writ became *functus officio* before the date of its service there was an apparent contradiction in the record, but that, every legal intendment being in favor of the validity of the judgment, the presumption arises that other evidence was introduced which established the sufficiency of the service to the satisfaction of the court. But this case was overruled in *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 320, as misapplying the presumption which supports a judgment collaterally attacked, to a case where the attack is direct. The court holds, in this last case, that there is a wide distinction between the application of the rule of presumption on direct and on collateral attack, and that in the former it cannot be presumed that the court acted on other or additional evidence outside the record, and, when the recital contradicts the finding in the judgment as to service of process, the finding must be disregarded; and while the decision draws a distinction between direct and collateral attack, and indicates the misapplication in *Blasdel v. Kean*, 8 Nev. 305, *supra*, it proceeds itself to cite, in support of its application of presumptions on direct appeal, the following cases, which are applications of the rule on collateral attack: *Settlemyer v. Sullivan*, 97 U. S. 444; *Cheely v. Clayton*, 110 U. S. 708; *Galpin v. Page*, 18 Wall. (U. S.) 365; *Hobby v. Bunch*, 83 Ga. 11; *Coan v.*

Clow, 83 Ind. 419; *Cloud v. Pierce City*, 86 Mo. 366; *Milner v. Shipley*, 94 Mo. 107; *Adams v. Cowles*, 95 Mo. 501; *Pollard v. Wegener*, 13 Wis. 569.

1. *California*. — *Blair v. Hamilton*, 32 Cal. 54; *Ryder v. Cohn*, 37 Cal. 88; *Quivey v. Porter*, 37 Cal. 462; *Sharp v. Daugney*, 33 Cal. 512; *Whitwell v. Barbier*, 7 Cal. 54; *Dorente v. Sullivan*, 7 Cal. 279; *Nagle v. Macy*, 9 Cal. 426; *Carpentier v. Oakland*, 30 Cal. 439; *Hill v. City Cab, etc., Co.*, 79 Cal. 190; *Harnish v. Bramer*, 71 Cal. 156; *Alderson v. Bell*, 9 Cal. 315; *Hahn v. Kelly*, 34 Cal. 391.

Connecticut. — *Colt v. Haven*, 30 Conn. 198.

Illinois. — *Swift v. Yanaway*, 153 Ill. 202; *Harris v. Lester*, 80 Ill. 307; *Senichka v. Lowe*, 74 Ill. 274; *Osgood v. Blackmore*, 59 Ill. 261; *Goudy v. Hall*, 30 Ill. 109; *Wing v. Dodge*, 80 Ill. 564; *Searle v. Galbraith*, 73 Ill. 269; *Law v. Grommes*, 55 Ill. App. 312; *Logan v. Williams*, 76 Ill. 175; *Barnett v. Wolf*, 70 Ill. 76; *Moore v. Neil*, 39 Ill. 256; *Finch v. Sink*, 46 Ill. 169; *Botsford v. O'Conner*, 57 Ill. 72; *Zepp v. Hager*, 70 Ill. 223; *Bimeler v. Dawson*, 5 Ill. 536; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Matthews v. Hoff*, 113 Ill. 90; *Coursen v. Hixon*, 78 Ill. 339; *Harris v. Lester*, 80 Ill. 307.

Indiana. — *Lantz v. Maffett*, 102 Ind. 23; *Cassady v. Miller*, 106 Ind. 69; *Indianapolis, etc., R. Co. v. Harmless*, 124 Ind. 25; *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240; *Anderson v. Wilson*, 100 Ind. 402.

Maine. — *Blaisdell v. Pray*, 68 Me. 269.

Michigan. — *Whitworth v. Pelton*, 81 Mich. 102.

Minnesota. — *Turrell v. Warren*, 25 Minn. 9; *Kipp v. Fullerton*, 4 Minn. 473.

New Jersey. — *Miller v. Dungan*, 35 N. J. L. 391, wherein it is said: "We have not been referred to any precedent or authority for a plea of want of jurisdiction, pleaded in an action on a domestic judgment rendered by a superior court of general common-law jurisdiction. The general rule on this subject is very clearly stated by Judge Redfield in the case of *Dimick v. Brooks*, 21 Vt.

they are irreconcilable with the other facts disclosed by the record, in which case the record impeaches itself.¹ Under this rule the statement that recitals in the record are *prima facie* suf-

578, as follows: 'It is of the very essence of debt upon judgment or upon any matter of record, that the obligation should result from the record itself. The record imports absolute and complete verity. It is neither to be increased nor diminished by averment out of, or beyond, the record. It is to the record as the law and the testimony upon which the pleader refers his claim. The record is generally vouched in the conclusion of the declaration as the basis of the claim. The defendant may crave oyer of the record, and have it set forth in terms, as part of the pleading, and if it do not sustain, and fully sustain, the declaration, may demur.' "

Ohio. — *Cincinnati, etc., R. Co. v. Belle Centre*, 48 Ohio St. 273, holding that the record showing a good service by publication could not be contradicted by showing that the defendant was in the state so as to be entitled to personal service. *Hammond v. Davenport*, 16 Ohio St. 177; *Shroyer v. Richmond*, 16 Ohio St. 455.

Oregon. — *Heatherly v. Hadley*, 4 Oregon 1.

South Carolina. — *Turner v. Malone*, 24 S. Car. 401; *Parr v. Lindler*, 40 S. Car. 193; *Prince v. Dickson*, 39 S. Car. 477.

Tennessee. — *Harris v. McClanahan*, 11 Lea (Tenn.) 181; *Davis v. Reeves*, 7 Lea (Tenn.) 585; *Robertson v. Winchester*, 85 Tenn. 171; *Pope v. Alwell*, 16 Lea (Tenn.) 99; *Mitchell v. McKinny*, 6 Heisk. (Tenn.) 87; *Gilliland v. Cullum*, 6 Lea (Tenn.) 532; *Claybrook v. Wade*, 7 Coldw. (Tenn.) 556.

Texas. — *Martin v. Cobb*, 77 Tex. 544; *Letney v. Marshall*, 79 Tex. 513; *Treadway v. Eastburn*, 57 Tex. 209; *Jones v. Jefferson*, 66 Tex. 578; *Davis v. Robinson*, 70 Tex. 397; *Heck v. Martin*, 75 Tex. 469; *Fowler v. Simpson*, 79 Tex. 615; *Martin v. Burns*, 80 Tex. 679; *Hardy v. Beaty*, 84 Tex. 563; *Brooks v. Powell*, (Tex. Civ. App. 1895) 29 S. W. Rep. 812; *Gillon v. Wear*, 9 Tex. Civ. App. 44; *Watkins v. Davis*, 61 Tex. 414; *Williams v. Ball*, 52 Tex. 603; *Long v. Brenneman*, 59 Tex. 210; *Mikeska v. Blum*, 63 Tex. 44; *Tennell v. Breedlove*, 54 Tex. 540; *Williams v. Haynes*, 77 Tex. 283.

Utah. — *Amy v. Amy*, 12 Utah 278.

Virginia. — *Wilcher v. Robertson*, 78

Va. 602; *Wandling v. Straw*, 25 W. Va. 692.

United States. — *U. S. v. Gayle*, 45 Fed. Rep. 107.

It is not sufficient in order to overcome the presumption in favor of jurisdiction to aver that the party seeking to escape its consequences had no legal notice of the pendency of the action in which it was rendered; but he must allege what, if anything, is shown by the record in relation to the issue and service of process therein. If the judgment itself were pleaded and did not show upon its face that the party seeking to avoid it had been served with legal notice, an averment that no such notice had in fact been served would not be sufficient to overcome the recital of notice in the record, and when the record of the judgment is not set forth in the pleading every presumption as to what it contains will be indulged in its favor until the contrary is made to appear by direct averment. *Indianapolis First Nat. Bank v. Hanna*, 12 Ind. App. 240 [citing *Cassady v. Miller*, 106 Ind. 69; *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471].

1. *California*. — *Hahn v. Kelly*, 34 Cal. 407; *Pearson v. Pearson*, 46 Cal. 636.

Illinois. — *Botsford v. O'Conner*, 57 Ill. 72; *Clark v. Thompson*, 47 Ill. 25; *Bannon v. People*, 1 Ill. App. 496; *Swearengen v. Gulick*, 67 Ill. 208; *Haywood v. Collins*, 60 Ill. 332.

Iowa. — *Mayfield v. Bennett*, 48 Iowa 194; *State v. Waterman*, 79 Iowa 360; *Miller v. Corbin*, 46 Iowa 151; *Bardsley v. Hines*, 33 Iowa 157; *Prince v. Griffin*, 16 Iowa 552.

Maine. — *Granger v. Clark*, 22 Me. 128.

Maryland. — *Clark v. Bryan*, 16 Md. 172.

Minnesota. — *Barber v. Morris*, 37 Minn. 194.

Missouri. — *Cloud v. Pierce City*, 86 Mo. 367; *Raley v. Gwinn*, 76 Mo. 263.

Texas. — *Davis v. Robinson*, 70 Tex. 394.

United States. — *Newman v. Crows*, 60 Fed. Rep. 220.

See also cases cited in the last preceding note.

Sufficiency of Record — Contradiction. — Where the record recites notice, and

sufficient would mean sufficient without other proof and conclusive against proof outside of the record.¹

In *New York a Contrary Rule Was Laid Down*, and in that state the court of last resort has refused to follow the general rule, holding, upon

other parts of the record or the notice itself set out are not inconsistent with such recital, the finding is conclusive and cannot be collaterally attacked as to the legality of the service. *McLain v. Duncan*, 57 Ark. 49; *Dunham v. Wilfong*, 69 Mo. 355; *Charley v. Kelley*, 120 Mo. 134; *Brawley v. Ranney*, 67 Mo. 280; *Winemiller v. Laughlin*, 51 Ohio St. 421.

If the judgment recites the facts in addition to the conclusion of due service, and the facts are not sufficient to warrant the conclusion, the presumption of jurisdiction is rebutted. *Fowler v. Simpson*, 79 Tex. 611.

Judgment Roll. — In *California* it was held that the jurisdiction must be determined alone by the judgment roll. *Sharp v. Daugney*, 33 Cal. 505; *Hahn v. Kelly*, 34 Cal. 407, wherein it was said: "Suppose that portion of the judgment roll denominated the 'affidavit or proof of service' shows that personal service was made upon the son of the defendant, and the remainder of the roll says nothing about service. We then have a want of jurisdiction appearing upon the face of the record. But suppose the judgment states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does; the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case. The record in such a case does not blow hot and cold, as might be supposed; on the contrary, both acts may have been done." And see *Blaisdell v. Pray*, 68 Me. 269.

Hahn v. Kelly, 34 Cal. 407, above cited, has been *overruled*, at least in so far as it was inconsistent with *Galpin v. Page*, 18 Wall. (U. S.) 350, and *Penoyer v. Neff*, 95 U. S. 714, upon the question of the effect of judgments against nonresidents without personal service of process. *Belcher v. Chambers*, 53 Cal. 635.

Contradiction of Return. — It is held that the finding of the court cannot be contradicted by the return of the citation, *Treadway v. Eastburn*, 57 Tex. 209; *Davis v. Robinson*, 70 Tex. 394;

which holding was said to extend the doctrine to its very limit, *Williams v. Haynes*, 77 Tex. 283; but that the insufficiency of service shown by the record rebuts the presumption of jurisdiction in the absence of a special finding in the judgment, though not otherwise. *Clark v. Thompson*, 47 Ill. 25; *Haywood v. Collins*, 60 Ill. 332; *Botsford v. O'Conner*, 57 Ill. 83; *Bannon v. People*, 1 Ill. App. 496; *Swearngen v. Gulick*, 67 Ill. 208; *Hunter v. Stoneburner*, 92 Ill. 79; *Hobby v. Bunch*, 83 Ga. 11.

On the other hand, it is said that if the doctrine announced in these cases is to prevail, it would be no benefit to a party desiring to collaterally attack a judgment, to impeach the whole record for the purpose of showing no service of process, if he is to be met at the very threshold of the investigation by a general recital of service, conclusive in its nature, which arrests investigation and cuts off debate. *Cloud v. Pierce City*, 86 Mo. 368. See further *Milner v. Shipley*, 94 Mo. 107; *Adams v. Cowles*, 95 Mo. 501; *Coan v. Clow*, 83 Ind. 419; *Mickel v. Hicks*, 19 Kan. 578; *Pollard v. Wegener*, 13 Wis. 569; *Newman v. Crowls*, 60 Fed. Rep. 220.

1. See cases cited generally in the two last preceding notes.

Judgments Void and Voidable. — That a void judgment may be attacked collaterally is true when considered with reference to the distinction between *void* and *voidable*. "The whole record is always admissible in any proceeding, and if that discloses a jurisdictional infirmity, the judgment is absolutely 'void,' but, as we understand it, where that infirmity can only be made to appear by proof contradicting the record, the judgment cannot be properly said to be 'void,' but is 'voidable merely,' and can only be impeached by a direct proceeding." *Turner v. Malone*, 24 S. Car. 405.

Admission of Facts or Proof Without Objection. — The rule that a judgment cannot be collaterally assailed unless it is void on its face means that a judgment cannot be shown to be void except in certain ways, and not that the judgment which is void will be enforced as

the reasoning and general statements of the long line of decisions in that state where the identical question was not presented, that the recitals in the record of a domestic court of general jurisdiction as to jurisdiction of the person may be rebutted by extraneous evidence.¹ The doctrine thus announced in this state has

if it were valid; and if the party should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, the case is like that where a judgment is void upon its face. *Hill v. City Cab, etc., Co.*, 79 Cal. 190.

Silence of the Record.—The conclusiveness of this presumption is held where the record is silent, and the evidence is not preserved therein. *Coit v. Haven*, 30 Conn. 198; *Moffitt v. Moffitt*, 69 Ill. 641; *Matthews v. Hoff*, 113 Ill. 90; *Hardy v. Beaty*, 84 Tex. 562; *Wilkinson v. Schoonmaker*, 77 Tex. 615.

In *Bell v. Brinkmann*, 123 Mo. 270, it was held that a mere recital in the record of a partition suit, of the appearance of the parties by their attorneys, was not sufficient upon collateral attack; three of the seven judges dissenting.

In *Mississippi* it seems to have been held that the presumption was conclusive against collateral attack only when the record showed jurisdiction. *Root v. McFerrin*, 37 Miss. 45; *Miller v. Ewing*, 8 Smed. & M. (Miss.) 421.

1. *Ferguson v. Crawford*, 70 N. Y. 253. In this case the court goes into an exhaustive review of the authorities in New York, and concludes that an examination of the cases involving the presumption attaching to judgments of sister states shows that the courts proceeded upon a ground common both to judgments of sister states and to domestic judgments. The cases reviewed may be profitably summarized: In *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, the action was upon a judgment of a sister state, and the court said: "But if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little else than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared; and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record

makes the appearance an unimpeachable fact." And on page 160 the court further says: "To say that the defendant may show the supposed record to be a nullity by showing a want of jurisdiction in the court which made it, and at the same time to estop him from doing so because the court has inserted in the record an allegation which he offers to prove untrue, does not seem to me to be very consistent."

In *Bigelow v. Stearns*, 19 Johns. (N. Y.) 41, Spencer, C. J., laid down the broad rule that if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before it in the manner required by law, the proceedings are void.

In *Latham v. Edgerton*, 9 Cow. (N. Y.) 227, it was said that "the principle that a record cannot be impeached by pleading is not applicable to a case like this. The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it."

In *Davis v. Packard*, 6 Wend. (N. Y.) 332, the chancellor, speaking of domestic judgments, said: "If the jurisdiction of the court is general or unlimited both as to parties and subject matter, it will be presumed to have had jurisdiction of the cause unless it appears affirmatively from the record or by the showing of the party denying the jurisdiction of the court that some special circumstances existed to oust the court of its jurisdiction in that particular case."

In *People v. Cassels*, 5 Hill (N. Y.) 168, Bronson, J., makes the remark that no court or officer can acquire jurisdiction by a mere assertion of it by falsely alleging the existence of facts upon which the jurisdiction depends.

In *Harrington v. People*, 6 Barb. (N. Y.) 610, Paige, J., expresses the opinion that the jurisdiction of the court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He

never been authoritatively overthrown, although in a recent case in an intermediate appellate court it was seriously questioned.

repeats the same view in *Noyes v. Butler*, 6 Barb. (N. Y.) 617, and in *Hard v. Shipman*, 6 Barb. (N. Y.) 623, saying in the latter case, as to superior as well as inferior courts, that the record is never conclusive as to the recital of a jurisdictional fact, and that the defendant is always at liberty to show a want of jurisdiction, although the record avers to the contrary; that if the court has no jurisdiction it has no power to make the record; citing *Starbuck v. Murray*, 5 Wend. (N. Y.) 148.

In *Wright v. Douglass*, 10 Barb. (N. Y.) 111, it is said, upon the point that want of jurisdiction cannot be collaterally shown to defeat a judgment of a court of general jurisdiction, that the true rule is laid down in *Bloom v. Burdick*, 1 Hill (N. Y.) 138, that in a court of general jurisdiction it is to be presumed that the court has jurisdiction till the contrary appears, but that the want of jurisdiction may always be shown by evidence, except in one solitary case, viz., "when the jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of that party who avers jurisdiction; then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside or reversed by a direct proceeding." See also, to this effect, *People v. Liscomb*, 60 N. Y. 568; *Staples v. Fairchild*, 3 N. Y. 41; *Che-mung Canal Bank v. Judson*, 8 N. Y. 254.

In *Pendleton v. Weed*, 17 N. Y. 75, a judgment of the Supreme Court was sought to be collaterally attacked, and Strong, J., said: "It is undoubtedly true that the want of jurisdiction of the person is a good defense in answer to a judgment when set up for any purpose, and that such jurisdiction is open for inquiry." Comstock, J., in the same case, said: "I assent to the doctrine that where there is no suit or process, appearance or confession, no valid judgment can be rendered in any court, and that in such a case the recital in the record of jurisdictional facts is not conclusive."

In *Porter v. Bronson*, 29 How. Pr. (N. Y. C. Pl.) 292, it was held that if the Marine Court be assumed to be a court of record, a defendant in an action

on a judgment of that court might set up that he was not served with process, and did not appear, notwithstanding the recitals in the record showing jurisdiction.

In *Bolton v. Jacks*, 6 Robt. (N. Y.) 198, it was said to be conceded that want of jurisdiction would render void the judgment of any court, whether it be of superior or inferior, general, limited, or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and the party against whom it is offered is not, by the bare fact of such recitals, estopped from showing by affirmative proof that they are untrue, and thus rendering the judgment void for want of jurisdiction.

The proposition stated in the last case was said to be supported by the current of authority in New York, and the court adopted it, saying, however, that such a ruling finds no support in adjudications elsewhere, but that there were reasons founded upon the system of practice in New York which warranted the adoption of the rule; to wit, the powers of courts of equity being vested in courts of law, and equitable defenses being allowable in New York, there was no reason why, in an action upon a judgment, the defendant should not be permitted to set up by way of defense any matter which would be a ground of relief in equity against the judgment. See also *People v. County Jail*, 100 N. Y. 26; *Craig v. Andes*, 93 N. Y. 411; *Bonnet v. Lachman*, 65 Hun (N. Y.) 554.

In Wisconsin one case comes near to the rule laid down in New York, if indeed it is not in perfect accord therewith. In *Pollard v. Wegener*, 13 Wis. 569, which was an ejectment suit, the record of a decree of divorce was offered in evidence by the plaintiff, who was the defendant in the divorce suit, from which record the return of the sheriff on the subpoena appeared, and the plaintiff offered to prove by parol testimony that the subpoena in said suit was never served upon nor received by her. There was a return in the record, in an

The court of last resort, however, refused in that case to pass upon the point as not being involved in the controversy.¹

d. FINDING OF JURISDICTIONAL FACTS. — When jurisdiction depends on a fact that is litigated in a suit, and such fact is found in favor of the party who avers jurisdiction, the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence thereof until set aside or reversed by a direct proceeding.²

order for taking testimony, of the service of the subpoena, as follows: "And it appearing to the court that a subpoena has been personally served on the defendant, and returned," etc. The decree recited the bringing of the cause to a hearing upon the petition and testimony of the complainant, and that "the defendant failed to appear and answer or make defense." This testimony was rejected as inadmissible, and on appeal the rejection was held to be erroneous. The preliminary reasoning of the court was based upon *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, above cited in this note.

Defense as Direct Attack. — In *Iowa* it was held that the defense of want of jurisdiction in contradiction of recitals of jurisdictional facts in the judgment is a direct and not a collateral attack. *Clark v. Little*, 41 Iowa 497.

1. *O'Connor v. Felix*, 87 Hun (N. Y.) 179.

2. *Bloom v. Burdick*, 1 Hill (N. Y.) 138.

Where a court exercising general jurisdiction over the subject-matter of the litigation is presented with a case of such character that, before rendering final decree or judgment, it must determine whether it has jurisdiction to pass such judgment or decree, and it is passed, the jurisdiction cannot be assailed collaterally. *Goodman v. Winter*, 64 Ala. 433; *Ex p. Stearnes*, 77 Cal. 162; *Bostwick v. Skinner*, 80 Ill. 153; *Wing v. Dodge*, 80 Ill. 564; *Tucker v. Sellers*, 130 Ind. 514; *Dequindre v. Williams*, 31 Ind. 456; *Matter of Dill*, 32 Kan. 691; *Cannon v. Cooper*, 39 Miss. 784; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42; *Wilson v. Ireland*, 4 Md. 448; *Edelen v. Edelen*, 6 Md. 295; *Grevemberg v. Bradford*, 44 La. Ann. 400; *Camden v. Plain*, 91 Mo. 117; *Shroyer v. Richmond*, 16 Ohio St. 455; *Cox v. Thomas*, 9 Gratt. (Va.) 312; *Brockenborough v. Melton*, 55 Tex. 493; *Dickson v. Moore*, 9 Tex. Civ. App. 514; *Kindell v. Titus*, 9 Heisk. (Tenn.) 735. In another case this ques-

tion was said not to be a jurisdictional one. *Young v. Lorain*, 11 Ill. 624.

Whenever the Right of a Court to Proceed in a particular case depends upon the existence and determination of certain jurisdictional facts, if it does determine such facts its decision is conclusive. *Hamner v. Mason*, 24 Ala. 480; *Stout v. Woods*, 79 Ind. 108; *Youngman v. Elmira*, etc., R. Co., 65 Pa. St. 278; *Pollard v. Wegener*, 13 Wis. 569; *Ex p. Stearnes*, 77 Cal. 156; *People v. Hagar*, 52 Cal. 171; *Dutton v. Dutton*, 8 How. Pr. (N. Y. Supreme Ct.) 102; *Morrow v. Weed*, 4 Iowa 77.

Facts Jurisdictional and Quasi-Jurisdictional. — There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those quasi-jurisdictional facts without allegation of which the court cannot be set in motion and without proof of which a decree should not be pronounced. When such quasi-jurisdictional facts are proved, they are conclusive in a collateral proceeding. *Reinach v. Atlantic*, etc., R. Co., 58 Fed. Rep. 43. See also, as illustrating the point in various kinds of litigation, *Betts v. Bagley*, 12 Pick. (Mass.) 572; *Holcomb v. Phelps*, 16 Conn. 132; *Sheldon v. Wright*, 5 N. Y. 497; *Dyckman v. New York*, 5 N. Y. 434; *Jackson v. Crawford*, 12 Wend. (N. Y.) 533; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436; *Wright v. Douglass*, 10 Barb. (N. Y.) 97; *Pope v. Atwell*, 16 Lea (Tenn.) 106; *Fisher v. Bassett*, 9 Leigh (Va.) 119; *Hudson v. Guestier*, 6 Cranch (U. S.) 281; *Thompson v. Tolmie*, 2 Pet. (U. S.) 157; *Ex p. Watkins*, 3 Pet. (U. S.) 193; *Grignon v. Astor*, 2 How. (U. S.) 319; *U. S. v. Arredondo*, 6 Pet. (U. S.) 709; *Griffith v. Bogert*, 18 How. (U. S.) 158; *Beauregard v. New Orleans*, 18 How. (U. S.) 497; *Florentine v. Barton*, 2 Wall. (U. S.) 210; *Comstock v. Crawford*, 3 Wall. (U. S.) 396; *Segee v. Thomas*, 3 Blatchf. (U. S.) 11.

The degree of proof required by the court will not be inquired into in

Court of Inferior or Limited Jurisdiction. — The rule is not confined to courts of general jurisdiction, but it has been held that if an inferior court or one of limited jurisdiction is charged with the ascertainment of a jurisdictional fact, and its proceedings show that the fact was ascertained, the finding cannot be collaterally attacked.¹

a collateral proceeding. *Morford v. Dieffenbacker*, 54 Mich. 593; *Church v. Holcomb*, 45 Mich. 29; *Roberts v. Flanagan*, 21 Neb. 503; *Kindell v. Titus*, 9 Heisk. (Tenn.) 735.

An adjudication that a petition presented to a County Court, praying for the creation and issuance of bonds by a town and the investment of the same, was signed by a majority of the taxpayers of such town, and that the petitioners represent a majority of the taxable property upon the tax list and assessment roll of said town, cannot be collaterally attacked. *Cherry Creek v. Becker*, 123 N. Y. 166. See, to the same effect, *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Koehler v. Hill*, 60 Iowa 566, citing *Ryan v. Varga*, 37 Iowa 78.

But when it is lawfully essential to the doing of any given thing that a majority of the taxpayers should concur, a finding that one-half concurred excludes the supposition that any greater number did so. *Slack v. Blackburn*, 64 Iowa 373.

At Chambers. — On an application for discharge from imprisonment the proof showed that the question on which the want of jurisdiction was charged was raised in and decided by the committing court, and it was held that it would not do for an officer acting at chambers to collaterally review the decisions of courts of competent jurisdiction. *People v. Orser*, 12 How. Pr. (N. Y. Supreme Ct.) 550.

Admission of Jurisdictional Facts Alleged. — Where a judicial tribunal has general jurisdiction of the subject-matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred and are not controverted upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceeding. *Bumstead v. Read*, 31 Barb. (N. Y.) 661. See also *Wanzer v. Howland*, 10 Wis. 8; *Heilmann v. Stricklin*, 60 Miss. 234.

1. *Wyatt v. Rambo*, 29 Ala. 524; *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Lamb v. Cain*, 129 Ind. 486; *Brokaw v. Gibson*

County, 73 Ind. 543; *Ricketts v. Spraker*, 77 Ind. 371; *Reynolds v. Faris*, 80 Ind. 14; *Adams v. Harrington*, 114 Ind. 66; *Rhodes v. Piper*, 40 Ind. 369; *Porter v. Stout*, 73 Ind. 3; *Brittain v. Kinnaird*, 1 Brod. & B. 432, 5 E. C. L. 137. See also *In re Grove St.*, 61 Cal. 453.

In *Staples v. Fairchild*, 3 N. Y. 41, the rule is announced that "where certain facts are to be proved before a court or officer of special and limited jurisdiction, as a ground for issuing process, and there is a total defect of evidence, the process will be void; but where the proof has a legal tendency to make out a proper case in all its parts for the jurisdiction of the court or officer, although such proof may be slight and inconclusive, the process will be valid until set aside on a direct proceeding for that purpose." "In one case the court acts without authority, in the other it only errs in judgment upon a question properly before it for adjudication." To the same effect are *Potter v. Ogden*, 136 N. Y. 384; *Porter v. Purdy*, 29 N. Y. 106; *Miller v. Brinkerhoff*, 4 Den. (N. Y.) 119; *Sheldon v. Wright*, 5 N. Y. 497; *Skinnion v. Kelley*, 18 N. Y. 355.

In *State v. Scott*, 1 Bailey L. (S. Car.) 294, it is said: "Ordinarily, the judgment of an inferior court, on the question of jurisdiction thus submitted to it, has the same blinding efficacy on the parties as its judgment in any other matter confessedly within its cognizance; and errors in this respect can only be corrected in the same manner that its other errors are. The only exception to this rule is where the want of jurisdiction is apparent on the face of the proceedings themselves. In those cases the superior courts will interfere, even after sentence, and restrain the inferior court by prohibition."

Leading English Case. — In *Brittain v. Kinnaird*, 1 Brod. & B. 432, 5 E. C. L. 137, an action of trespass against magistrates for taking and detaining a vessel under the Bumboat Act, *Richardson, J.*, said: "Whether the vessel in question were a boat or no, was a fact on which the magistrate was to

But while the assumption of jurisdiction by a court of general jurisdiction implies a rightful exercise of jurisdiction under particular facts,¹ yet when the court is one of inferior and special jurisdiction the mere exercise of jurisdiction does not imply a previous ascertainment of the facts the existence of which is necessary in order to justify its action.²

decide, and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction." Dallas, C. J., in the same case, said: "[The principle] established by all the ancient and recognized by all the modern decisions * * * is that a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, conclusive evidence of the facts stated in it." This case is cited on both sides of the question as to inferior courts. See *People's Sav. Bank v. Wilcox*, 15 R. I. 260, and *Wyatt v. Rambo*, 29 Ala. 523.

Contra. — On the other hand, the finding of the existence of circumstances necessary to confer jurisdiction upon a court of special jurisdiction, has been held to be only *prima facie*. *Sears v. Terry*, 26 Conn. 285; *Culver's Appeal*, 48 Conn. 173; *New Haven First Nat. Bank v. Balcom*, 35 Conn. 351.

In *Rhode Island* the court deduced a rule as applied to courts of inferior jurisdiction, which it recognizes to be in conflict with the holdings in other states, to wit, that "where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally and disproved even though the jurisdictional fact be averred of record, and was actually found upon evidence by the court rendering the judgment; but, on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without partly at least retrying the case on its merits, which is not permissible in a collateral proceeding." *People's Sav. Bank v. Wilcox*, 15 R. I. 260; *Loring v. Arnold*, 15 R. I. 430. While not expressly restricted as in the above cases, some of the cases laying down the general rule that the finding of jurisdictional facts

by an inferior court is conclusive are of the class indicated by the latter section of the rule laid down in *Rhode Island*. *People v. Hagar*, 52 Cal. 171. And see the cases generally in this section.

1. *Johnson v. Beazley*, 65 Mo. 250; *Lees v. Wetmore*, 58 Iowa 170; *Fanning v. Krapfl*, 68 Iowa 247; *Wright v. Marsh*, 2 Greene (Iowa) 94; *Harris v. Lester*, 80 Ill. 307.

2. *Gunn v. Howell*, 27 Ala. 663; *Wyatt v. Rambo*, 29 Ala. 523 [*overruling* *Wyatt v. Steele*, 26 Ala. 639]; *Root v. McFerrin*, 37 Miss. 49. See further *Scobey v. Gano*, 35 Ohio St. 553, wherein the court, in reviewing the record of appointment of an administratrix, and the authorities upon this point, said: "Clearly, as it seems to us, the facts show that Amanda's appointment was within the prohibition of this statute, however it may be construed; but the question remains, whether such appointment can be regarded as void in a collateral proceeding. We fully recognize the rule stated in the well-considered case of *Shroyer v. Richmond*, 16 Ohio St. 455, as to the character of the jurisdiction of the probate courts and the verity which is imposed by their records; but this does not conflict with another well-established general rule, that the jurisdiction of a court is a matter into which inquiry may be made even in collateral proceedings, where the record contains no finding of facts expressly showing jurisdiction. *Maxsom v. Sawyer*, 12 Ohio 195; *Moore v. Starks*, 1 Ohio St. 369; *Buchanan v. Roy*, 2 Ohio St. 252; *Fowler v. Whiteman*, 2 Ohio St. 270; *Callen v. Ellison*, 13 Ohio St. 446; *Pennywit v. Foote*, 27 Ohio St. 615; *Spier v. Corll*, 33 Ohio St. 236. And see *Thompson v. Whitman*, 13 Wall. (U. S.) 457, as to cases where the record shows jurisdiction. But here there is no express finding as to the qualifications of Amanda, and the fact that she was administratrix of an estate in which Eliza Kinney was interested, was probably unknown to the Probate Court of Hamilton county."

Confusion of Authorities.— But while the authorities lay down the general propositions heretofore stated, the cases are not free from confusion,¹ as will be seen by a reference to the cases indicating that a court cannot erroneously decide that it has power to act when the law does not confer such power,² and to the cases which in their very nature, as well as their necessary rulings,³ indicate that it cannot be *universally* true that because a court has the right to determine jurisdictional facts, and does determine them, the decision can never be collaterally attacked.

1. Thus, in *Fisher v. Bassett*, 9 Leigh (Va.) 132, wherein the court was considering the application of the principle to a court exercising the same kind of powers as those involved in *People's Sav. Bank v. Wilcox*, 15 R. I. 260, cited in note 1, pp. 212, 213, it is said: "I do not consider a county or hustings court, in relation to the grant of administration, as standing on the same footing with the ordinary in England. The county court is a court of record, and its judgments or sentences cannot be questioned collaterally in other actions provided it has jurisdiction of the cause. 6 Bac. Abr., Sheriff (M) 2, p. 166; *Parsons v. Loyd*, 3 Wils. 345. And this is to be understood as having reference to jurisdiction over the subject-matter; for though it may be that the facts do not give jurisdiction over the particular case, yet if the jurisdiction extends over that class of cases, the judgment cannot be questioned; for then the question of jurisdiction enters into and becomes an essential part of the judgment of the court. Thus if a county court were to give judgment of death against a white man, the sheriff would have no lawful authority to execute him; or if a court of chancery were to grant probate of a will, it would be *ipso facto* void, since that court has no jurisdiction in any case of probates. It is held void *ipso facto* because no inquiry is necessary to ascertain its invalidity. But where the court has jurisdiction of cases *ejusdem generis* its judgment in any case is not merely void; because its invalidity cannot appear without an inquiry into the facts—an inquiry which the court itself must be presumed to have made, and which will not therefore be permitted to be revived collaterally."

2. *Griffin v. Brown*, 1 Tex. App. Civ. Cas. § 1098; *Lindsey v. Luckett* 20 Tex. 516; *Wanzer v. Howland*, 10 Wis. 8; *Whitney v. Brunette*, 15 Wis. 61.

See further *supra*, II. 7. *Jurisdiction by Consent*.

If a court has no power whatever to foreclose a mortgage of land situate in another county, it cannot acquire jurisdiction by deciding that the land is within the county of its jurisdiction. *Rogers v. Cady*, 104 Cal. 288.

3. By the common law the judgment of a superior court is not void, but only voidable by plea on error. The existence of this rule of law, besides being established by authority, is maintained by the consideration that among the powers vested by law in these courts is the power to decide upon their own jurisdiction. But the rule that judgments of superior courts are not void, but only voidable by plea on error, though a very general rule is not adopted as universal, and is subject to exceptions; for example, if a Circuit Court were to assume jurisdiction of a matter committed by law to the Probate Court exclusively, or the County Court were to assume jurisdiction of a military offense, or if the Probate Court were to try and condemn a man for high treason, such proceedings would be nullities. *Borden v. State*, 11 Ark. 519. See also *Rose v. Himely*, 4 Cranch (U. S.) 280.

Administration upon Estate of Living Person.— In *Withers v. Patterson*, 27 Tex. 497, it is said that the idea that the rule that a court's determination of jurisdictional facts can never be collaterally attacked is a loose one; and this position is illustrated by the case of the grant of administration upon the estate of a living man. In such a case, "the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of the judgment; and in such case, although every step in the proceedings by which the man's estate is sold may have been taken with the most perfect regularity, and although the purchaser buys in good

c. ON DIRECT ATTACK — *The Different Rules of Presumption.* — When the want of jurisdiction is made the issue of a direct attack, the presumption attaching to the verity of a domestic judgment is not indulged,¹ but the record must show jurisdiction.² Thus, on error or appeal it must appear by the record that jurisdiction of the person of the defendant was acquired.³ This has been held even upon the question of jurisdiction of the subject-matter in a court of general jurisdiction, where the objection is made below and the record on appeal does not show the special facts which bring the matter within the jurisdiction of the court in the particular case.⁴

faith, no title passes or can pass. This shows that the court only exercises its jurisdiction when the facts exist which authorize it to do the thing in question." The same principle in regard to the administration of the estate of a living man is announced in the following cases: *Moore v. Smith*, 11 Rich. L. (S. Car.) 569; *Springer v. Shavender*, 116 N. Car. 12; *D'Arusment v. Jones*, 4 Lea (Tenn.) 251; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87; *Wales v. Willard*, 2 Mass. 120; *Devlin v. Com.*, 101 Pa. St. 273; *Melia v. Simmons*, 45 Wis. 334; *Stevenson v. Superior Ct.*, 62 Cal. 60; *Thomas v. People*, 107 Ill. 517; *Griffith v. Frazier*, 8 Cranch (U. S.) 28.

In *New York* it was held, in an action brought by an administratrix against one who had made a payment to a former administratrix, that such payment was a bar to the action, although it appeared that at the time the first letters were issued the persons upon whose estate they were issued was in fact living. *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460. But see the case of *Roderigas v. East River Sav. Inst.*, 76 N. Y. 318.

For the extent of conclusiveness of record in such cases, see the article PROBATE AND ADMINISTRATION.

1. *California.* — *Lyons v. Roach*, 84 Cal. 30; *Sichler v. Look*, 93 Cal. 600.

Illinois. — *Jackson v. Rickard*, 19 Ill. App. 507; *Johnson v. Johnson*, 30 Ill. 223.

Indiana. — *Gale v. Parks*, 58 Ind. 119.

Iowa. — *Wolf v. Shenandoah Nat. Bank*, 84 Iowa 138; *Mayfield v. Bennett*, 48 Iowa 194; *Newcomb v. Dewey*, 27 Iowa 381; *Stone v. Skerry*, 31 Iowa 582.

Kansas. — *Reynolds v. Fleming*, 30 Kan. 113.

Nevada. — *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 320.

Oregon. — *Heatherly v. Hadley*, 4 Oregon 1; *Northcut v. Lemery*, 8 Oregon 322; *Murray v. Murray*, 6 Oregon 24.

Vermont. — *Paddleford v. Bancroft*, 22 Vt. 535.

2. See the cases in the last note.

Extrinsic Evidence has been held to be inadmissible to supply omissions in the record. *Heatherly v. Hadley*, 4 Oregon 15.

3. *Illinois.* — *Dunbar v. Hallowell*, 34 Ill. 169.

Indiana. — *Hawkins v. Hawkins*, 23 Ind. 66; *Robbins v. Robbins*, 2 Ind. 74; *Martin v. Starr*, 7 Ind. 224; *Abdil v. Abdil*, 26 Ind. 287.

Iowa. — *Kite v. Bonafield*, 3 Greene (Iowa) 199; *Wright v. Marsh*, 2 Greene (Iowa) 103.

Mississippi. — *Reed v. Vaughn*, 10 Mo. 447.

Nevada. — *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 320.

United States. — *M'Cormick v. Sullivant*, 10 Wheat. (U. S.) 192.

See also article DEFAULTS, vol. 6, p. 1.

4. *The Tug Montauk v. Walker*, 47 Ill. 335, wherein it was held that as the question was distinctly made by a motion to dismiss in the trial court, that court, in considering the motion, had necessarily to inquire into the subject-matter of the action, and the record not showing that the tug in litigation was a domestic vessel and that the supplies were furnished in her home port, which facts were essential to the jurisdiction of the court in this case, sufficient did not appear to set the court in motion. The opinion was further based upon the principle that "he who claims a right must aver it and establish the right."

5. Judgments of Sister States and Foreign Judgments¹ — a. IMPEACHMENT FOR WANT OF JURISDICTION.— Under the Constitution of the United States² and the Act of Congress pursuant thereto,³ the judgments of one state are entitled to full faith and credit in every other state. Neither of these provisions, however, precludes inquiry into the jurisdiction of the court which rendered the judgment.⁴ This is the uniform rule, although

Objection Not Raised Below.— If, however, such an objection is not raised in the trial court, the appeal, it seems, does not raise it. If made in the trial court, the objection might have been obviated by an amendment, and it is too late to make it on appeal. *Tug Boat E. P. Dorr v. Waldron*, 62 Ill. 225.

So it may be said that the presumption is indulged in favor of jurisdiction where the parties appear or are served with process and where there is no question of jurisdiction raised. *O'Brien v. State*, 125 Ind. 38; *Schad v. Sharp*, 95 Mo. 576, holding that the record in an ejectment suit need not show that the land was in the county where the suit is brought, no such objection having been raised in the court below. For presumptions of jurisdiction on appeal generally, see article APPALS, vol. 2, p. 1. And see article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 169 *et seq.*

1. As to actions upon foreign judgments, see article JUDGMENTS, vol. 11, p. 796.

2. Const. U. S., art. 4, § 1, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

3. Rev. Stat. U. S., § 905, providing: "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

4. A Judgment Is Not Entitled to Full Faith and Credit unless the court rendering it has jurisdiction of the person and the subject-matter.

Alabama.— *Kohn v. Haas*, 95 Ala. 478.

Connecticut.— *Aldrich v. Kianey*, 4 Conn. 380.

Delaware.— *Mitchell v. Garrett*, 5 Houst. (Del.) 34.

Florida.— *Sammis v. Wightman*, 31 Fla. 10.

Georgia.— *McCauley v. Hargroves*, 48 Ga. 50.

Illinois.— *Ambler v. Whipple*, 139 Ill. 311; *Bimeler v. Dawson*, 5 Ill. 536; *Jones v. Warner*, 81 Ill. 343; *Lawrence v. Jarvis*, 32 Ill. 304; *Welch v. Sykes*, 8 Ill. 197.

Indiana.— *Holt v. Alloway*, 2 Blackf. (Ind.) 108.

Indian Territory.— *Raymond v. Raymond*, (Indian Ter. 1896) 37 S. W. Rep. 202.

Iowa.— *Melhop v. Doane*, 31 Iowa 397.

Kansas.— *Chicago, etc., R. Co. v. Campbell*, (Kan. App. 1897) 49 Pac. Rep. 321.

Kentucky.— *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 603; *Rogers v. Coleman*, Hard. (Ky.) 422.

Maryland.— *Glenn v. Williams*, 60 Md. 93.

Massachusetts.— *Gilman v. Gilman*, 126 Mass. 26; *Gleason v. Dodd*, 4 Met. (Mass.) 333; *Bissell v. Briggs*, 9 Mass. 462; *Jacobs v. Hull*, 12 Mass. 25; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423; *Wright v. Andrews*, 130 Mass. 149.

Michigan.— *Reed v. Reed*, 52 Mich. 117.

New Hampshire.— *Leith v. Leith*, 39 N. H. 42.

New York.— *Martin v. Central Vermont R. Co.*, 50 Hun (N. Y.) 347; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37; *Pawling v. Willson*, 13 Johns. (N. Y.) 192; *Robinson v. Ward*, 8 Johns. (N. Y.) 86; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148; *Harrod v. Barretto*, 1 Hall (N. Y.) 155.

North Carolina.— *Miller v. Leach*, 95 N. Car. 229.

Ohio.— *Pennywit v. Foote*, 27 Ohio St. 615; *Spier v. Corll*, 33 Ohio St. 244.

Pennsylvania.— *Steel v. Smith*, 7 W.

there have been some differences in the application of it with respect to the method and extent of the impeachment of a record for want of jurisdiction; it being sometimes held that, the record being entitled under the Constitution and Act of Congress to the same faith and credit extended to it in the state where the judgment was rendered, the recitals in the record of a judgment of a court of general jurisdiction are entitled to the same conclusive faith as are accorded them in that state, and cannot be impeached by extraneous evidence,¹ and upon the same principle that the record cannot be impeached unless the defect appears on the face thereof.² From other decisions it seems that the record may not be attacked if it affirmatively shows jurisdiction, but may be attacked if jurisdiction does not affirmatively appear.³

The Settled Rule.—The rule, however, which avoids these difficulties and which seems to be now the one established by the best authority is that the record of a foreign judgment may be collaterally attacked for want of jurisdiction, which may be shown, even in contradiction of recitals in the record itself.⁴ This rule is

& S. (Pa.) 447; *Benton v. Burgot*, 10 S. & R. (Pa.) 240.

Rhode Island.—*Rathbone v. Terry*, 1 R. I. 73.

South Carolina.—*Miller v. Miller*, 1 Bailey L. (S. Car.) 242.

Tennessee.—*Kelly v. Hooper*, 3 Yerg. (Tenn.) 396; *Coffee v. Neely*, 2 Heisk. (Tenn.) 304; *Earthman v. Jones*, 2 Yerg. (Tenn.) 484.

Texas.—*Morgan v. Morgan*, 1 Tex. Civ. App. 315; *Southern Ins. Co. v. Wolverton Hardware Co.*, (Tex. 1892) 19 S. W. Rep. 615, applying the principle to the judgment of a federal court of another state.

Vermont.—*Hoxie v. Wright*, 2 Vt. 263.

West Virginia.—*Crumlish v. Central Imp. Co.*, 38 W. Va. 390.

Wyoming.—*Chadron Bank v. Anderson*, (Wyoming 1897) 48 Pac. Rep. 197.

United States.—*Simmons v. Saul*, 138 U. S. 439; *L'Engle v. Gates*, 74 Fed. Rep. 513; *Harris v. Hardeman*, 14 How. (U. S.) 334; *Voorhees v. Jackson*, 10 Pet. (U. S.) 475.

1. *Arkansas*.—*May v. Jameson*, 11 Ark. 368; *Hensley v. Force*, 12 Ark. 756.

California.—*Whitwell v. Barbier*, 7 Cal. 63.

Delaware.—*Pritchett v. Clark*, 4 Harr. (Del.) 280.

Georgia.—*Thomas v. Morrisett*, 76 Ga. 396.

Illinois.—*Welch v. Sykes*, 8 Ill. 199.

Iowa.—*Melhop v. Doane*, 31 Iowa 397.

Kentucky.—*Roberts v. Caldwell*, 5 Dana (Ky.) 512.

Michigan.—*Wilcox v. Kassick*, 2 Mich. 165.

Mississippi.—*Miller v. Ewing*, 8 Smed. & M. (Miss.) 421.

United States.—*Lincoln v. Tower*, 2 McLean (U. S.) 473.

2. *Bimeler v. Dawson*, 5 Ill. 536; *Lapham v. Briggs*, 27 Vt. 26; *McCaulley v. Hargroves*, 48 Ga. 50. See also the cases in the last preceding note.

3. *Wilcox v. Kassick*, 2 Mich. 165; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Zepp v. Hager*, 70 Ill. 223.

In *New Jersey* a statute was in force at one time permitting contradiction of the recitals in the record of a former judgment, in regard to which it was said that prior thereto a defendant could show want of jurisdiction of his person in the court rendering the judgment where the record was silent, and that the statute was passed in order to clear the doubt in cases where the record recited jurisdictional facts. *MacKay v. Gordon*, 34 N. J. L. 286; *Price v. Ward*, 25 N. J. L. 225.

4. *Alabama*.—*Kingsbury v. Ynietra*, 59 Ala. 320.

California.—*Greenzweig v. Strelinger*, 103 Cal. 278.

Indiana.—*Cavanaugh v. Smith*, 84 Ind. 380; *Pond v. Simons*, (Ind. App. 1896) 45 N. E. Rep. 48.

Iowa.—*Pollard v. Baldwin*, 22 Iowa 328; *Webster v. Hunter*, 50 Iowa 215;

authoritatively settled by the decisions of the Supreme Court of the United States.¹

Prima Facie Evidence.—The record of a judgment of a court of

Lowe v. Lowe, 40 Iowa 220; *State v. Fleak*, 54 Iowa 431; *O'Rourke v. C. M. & St. P. R. Co.*, 55 Iowa 332.

Kansas.—*Thorn v. Salmonson*, 37 Kan. 441; *Litowich v. Litowich*, 19 Kan. 455; *Chicago, etc., R. Co. v. Campbell*, (Kan. App. 1897) 49 Pac. Rep. 321.

Kentucky.—*Wood v. Wood*, 78 Ky. 624. *Massachusetts*.—*Carleton v. Bickford*, 13 Gray (Mass.) 591; *Gilman v. Gilman*, 126 Mass. 26.

Michigan.—*Reed v. Reed*, 52 Mich. 117; *People v. Dawell*, 25 Mich. 247.

Missouri.—*Marx v. Fore*, 51 Mo. 69; *Eager v. Stover*, 59 Mo. 87; *Barlow v. Steel*, 65 Mo. 611; *Napton v. Leaton*, 71 Mo. 358.

Nebraska.—*Eaton v. Hasty*, 6 Neb. 421.

New Jersey.—*Nichols v. Nichols*, 25 N. J. Eq. 60; *Price v. Ward*, 25 N. J. L. 225.

New York.—*Vilas v. Plattsburgh, etc.*, R. Co., 123 N. Y. 454; *Borden v. Fitch*, 15 Johns. (N. Y.) 121; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148; *Shumway v. Stillman*, 6 Wend. (N. Y.) 447; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30; *Hunt v. Hunt*, 72 N. Y. 224; *Mills v. Martin*, 19 Johns. (N. Y.) 33; *Noyes v. Butler*, 6 Barb. (N. Y.) 613; *Latham v. Delany*, 59 N. Y. Super. Ct. 37.

Ohio.—*Kingsborough v. Towsley*, 56 Ohio St. 450; *Pennywit v. Foote*, 27 Ohio St. 618.

Pennsylvania.—*Price v. Schaeffer*, 161 Pa. St. 530.

Tennessee.—*Chaney v. Bryan*, 15 Lea (Tenn.) 589.

Texas.—*Norwood v. Cobb*, 15 Tex. 500, 24 Tex. 551; *Easley v. McClinton*, 33 Tex. 288; *Chunn v. Gray*, 51 Tex. 112; *Redus v. Burnett*, 59 Tex. 581.

Virginia.—*Bowler v. Huston*, 30 Gratt. (Va.) 266.

Washington.—*Aultman v. Mills*, 9 Wash. 68; *Ritchie v. Carpenter*, 2 Wash. 512.

Wisconsin.—*Rape v. Heaton*, 9 Wis. 332.

Contradiction of Return of Process.—The return of the officer of service of process on the defendant in a foreign judgment may be contradicted. *Carleton v. Bickford*, 13 Gray (Mass.) 591; *Cavanaugh v. Smith*, 84 Ind. 380;

Lowe v. Lowe, 40 Iowa 224; *Webster v. Hunter*, 50 Iowa 215; *Norwood v. Cobb*, 15 Tex. 500.

1. *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Knowles v. Logansport Gaslight, etc., Co.*, 19 Wall. (U. S.) 59; *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Pennoyer v. Neff*, 95 U. S. 741. See also *Downs v. Allen*, 22 Fed. Rep. 805; *Citizens' Bank v. Brooks*, 23 Fed. Rep. 21; *Graham v. Spencer*, 14 Fed. Rep. 603.

The first leading case under the provision of the Constitution and Act of Congress above referred to, *Mills v. Duryee*, 7 Cranch (U. S.) 481, in its broad holding that no plea could be interposed except such as would be admissible in the state where the judgment was rendered, seems to indicate a different rule, but the decision was really upon the effect of the judgment as a conclusive adjudication upon the merits. That case is referred to in *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 223, wherein the court said that when the above case was decided "a majority of the judges seem to have understood that a judgment of a superior court of one of the states, when an action was brought upon it in another state, would be in all respects of the same effect as a judgment of a court in the state where the action was brought. Such was undoubtedly the opinion of Judge Washington, who, in the case of *Field v. Gibbs, Pet.* (C. C.) 158, expressly states that if the judgment has been obtained against a person residing out of the state who was never served with process or notified of the existence of the suit, the remedy must be had by application to the court which rendered the judgment. Mr. Justice Johnson, who dissented, predicted that great embarrassment would arise from the decision, and his prediction was soon verified. The courts of the states yielded to the decision of the tribunal which, in questions relating to the constitution and laws of the United States, is superior to them, and therefore entitled to control them; but it was found indispensably necessary to prevent the most gross injustice; that it should be followed only in cases where, as the fact in that case was, the defendant appeared or was served with

general jurisdiction of a sister state is *prima facie* evidence of jurisdiction,¹ and cannot be impeached for irregularities which do not go to the jurisdiction.²

process. In almost every instance where actions were brought upon judgments obtained without a due service of process or appearance, those courts sustained a special plea in bar, setting up that fact as a ground of defense. This course of decision has recently been sanctioned by the Supreme Court of the United States. In the case of *D'Arcy v. Ketchum*, 11 How. (U. S.) 165, that court has placed its decision on the ground that, upon the principles of international law, a judgment rendered in one state assuming to bind the citizens of another was void within the foreign state when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of courts of justice had binding force."

But it was long before shown that *Mills v. Duryee*, 7 Cranch (U. S.) 481, did not mean that judgments of sister states or foreign judgments could not be contradicted upon questions of jurisdiction, and that it only extended to the merits. *Borden v. Fitch*, 15 Johns. (N. Y.) 121; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162.

1. *Alabama*. — *Kohn v. Haas*, 95 Ala. 479; *Mills v. Stewart*, 12 Ala. 90.

Arkansas. — *Halliburton v. Fletcher*, 22 Ark. 453.

Connecticut. — *Coit v. Haven*, 30 Conn. 198.

Illinois. — *Dunbar v. Hallowell*, 34 Ill. 170; *Horton v. Critchfield*, 18 Ill. 135.

Indiana. — *Bailey v. Martin*, 119 Ind. 103.

Iowa. — *Coughran v. Gilman*, 81 Iowa 442.

Kansas. — *Westervelt v. Jones*, 5 Kan. App. 35.

Kentucky. — *Scott v. Coleman*, 5 Litt. (Ky.) 349.

Maryland. — *Coie v. Flitcraft*, 47 Md. 312; *U. S. Bank v. Merchants' Bank*, 7 Gill (Md.) 430; *Savin v. Bond*, 57 Md. 228; *Glenn v. Williams*, 60 Md. 112.

Massachusetts. — *Buffum v. Stimpson*, 5 Allen (Mass.) 591.

Nebraska. — *Council Bluffs Sav. Bank v. Griswold*, (Neb. 1897) 70 N. W. Rep. 376.

New Hampshire. — *Downer v. Shaw*,

22 N. H. 277; *State v. Blaisdell*, 59 N. H. 331.

New Jersey. — *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 222.

New York. — *Hoffheimer v. Stiefel*, 17 Misc. Rep. (N. Y. Supreme Ct.) 236; *Shumway v. Stillman*, 4 Cow. (N. Y.) 296; *Hatcher v. Rocheleau*, 18 N. Y. 92; *Wheeler v. Raymond*, 8 Cow. (N. Y.) 311; *Harrod v. Barretto*, 1 Hall (N. Y.) 155; *Leach v. Linde*, 70 Hun (N. Y.) 145; *Noyes v. Butler*, 6 Barb. (N. Y.) 613.

Washington. — *Ritchie v. Carpenter*, 2 Wash. 512.

Wisconsin. — *Jarvis v. Robinson*, 21 Wis. 523.

The Burden of Proof is upon the defendant, the presumption in the absence of evidence being in favor of jurisdiction. *Savin v. Bond*, 57 Md. 228; *Murphy v. Marscheider*, (Supreme Ct.) 4 N. Y. Supp. 799; *Lowe v. Lowe*, 40 Iowa 220; *Bissell v. Wheelock*, 11 Cush. (Mass.) 277.

In an action in New York upon a judgment of a Superior Court of North Carolina, it appearing from the section of the code of the latter state introduced in evidence that the Superior Court in which the judgment was rendered was a court of original jurisdiction in all civil actions whereof exclusive jurisdiction was not given to some other court, it was held that this was *prima facie* sufficient and cast upon the defendant the burden of showing that exclusive jurisdiction of the action in question was given to some other court. *Leach v. Linde*, 70 Hun (N. Y.) 145, affirmed in 142 N. Y. 628.

Where the Defendant Denied that He Had Notice of the proceedings against him in the foreign state, or that he was a citizen of such state, a recital in the original writ that the defendant was an "absent and absconding debtor," which was a form prescribed by law in the sister state in cases of trustee process whether the defendant was within or without the state, does not show that the court did not have jurisdiction of the person of the defendant. *Bissell v. Wheelock*, 11 Cush. (Mass.) 279.

2. *Danforth v. Thompson*, 34 Iowa 243; *State v. Williamson*, 57 Mo. 192.

Presumption of Lawful Procedure. — It

Inferior Courts. — But the presumptions indulged in support of judgments have been limited to proceedings which are in accordance with the course of the common law, and in this regard there is no difference between domestic and foreign judgments.¹

b. CONCLUSIVENESS UPON MATTERS LITIGATED — (1) *On the Merits.* — The constitutional provision and Act of Congress above referred to extend to judgments in other respects and make them conclusive evidence of the matters involved in and decided by the court.²

will be presumed, in the absence of evidence to the contrary, that the court of the sister state pursued the modes of procedure authorized by the established law of that state. *Butcher v. Brownsville Bank*, 2 Kan. 70; *Dodge v. Coffin*, 15 Kan. 277; *Ward v. Baker*, 16 Kan. 31; *Haynes v. Cowen*, 15 Kan. 637; *Otto v. Doty*, 61 Iowa 23; *Cone v. Hooper*, 18 Minn. 531; *Van Matre v. Sankey*, 148 Ill. 536; *Dobson v. Pearce*, 12 N. Y. 156; *McLendon v. Dodge*, 32 Ala. 491.

1. *Galpin v. Page*, 18 Wall. (U. S.) 365; *Kelley v. Kelley*, 161 Mass. 111; *Morse v. Presby*, 25 N. H. 302; *Com. v. Blood*, 97 Mass. 538. See generally *supra*, IX. *General Rule of Presumptions as to Jurisdiction.*

Mode of Procedure in Derogation of Common Law. — In *Kohn v. Haas*, 95 Ala. 480, it was held that the rule which raises the presumption that courts of general jurisdiction of sister states have jurisdiction over questions and matters adjudicated does not prevail in cases where, in order to maintain the jurisdiction exercised, it is necessary to presume that the legislature of the sister state has, by statute, conferred that jurisdiction, and that the common law in respect thereto has been altered.

In *Kopperl v. Nagy*, 37 Ill. App. 23, which was an action on a judgment rendered by the District Court of the city of New York, it was held that, taking judicial notice of the laws of New York so far as necessary to ascertain the faith and credit to be given to the judgment, and it appearing that under the statute in New York the jurisdiction of said court was restricted with regard to the residence of the parties, and placing said court in the class with inferior courts of limited jurisdiction, nothing could be presumed in favor of its jurisdiction. *Citing Kenney v. Greer*, 13 Ill. 432; *Shufeldt v. Buckley*, 45 Ill. 223.

In *Bogan v. Hamilton*, 90 Ala. 455, it was held that the record of the probate of a will in a court of ordinary in the state of Georgia, properly certified in accordance with the Act of Congress and authenticated in due form, is entitled to equal faith and credit with a domestic judgment, and therefore the courts of Alabama are bound to presume that the court of ordinary in Georgia possessed jurisdiction of the subject-matter until the contrary is made satisfactorily to appear, although such court be one of special and limited jurisdiction. *Citing Slaughter v. Cunningham*, 24 Ala. 260; *Dunlap v. Newman*, 47 Ala. 429.

Where the Court of Last Resort of Another State has conclusively decided that a lower court has jurisdiction of the subject-matter, it is not necessary, when the judgment comes in question in the courts of another state, that the latter should determine whether or not the court in the former state was exercising a special statutory jurisdiction and whether the rules applicable to courts of inferior jurisdiction applied. *Van Matre v. Sankey*, 148 Ill. 536.

2. *Arkansas.* — *Lockhart v. Locke*, 42 Ark. 17; *Nunn v. Sturges*, 22 Ark. 389.

Florida. — *Drake v. Granger*, 22 Fla. 353; *Sammis v. Wightman*, 31 Fla. 10.

Illinois. — *Van Matre v. Sankey*, 148 Ill. 536.

Iowa. — *Walker v. Sleight*, 30 Iowa 310.

Maryland. — *Barney v. Patterson*, 6 Har. & J. (Md.) 182; *Cole v. Flitcraft*, 47 Md. 312; *Harryman v. Roberts*, 52 Md. 64.

Massachusetts. — *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Crippen v. Dexter*, 13 Gray (Mass.) 330.

Missouri. — *Grover v. Grover*, 30 Mo. 400; *Napton v. Leaton*, 71 Mo. 367.

Nebraska. — *Keeler v. Elston*, 22

(2) *Jurisdictional Facts*. — Each state has a right to determine the existence of facts which are necessary to authorize the action of its courts in particular matters, such as the status or residence of persons domiciled within its territory, and its finding upon *quasi-jurisdictional* matters of that character is conclusive, as upon other matters adjudicated,¹ if the court has jurisdiction of the

Neb. 310; *Packer v. Thompson*, 25 Neb. 688; *Eaton v. Hasty*, 6 Neb. 419.

New Hampshire. — *State v. Blaisdell*, 59 N. H. 328.

North Carolina. — *Miller v. Leach*, 95 N. Car. 229.

Rhode Island. — *Rathbone v. Terry*, 1 R. I. 73.

Tennessee. — *Hunt v. Lyle*, 8 Yerg. (Tenn.) 142; *Moren v. Killbrew*, 2 Yerg. (Tenn.) 376.

United States. — *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Mills v. Duryee*, 7 Cranch (U. S.) 481; *Hampton v. M'Connell*, 3 Wheat. (U. S.) 234; *Mayhew v. Thatcher*, 6 Wheat. (U. S.) 129.

Distinction Between Foreign, Domestic, and Sister State Judgments. — Formerly it was held that judgments of sister states were not to be considered as domestic judgments, because the jurisdiction was open to inquiry, nor as foreign judgments, because the jurisdiction being established the merits were not open to inquiry, *Bissell v. Briggs*, 9 Mass. 462; and further, that foreign judgments were as conclusive as domestic judgments when they came incidentally into question, but that it was otherwise when the courts of this country were invoked to enforce them. *Taylor v. Phelps*, 1 Har. & G. (Md.) 492; *Barney v. Patterson*, 6 Har. & J. (Md.) 182; *Donohue v. Daniel*, 58 Md. 601; *Savin v. Bond*, 57 Md. 233; *Buttrick v. Allen*, 8 Mass. 273; *Wood v. Gamble*, 11 Cush. (Mass.) 8; *Philips v. Hunter*, 2 H. Bl. 410; *Walker v. Witter*, 1 Doug. 1.

The same principle is recognized in *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600; *Griswold v. Pitcairn*, 2 Conn. 85; *Bimeler v. Dawson*, 5 Ill. 540; and is applied to the judgment of courts of sister states in *Bartlet v. Knight*, 1 Mass. 401; *Hitchcock v. Aicken*, 1 Cai. (N. Y.) 460; *Taylor v. Bryden*, 8 Johns. (N. Y.) 173; *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132. These New York cases were afterwards *overruled*, the court conforming to the principle laid down in *Mills v. Duryee*, 7 Cranch (U. S.) 481, to the extent that such judg-

ments were conclusive on the merits. *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162.

A later rule, however, is that the same principles shall be applied to foreign judgments as to judgments of courts of other states of the Union, and that such judgments are conclusive so far as to preclude a retrial upon the merits although the defendant may show that the foreign court was without jurisdiction. *Lazier v. Westcott*, 26 N. Y. 146; *Brinkley v. Brinkley*, 50 N. Y. 202; *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 126; *Baker v. Palmer*, 83 Ill. 572. This is the English rule: *Ricardo v. Garcias*, 12 Cl. & F. 384; *Martin v. Nicolls*, 3 Sim. 458; *Castrique v. Imrie*, L. R. 4 H. L. 414; *De Casse Brissac v. Rathbone*, 6 H. & N. 301; *Ferguson v. Mahon*, 11 Ad. & El. 179; 39 E. C. L. 38; *Vanquelin v. Bouard*, 10 Jur. N. S. 569; *Warrener v. Kingsmill*, 8 U. C. Q. B. 407.

Wrongful Administration of Foreign Law. — In *Warrener v. Kingsmill*, 8 U. C. Q. B. 407, it was held that a foreign judgment is conclusive of the merits unless the foreign court wrongfully administers the law of the country where such judgment is afterwards sought to be enforced.

1. *Van Matre v. Sankey*, 148 Ill. 536; *Johnson v. Johnson*, 67 How. Pr. (N. Y. Supreme Ct.) 144; *Hunt v. Hunt*, 72 N. Y. 227; *Kinnier v. Kinnier*, 45 N. Y. 535; *Wheeler v. Raymond*, 8 Cow. (N. Y.) 313; *Loring v. Arnold*, 15 R. I. 428; *Barber v. Root*, 10 Mass. 260; *Strader v. Graham*, 10 How. (U. S.) 82; *Cheever v. Wilson*, 9 Wall. (U. S.) 108.

The decision that a will is probated according to law in a sister state is conclusive though the jurisdiction depended upon this fact. *Loring v. Arnold*, 15 R. I. 428.

Where it appears that a party appeared in a court of general jurisdiction in a sister state, the adjudication by that court that the party was an absconding debtor is conclusive. *Wheeler v. Raymond*, 8 Cow. (N. Y.) 311.

parties by service of process or appearance, so that it may proceed to adjudicate such questions in the first instance.¹

1. In *Divorce Cases*, if there is no personal service of process or appearance, the adjudication of a sister state upon the residence of the parties within that state for such a period as would give the court jurisdiction in divorce cases may be collaterally attacked. *Chaney v. Bryan*, 15 Lea (Tenn.) 589; *Gettys v. Gettys*, 3 Lea (Tenn.) 260; *Kerr v. Kerr*, 41 N. Y. 272; *Reed v. Reed*, 52 Mich. 117. See also, to the same principle, *People v. Baker*, 76 N. Y. 78; *Cross v. Cross*, 108 N. Y. 628, 13 N. Y. St. Rep. 470; *Reis v. Lawrence*, 63 Cal. 137; *State v. Armington*, 25 Minn. 37; *Ditson v. Ditson*, 4 R. I. 93; *Sewall v. Sewall*, 122 Mass. 156; *Cook v. Cook*, 26 Wis. 195; *Hinds v. Hinds*, 1 Iowa

36; *Litowitch v. Litowitch*, 19 Kan. 455; *Hood v. State*, 56 Ind. 263; *Van Fossen v. State*, 37 Ohio St. 320; *Cox v. Cox*, 19 Ohio St. 502; *Miller v. Leach*, 95 N. Car. 229; *Adams v. Adams*, 51 N. H. 398; *Gregory v. Gregory*, 78 Me. 190; *People v. Dawell*, 25 Mich. 258.

Jurisdiction of Subject-matter.—Where the record of the judgment of a sister state is conclusive upon the defendant as to jurisdiction of his person, he cannot raise questions pertaining to the jurisdiction of the court in the state where the judgment was rendered when a suit is brought on such judgment in a state where the record is held conclusive. *Hensley v. Force*, 12 Ark. 756.

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Coroner's Jury, see article *CORONER'S INQUEST*, vol. 5, p. 42.
Verdict of Jury, see articles *DIRECTING VERDICT*, vol. 6, p. 667; *VERDICT*; see also article *NEW TRIALS*.
Jury in Justices' Court, see article *JUSTICES OF THE PEACE*, *post*, p. 664.
Special and Struck Jury, see article *SPECIAL AND STRUCK JURIES*.
Trial of Special Issues by a Jury, see article *ISSUES TO THE JURY*, vol. 11, p. 599.

As to *Withdrawal of Jurors*, see articles *CONTINUANCE*, vol. 4, p. 822; *TRIALS*.

Instructions to Jury, see article *INSTRUCTIONS*, vol. 11, p. 47.

View by Jury, see article *VIEW*.

Coercion of Jury, see article *INSTRUCTIONS*, vol. 11, p. 47.

Jury of Inquest, see article *INQUESTS AND INQUIRIES*, vol. 10, p. 1134.

Jury in Condemnation and Highway Proceedings, see articles *EMINENT DOMAIN*, vol. 7, p. 460; *STREETS AND HIGHWAYS*.

For matters relating to juries in particular proceedings, see the various titles in this work and consult the General Index.

For the *SUBSTANTIVE LAW*, including the qualifications, competency, fees, etc., of Juries, see AM. AND ENG. ENCYCLOPÆDIA OF LAW (2d ed.), title *JURY AND JURY TRIAL*.

I. JURY DEFINED.—By a jury is meant a body of competent men selected in the mode prescribed by law to determine, on oath and in a legal tribunal, the facts in a case from the evidence presented to them.¹

II. COMPOSITION OF JURY—Twelve Men.—At common law, and in its technical sense, the term signifies a body of twelve men, and this is especially true in trials for criminal offenses, particularly offenses of the higher grades.²

1. *State v. Voorhies*, 12 Wash. 53.

For construction of the word "jury" in various statutes and instruments, see Am. and Eng. Encyc. Law (2d ed.), tit. *Jury and Jury Trial*.

"Jury," in the Nevada Constitution providing that trial by jury shall remain inviolate, means twelve competent men who are free from all ties of consanguinity and all other relations which might tend to make them dependent upon either party; who are not interested in the event of the suit, and who have no such bias or prejudice in favor of or against either party as would render them partial towards either party. *State v. McClear*, 11 Nev. 39.

The New Hampshire Supreme Court, in defining "jury," as known in the language of the law before the adoption of the Constitution, said: "A jury for the trial of a cause was a body of twelve men, described as upright, well qualified, and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party,

duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them." Opinion of the Justices, 41 N. H. 550.

Term Includes Tales Jurors.—The terms "grand or petit juror," in a statute denouncing the offense of bribing certain officers including "grand or petit jurors," embrace tales jurors as well as regular jurors. *State v. McCrystol*, 43 La. Ann. 907.

2. *Alabama*.—*Foote v. Lawrence*, 1 Stew. (Ala.) 483; *Bell v. State*, 44 Ala. 393.

California.—*People v. O'Neill*, 48 Cal. 257.

Indiana.—*Jackson v. State*, 6 Blackf. (Ind.) 461.

Iowa.—*Cowles v. Buckman*, 6 Iowa 161; *Eshelman v. Chicago*, etc., R. Co., 67 Iowa 296.

Kentucky.—*Ross v. Neal*, 7 T. B.

Less than Twelve — Constitutional Changes. — But when so authorized by constitutional provisions, the legislature may provide that a jury may be composed of less than twelve men.¹

Mon. (Ky.) 407; Ayres v. Barr, 5 J. J. Marsh. (Ky.) 287; Oldham v. Hill, 5 J. J. Marsh. (Ky.) 300.

Massachusetts. — Turns v. Com., 6 Met. (Mass.) 224.

Michigan. — People v. Luby, 56 Mich. 551.

Mississippi. — Tillman v. Ailles, 5 Smed. & M. (Miss.) 373; Bone v. McGinley, 7 How. (Miss.) 671; Dixon v. Richards, 2 How. (Miss.) 771; Carpenter v. State, 4 How. (Miss.) 163; Hunt v. State, 61 Miss. 577.

Missouri. — Henning v. Hannibal, etc., R. Co., 35 Mo. 408; Foster v. Kirby, 31 Mo. 496; Vaughan v. Scade, 30 Mo. 600; Norvell v. Deval, 50 Mo. 272; State v. Meyers, 68 Mo. 266.

Nevada. — State v. McClear, 11 Nev.

39. New Hampshire. — Opinion of Justices, 41 N. H. 550.

New Jersey. — Briant v. Russel, 2 N. J. L. 135; Mitten v. Smock, 3 N. J. L. 470.

New Mexico. — Territory v. Ortiz, (N. Mex. 1895) 42 Pac. Rep. 87.

New York. — Cancemi v. People, 18 N. Y. 128; Porter v. People, 7 How. Pr. (N. Y. Supreme Ct.) 441; Baxter v. Putney, 37 How. Pr. (Oneida County Ct.) 140; People v. Kennedy, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 312; People v. Johnson, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 322; People v. Fisher, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 402.

North Carolina. — State v. Stewart, 89 N. Car. 563; State v. Scruggs, 115 N. Car. 805.

Ohio. — Work v. State, 2 Ohio St. 296.

Pennsylvania. — Alexander v. Com., 105 Pa. St. 1.

South Carolina. — Kennedy v. Williams, 2 Nott & M. (S. Car.) 79.

Tennessee. — M'Donald v. M'Donald, 5 Verg. (Tenn.) 307; Bowles v. State, 5 Sneed (Tenn.) 360.

Recital in Record. — The term "jury" is a technical legal word, and unless something contrary is contained in a record, when found therein will be construed to mean twelve men duly qualified. Redus v. Wofford, 4 Smed. & M. (Miss.) 579.

If the Record Shows that Twelve Jurors Actually Sat, the fact that the names of

only eleven are given is immaterial. Foster v. Van Norman, 1 Tex. 636.

In Lavillian v. Lane, 8 Ark. 374, the record stated that twelve good and lawful men returned the verdict, but only eleven names appeared recorded. It was held that, the record appearing contradictory, it would be presumed that the portion of it was true which answered the requirements of the law, unless the contrary was made to appear by exceptions taken at the time or in some mode by which the matter might be brought before the court.

"Jury of Good and Lawful Men." — Where the record shows that the issue was tried by a "jury of good and lawful men," it will be presumed after verdict that twelve jurors participated, although but eleven names are set forth and no objection appears to have been made at the trial. Foote v. Lawrence, 1 Stew. (Ala.) 483.

Incapacitation of Juror Equivalent to Verdict by Eleven. — In Den v. Baldwin, 3 N. J. L. 501, one of the jurors became too sick to deliberate or to assist in the deliberations, and it was held that in fact the verdict was by but eleven. It further appearing that the verdict was unsatisfactory to the trial judge, a new trial was granted.

Federal Courts. — The number in the federal courts is subject to the rules of the common law; their qualifications are determined by state laws. U. S. v. Dow, Taney's Dec. (U. S.) 34.

1. Construction of Constitutional Provisions. — In McManus v. McDonough, 107 Ill. 95, it was held that "jury," as used in a constitutional provision that private property shall not be taken for public use without just compensation, to be ascertained by a jury as shall be prescribed by law, does not necessarily mean a jury of twelve.

Statutory Construction. — In construing the Illinois Act of July 1, 1895, entitled "An Act to revise the law in relation to the justices of the peace and constables," and providing, in section 12 of article 8, that "no person shall be imprisoned for nonpayment of a fine or a judgment * * * except upon conviction by a jury," etc., which is substantially identical with section 1 of the Act of July 1, 1893, entitled "An Act to provide a trial by jury in

Thirteen Jurors. — By the weight of authority, however, the fact that thirteen jurors participated in a criminal trial will vitiate the verdict and require a reversal of the conviction,¹ but in civil proceedings the rule is not so strict.²

III. RIGHT TO TRIAL BY JURY. — The right to a trial by jury, except so far as a court of equity has power to take the advice of a jury on disputed questions of fact,³ is usually confined to actions at law as distinguished from equitable or special proceedings, wherein, when the right to such mode of trial exists, provision therefor is made by statute.⁴

all cases where a judgment may be satisfied by imprisonment," it was held that "jury" did not have the fixed and well understood meaning of that word at common law, but might be taken to mean a jury of less than twelve in trials before justices of the peace. *Vaclav v. Guthman*, (Ill. App. Ct.) 3 Chicago L. J. (N. S.) 10.

Change of Number by Statute After Institution of Action and Before Trial. — In *Warner v. Baltimore*, etc., R. Co., 31 Ohio St. 265, it appeared that before the trial the law relative to the number of jurors who should act was repealed by another law prescribing a different number of jurors, and it was held that the act in force at the time of the trial should have governed.

In *Louisiana* it has been held that a jury formed before the recorder's court, under a special statute, did not fall under a constitutional clause in respect to an impartial trial by a jury of the vicinage, and that any number of jurors that the legislature might deem proper to fix might compose the jury. *State v. Gutierrez*, 15 La. Ann. 190.

Right to Constitutional Number. — Where the number of jurors is prescribed by the Constitution, the court cannot compel a trial by a less number. *Jackson v. Coates*, (Tex. Civ. App. 1897) 43 S. W. Rep. 24.

1. *Whitehurst v. Davis*, 2 Hayw. (N. Car.) 113; *Bullard v. State*, 38 Tex. 504; *State v. Hudkins*, 35 W. Va. 247.

Mode of Objection. — If thirteen are impaneled and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial proceed before the legally constituted jury; or if the fact is discovered before verdict, the case may be withdrawn from the jury and a new jury impaneled and sworn to try it. *Bullard v. State*, 38 Tex. 504, approved in *Davis v. State*, 9 Tex. App. 634.

2. In *Wolfe v. Martin*, 1 How. (Miss.)

30, decided in 1834, which was an action of assumpsit, it appeared that the verdict was rendered by a jury consisting of thirteen persons, and the court said that "the individuals who were charged with the issue were not a legal and constitutional jury," no jury being known to the Constitution and laws except one consisting of twelve men. But in the later case of *Tillman v. Ailles*, 5 Smed. & M. (Miss.) 373, which was an action on a promissory note, it was held that the fact that the jury consisted of thirteen individuals was not a ground of error, the court saying: "A verdict by a less number than twelve, in issues of this kind, would be void, but a verdict of a greater number than twelve is not so on that account."

Failure to Object Below. — In *Ross v. Neal*, 7 T. B. Mon. (Ky.) 407, wherein thirteen jurors participated in the trial, the court refused to interfere, but said that objection on that ground would have been fatal had it been urged below. See also *Berry v. Kenney*, 5 B. Mon. (Ky.) 120.

Rejecting Thirteenth Juror. — In *Muirhead v. Evans*, 6 Exch. 447, the thirteenth juror could not be identified, and the court said that if he could have been picked out he might have been withdrawn, but as it was, the proceedings were treated as invalid and a new panel from the thirteen in question was selected and sworn.

3. See article ISSUES TO THE JURY, vol. II, p. 599.

4. As to the abstract right to a jury trial treated substantively, see Am. and Eng. Encyc. of Law, titles *Constitutional Law*, vol. 6, p. 882; *Jury and Jury Trial*.

The right to a jury, so far as dependent on the nature of the proceeding, is discussed under the particular titles in this work wherein the right has come in question.

Special Proceedings.—A constitutional

Power of Court to Dispense with Jury. — Where a jury trial of issues involved is a matter of right, or has been duly demanded, the court has no power to dispense with a jury, without the consent of the parties either express or implied, and if the issues are tried by the court without such consent, the party against whom judgment is rendered is not bound thereby.¹

provision that trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever, does not apply to special proceedings. *Roberts v. Cone*, 3 Alb. L. J. 151.

Action in Justice's Court. — There is the same right to a jury in a case in a justice's court, commenced by notice and motion, as there is in any other case. *Cowgill v. Wooden*, 2 Blackf. (Ind.) 332.

Right Determined by Pleadings and Prayer. — Whether or not a right to trial by jury exists must be determined from the object of the action as determined by the averments of the petition, and, in case of ambiguity, by resort to the prayer. *Yager v. Exchange Nat. Bank*, (Neb. 1897) 72 N. W. Rep. 211.

When Complete Relief Cannot Be Granted at Law. — Where a cross-petition in an action begun by ordinary proceedings shows facts under which complete relief cannot be granted at law, there can be no insistence on a trial by jury. *Marling v. Burlington, etc., R. Co.*, 67 Iowa 331.

Where Damages Cannot Be Assessed by Calculation, the court has no right to take the assessment from the jury. *Wallace v. Henry*, 5 Ark. 105.

Proceedings in Chancery. — The right of trial by jury in proceedings according to the course of the common law as it existed at the time of the organization of the state, and was continued or guaranteed by the Bill of Rights of the Constitution of 1885, has reference to legal rights and contentions, and not to equitable demands enforced in a court of chancery, whether pertaining to the original or the concurrent jurisdiction of that court. *Hughes v. Hannah*, (Fla. 1897) 22 So. Rep. 613.

Interposition of Counterclaim in Equity Suit. — The defendant in an equity suit is not entitled as a matter of right to a jury for the trial of a counterclaim for damages which he has voluntarily pleaded in the case. *Morrissey v. Broomal*, 37 Neb. 766.

The defendant has no right to submit his reconventional demand to a jury when the principal action must be

tried without a jury. *Pool v. Alexander*, 26 La. Ann. 669.

1. *Treadway v. Wilder*, 12 Nev. 115.

Usurpation of Functions of Jury After Their Discharge. — Where on appeal from an order of the judge of probate, allowing an administrator's final account and discharging him, while the jury were in their room deliberating one of the parties moved the court to decide the case without a jury, on the ground that the issues were properly triable by the court; and thereafter the jury coming in, and declaring their inability to agree, the court discharged them, and against the objection of the other party tried the cause without a jury, and afterwards upon the evidence taken before the jury, the parties consenting that the evidence need not be retaken, affirmed the order appealed from, there was held to be error, for the reason that there was a right to a trial by jury, and that it was the duty of the court to have impaneled a new jury to try the cause, unless it was waived. *Grovier v. Hall*, 23 Mich. 7.

Where defendant has demanded a jury trial, and the jury summoned for that purpose has been discharged because of inability to agree, and the demand is not withdrawn, the court is bound to issue another venire, and cannot legally try the defendant without a jury. *Vanderwerker v. People*, 5 Wend. (N. Y.) 530.

In *Montgomery v. Sayre*, 91 Cal. 206, there was a verdict in answer to special questions embracing special issues submitted to the jury, but no other verdict, nor did it appear that any general verdict was demanded. It appeared further from the record that the trial proceeded after the return of the verdict, that both parties introduced evidence, and "said trial was completed, and submitted to the court for decision and judgment, with the privilege to the parties to file briefs herein, which was done." The court subsequently rendered its decision finding on all the issues in the case, disregarded the verdict, treated it as non-existent, found contrary to the an-

IV. DEMAND FOR JURY — 1. Necessity — Right to Jury Absolute. — If there is an absolute right to a trial by jury, there is no necessity that a formal demand should be made for that mode of trial, for a litigant may well assume that he will be accorded the right without a demand.¹

Right Not Absolute. — However, where the right to a jury is not absolute, but is the subject of statutory regulation, in order to secure the privilege there must be an application to the court in that behalf; and such application must, substantially at least, be in the form and manner prescribed.²

2. Power of Courts to Regulate. — Courts have no authority to make rules in derogation of constitutional or statutory provisions prescribing the time when or the manner in which the demand for a trial by jury shall be made, or under what circumstances a failure to comply with such rules shall be deemed a waiver.³

swers of the jury on the questions submitted to them, and rendered judgment for plaintiff for a sum of money, and it was held that the court erred in proceeding and determining the cause, and that it should have ordered a new trial. *Reversing Montgomery v. Sayre*, (Cal. 1891) 25 Pac. Rep. 552.

Power of Court to Dispense with Jury After Their Retirement. — Where the court has denied a motion to dispense with a jury, and the cause has been submitted to the jury and they have retired, it is too late for the court to reconsider its ruling, and without the consent of the parties withdraw the cause from the jury and decide the case on the evidence presented to them. *Hendry v. Crandall*, 131 Ind. 42.

1. *De Walt v. Kinard*, 19 S. Car. 290; *Odell v. Reynolds*, 40 Mich. 21.

2. *Deadrick v. Harrington*, Hempst. (U. S.) 50.

Constitutional Requirement of Demand. — If there is no constitutional declaration as to whether a jury may be demanded or denied as a matter of course in the trial of civil cases, the subject is one for statutory regulation. *Londoner v. People*, 15 Colo. 557.

When the Plea Admits the Claim and presents no issue for a jury to try, a demand for a jury trial is properly refused. *Ashley v. Sholars*, 22 La. Ann. 442.

Default for Want of Reply. — A plaintiff in default for failure to reply cannot waive a jury on the cause of action in the petition and demand a jury on the counterclaim. *Clute v. Hazleton*, 51 Iowa 355.

3. Where the Constitutional Right to

a Trial by Jury Can Only Be Waived as Prescribed by Statute, the court has no power to make rules in derogation of the statute, fixing the time when the demand must be made, nor can it refuse to comply with a demand not in accordance with such rules, but which under the statute entitles the demandant to a jury trial. *Biggs v. Lloyd*, 70 Cal. 447.

Rule Requiring Repeated Demands. — In *Ten Eyck v. Farlee*, 16 N. J. L. 348, it was held that a rule in cases on appeal that a jury trial should be considered as waived unless it should be demanded at the time of appointing a special term for hearing appeals was oppressive and unauthorized, because requiring a repetition of the demand, thereby putting the party to the expense of continued entries of his demand.

Prescribing Time for Election in Contravention of Statute. — The court cannot make a rule of practice by which the parties will be considered as waiving their rights to a trial by jury unless they signify their intention of having a jury on or before a certain day in the term to which an appeal should be returned, where by statute the time for making such election is otherwise fixed, as, "if the parties consent to waive the right of trial by jury at the time of setting down such appeal for hearing at the special term." *Hinchly v. Machine*, 15 N. J. L. 476.

Nonexistence of Statutory Provision. — A rule prescribing the time within which a motion for a trial of issues by a jury, for which no provision is made by law, shall be made is not applicable

3. Application Favored. — The privilege of a trial by jury should not be unreasonably curtailed, but an application therefor should be favored and doubts as to the propriety of the demand resolved in favor of the applicant.¹

4. Time of Making Demand — *a. IN GENERAL.* — Ordinarily, the time within which the application for a jury should be made is determined by statute, though where authority is delegated to the courts the time of the application is within its province and may be prescribed by rules; but when, in either case, the time within which the demand is required to be made is established, there must be a substantial compliance with the requirements.²

to a case expressly provided for by statute. *Bradley, etc., Co. v. Herter*, 23 Civ. Pro. Rep. (N. Y. Super. Ct.) 408.

1. *Bayon v. Rivet*, 2 Martin (La.) 148; *Davis v. Prevost*, 6 Martin, N. S. (La.) 265; *Poyer v. New York Cent., etc., R. Co.*, 7 Abb. N. Cas. (N. Y. C. Pl.) 371.

Doubt as to Fact of Demand. — If the justice is unable to certify in positive terms that no jury was demanded at the time provided for by statute, or has any doubts on the subject, the demand should be entertained and a jury impaneled. *Pontiac, etc., Plank-road Co. v. Hopkinson*, 69 Mich. 10.

Right on Appeal. — Where a jury has been had below on a prayer therefor, it should be allowed in the appellate court. *Bayon v. Rivet*, 2 Martin (La.) 148.

Disregard of Demand. — Where either party to an issue may demand a jury trial, if the demand is made it is error for the judge to try the issues without a jury. *Nooe v. Garner*, 70 Ala. 443.

Demand of Number in Excess of Power to Award. — Where, in a particular proceeding, a defendant has the constitutional right to a trial by a jury of twelve, and such a proceeding is brought before a justice who has no power to impanel a jury of more than six, if the defendant insists on his right and demands the larger number the proceeding must be dismissed. *Baxter v. Putney*, 37 How. Pr. (Oneida County Ct.) 140. See also *People v. Lane*, 55 Barb. (N. Y.) 168.

2. Michigan. — *Van Sickle v. Kellogg*, 19 Mich. 49.

New York. — *Shannon v. Kennedy*, 1 E. D. Smith (N. Y.) 348; *Mason v. Campbell*, 1 Hilt. (N. Y.) 291.

Tennessee. — *Cooper v. Stockard*, 16 Lea (Tenn.) 140; *McGuire v. North Carolina, etc., R. Co.*, 95 Tenn. 707.

Texas. — *Cushman v. Flanagan*, 50 Tex. 389; *Cole v. Terrell*, 71 Tex. 549.

Timely Demand Must Be Acceded To. — The refusal of the court to accede to a demand for a jury, made in due time, is a fatal error, and where the record contains no rule of court, and shows no practice requiring the demand to be made at an earlier date than that upon which it was made, necessarily its refusal will require reversal. *Woods v. Tanquary*, 3 Colo. App. 515.

Demand on Motion for New Trial. — It is too late to pray for a jury on a motion for a new trial. *Bouquevalte v. Young*, 5 Rob. (La.) 162.

Appearance of New Attorney After Continuance. — In *Farwell v. Murray*, 104 Cal. 464, it appeared that the case coming on regularly to be heard was continued until the afternoon because of the engagement of the defendant's attorney, and that at that time a new attorney appeared, and being authorized to represent the defendant demanded a jury. The demand was denied because it had not been made when the case was first called. This was held error, it not appearing that the jury was waived in any of the modes prescribed by statute.

Demand After Issue of Venire for Less than Desired. — After a venire for six jurors has issued on the plaintiff's demand, a demand by the defendant for a jury trial by twelve men comes too late. *Bullard v. Spoor*, 2 Cow. (N. Y.) 431.

Under a statute giving the right to demand a jury of twelve men, for which twenty veniremen are required to be summoned, the demand for a jury of twelve made after six jurors have been selected from a venire of twelve comes too late. *Strong v. Beardslee*, 18 Johns. (N. Y.) 130.

b. JOINDER OF ISSUE. — Thus it is sometimes required that the demand be made at the time of joining issues of fact,¹ or that it be made within a prescribed time thereafter.²

Continuing Cause on Nonjury Docket. — A demand for a jury may be waived by allowing a case to be continued for several terms on the nonjury docket and failing to insist upon the demand at the proper time. *Coulter v. Weed Sewing Mach. Co.*, 3 Lea (Tenn.) 115.

Reservation of Right to Jury Trial in Order of Reference. — Where an order of reference made by consent contains a provision that either party may demand a jury trial upon exceptions to a referee's report, if there is any right to a trial by jury at all, it must be demanded when the exceptions are filed. *Harris v. Shaffer*, 92 N. Car. 30.

Discretion of Trial Court. — An application for a jury trial, not made in due time, is not a matter of right, but the grant of the right is discretionary with the court below, whose determination is not subject to review. *Schehan v. Malone*, 71 N. Car. 440.

1. Effect of Adjournment to Another Day. — Under an act limiting the right of the demand of a jury to the day on which issue is joined, and which provides that it shall not be lawful for either of the parties to demand a jury after the day in which an order has been made for an adjournment, it was held that it is too late to demand a jury after the joinder of issue and the adjournment of the case to another day. *Mason v. Campbell*, 1 Hilt. (N. Y.) 291.

To Another Hour of the Same Day. — In *Bayless v. Crany*, 1 Cow. (N. Y.) 86, in considering a statute providing that a jury might be demanded after issue joined and before inquiry into the merits of the case, but not after the day on which an order had been made for an adjournment, it was held that a mere adjournment to another hour of the same day on which the demand was made did not deprive the party of the right to demand a jury.

Adjournment by Clerk Before Joinder of Issue. — A demand is timely when made on a day to which the cause has been adjourned by the clerk in the absence of the justice and before joinder of issue. *Meech v. Brown*, 4 Abb. Pr. (N. Y. C. Pl.) 19.

2. Allowance of Answer After Time Prescribed for Demand. — Where, by a rule of court, notice that a jury is desired is

required to be filed within a specified time after answer or plea, and none of the parties give seasonable notice, the fact that a defendant in default is permitted to file an answer after the expiration of the prescribed time will confer no right to a jury where no special claim is made against him, and the answer so filed makes no change in the issues. *Graham v. Lord*, (Mass. 1897) 48 N. E. Rep. 778.

Withdrawal of Reservation to File Amended Answer. — Where, by consent of counsel, an answer was filed, and the right to file an amended answer was reserved, and thereafter the defendant gave notice that he would not file an amended answer, it was held that the parties were then at issue within a rule providing that the notice of a trial by jury required by statute shall be filed within ten days after the parties are at issue, and that the failure to give the notice within the prescribed time was a waiver of a right to a trial by jury. *Bailey v. Joy*, 132 Mass. 356.

Substitution of Personal Representative for Deceased Party. — Where the notice that a party requires a jury may be given "before the parties are at issue, or within such time thereafter as the court may by general or special order direct," and by rule the notice thus required must be filed within ten days after filing the answer, etc., a notice by the administratrix of a deceased plaintiff filed on the same day that she is admitted to prosecute is seasonable. *McGivern v. Wilson*, 160 Mass. 370.

Sufficiency of Demand on Appeal from Justice. — Where, by statute, it was provided that no case requiring the examination of mutual accounts or the taking of an account for the information of the court should be referred if either party should, within ten days after joinder of issue, file with the clerk a written demand for a trial by jury, it was held in an action commenced in a justice's court wherein the issue was joined and then brought into the Circuit Court on appeal, that a written demand filed with the clerk of that court at the time of the filing of the note of issue was sufficient to entitle the party to a jury. *Odell v. Reynolds*, 40 Mich. 21.

c. ON FIRST DAY OF TERM. — The requirement that a demand for a jury shall be made on the first day of the term has been held not only to mean the first day of the term at which the cause is called, but also the first day of any subsequent term.¹

1. Application on Appearance on Default Day. — Under the *Texas* Rev. Stat., art. 3061, which requires that an application shall be made on the first day of the term unless the case be an appearance case, in which event the application shall be made on default day, it was held that "appearance day" and "default day" had the same meaning, and that by failing to apply for a jury on default day, a demand made at the subsequent time when the case was called for trial came too late. *Cruger v. McCracken*, (Tex. Civ. App. 1894) 26 S. W. Rep. 282.

Demand After Discharge of Jury. — Where, by statute, the demand for a jury is required to be made on the first day of the term, a jury is properly refused when the demand is made after the disposition of the jury docket and discharge of the regular jury panel. *Denton Lumber Co. v. Fon du Lac First Nat. Bank*, (Tex. 1892) 18 S. W. Rep. 962.

In *Cook v. Cook*, 5 Tex. Civ. App. 30, it was held that a jury trial was erroneously refused on the ground that the right was waived by failing to make the demand when the appearance docket was called, and after an application for a continuance had been overruled; it not appearing that any jury was in attendance when the docket was called, but that presumably it had been discharged prior to that day.

Failure to Apply at Former Term. — If neither party demanded a jury when the case was called on appearance day, there is no error in granting a jury at a subsequent term on a proper demand, though no excuse is offered for the failure to apply at the preceding term. *Noel v. Denman*, 76 Tex. 306.

Demand After Lapse of Several Terms. — Where a rule provides that the clerk must keep a jury docket, and that no cause shall be tried by a jury unless it has been entered thereon, and that continued causes may be transferred thereto in vacation on the first day of any term, a jury trial may be demanded and had by any party in a continued cause if such demand is made on the first day of the term, no matter how many terms may have elapsed

since the cause was docketed without such a demand having been made. *Rogers v. Morton*, 51 Iowa 709.

Case Appealed. — Under the *Tennessee* Act of February 19, 1875, which provided that either party desiring a jury shall in case of original suits demand a jury in his first pleading tendering an issue triable by jury, and in case of all other suits shall demand a jury within the first three days of the trial term, etc., in a case appealed the demand was required to be made within the first three days of the term. *East Tennessee, etc. R. Co. v. Martin*, cited in *McGuire v. North Carolina R. Co.*, 95 Tenn. 709.

Sufficiency of Demand Made on First Day of Any Term. — In *Arlington Ins. Co. v. Caldwell*, 88 Tenn. 758, the court, in construing the amendatory Act of 1889, which allowed a demand on the first day of any term at which a suit stands for trial, it was held that in all cases in which demands were made in the pleadings under the original act, no further step was necessary to entitle the party to trial by jury, and that the amendatory act gave to him who had failed to make the demand in his pleading, and to parties in cases appealed, the right to demand a jury on the first day of any trial term.

Demand at Second Term. — A demand is properly made at the second term at which an appeal from a justice stands for trial, though no demand was made at the first term. *Swink v. McKnight*, 88 Tenn. 765.

Necessity of Notice in Attachment Proceedings. — Although it may be required by statute that the demand be made on the first day of the term on which a cause is returnable, yet a defendant in attachment proceedings is not required to make the demand until after he has been served with the notice required as the foundation for a general judgment for the amount of the debt. *Sutton v. Gunn*, 86 Ga. 652.

Excusing Neglect to Apply. — Under a statute (*Rev. Stat. Texas, § 3060 et seq.*) providing that no jury trial shall be had in any civil cases unless application be made therefor in open court on the first day of the term on the call of the docket, a failure to demand a

d. WHEN CAUSE SET FOR TRIAL. — It is sometimes provided that a demand for a jury shall be made when the case coming up in its regular order is set down for trial on a particular day fixed by the court.¹

e. BEFORE TRIAL. — The time for demanding a jury has also been fixed at the time when the cause is called for trial,² and prior to entering thereon or going into the merits of the case.³

jury on the first day of the term will preclude a subsequent application unless a sufficient cause is shown why the demand was not made in due time. *McFaddin v. Preston*, 54 Tex. 403.

Judge Not Present. — It is a sufficient excuse for not demanding a jury on the first day of the court that there was at that time no judge competent to receive the demand and enter the order. *Hays v. Hays*, 66 Tex. 606.

1. *Morgan v. Police Jury*, 11 La. 162; *Menefee v. Johnson*, 2 Rob. (La.) 274; *Brooks v. Walker*, 3 La. Ann. 150; *Wood v. Lyle*, 4 La. Ann. 145; *Wheelless v. Fisk*, 28 La. Ann. 731.

Continuance by Preference. — A prayer for a jury made after the case has been continued by preference cannot be allowed. *Wheelless v. Fisk*, 28 La. Ann. 731.

Failure to Fix Particular Trial Day. — Though a cause may have been set for trial and continued, yet if the particular day of trial had not actually been fixed at the time of demand the right is not lost. *State Bank v. Duplessis*, 2 La. Ann. 651.

Although a case has already been fixed for trial, an application for a jury is in time if, at the moment it is made, the case does not stand fixed for trial. *Gallagher v. Hebrew Congregation*, 34 La. Ann. 526.

In Texas, under Acts 78 and 170 of the Fifteenth Legislature, a party who desires a jury and tenders the required fee, or who makes oath in lieu thereof, by nine o'clock A. M. on the day of the court set by the presiding judge for the trial of jury cases, has the right to have his cause entered upon the "jury-case trial docket." *Dean v. Sweeney*, 51 Tex. 242.

2. **Call for Trial as Distinguished from Call of Calendar.** — Under a statutory requirement that the demand must be made when the case is called for trial, it is error to refuse a demand made when the case is actually called for trial, on the ground that it should have been made the first day of the term

when the case was called with others for the purpose of ascertaining in a general way what cases were for trial at the term. *State v. Clark*, 67 Wis. 229.

3. **Administration of Oath to Witness.** — In *Gale v. Barnes*, 1 Cow. (N. Y.) 235, the defendant stated his willingness to go on and the justice told the plaintiff to proceed, which he did; a witness was called, and when the justice was about to administer the oath the defendant demanded a venire. It was held that the demand came too late.

Inspection of Pleadings. — The mere inspection by the justice of a bill put in issue by the plea is not such an inquiry into the merits as will preclude the party from the right to a jury trial. *Olney v. Bacon*, 1 Johns. (N. Y.) 142.

Actual Taking of Testimony. — Under statutes respecting proceedings before magistrates, etc., providing that on a plea other than that of guilty, if the defendant does not demand a jury trial the court must proceed to try the issue, and that the demand may be made before the court hears any testimony on the trial, the right of a defendant to a trial by jury continues unaffected and available to him until testimony actually taken upon the trial, notwithstanding a previous election by the defendant to be tried without a jury and a waiver of a jury trial. *People v. Molinet*, 13 N. Y. Misc. Rep. (Queen's County Ct. Sess.) 301, *distinguishing* *People v. Mallon*, 39 How. Pr. (N. Y. Super. Ct.) 454, decided under a prior statute, and wherein it was held that the court could not acquire jurisdiction to try a prisoner without a jury unless it affirmatively appeared that, in the proceedings had before the trial, he had expressly waived his right to a trial by jury.

Affording Reasonable Opportunity to Plead. — Under a provision that in a justice's court either party desiring a jury shall himself demand the same "at or before the time for joining

f. DELAY OF TRIAL, BY GRANT OF DEMAND. — It is a good reason for refusing a demand not made in time, that to grant the application would have the effect of delaying the trial of the cause.¹

5. Mode and Sufficiency of Demand — a. GENERALLY. — The demand should be specific and should clearly show that it is the desire of the demandant that his cause should be submitted to the consideration of a jury.²

Issue. — It was held that such time would not expire until the plaintiff had been afforded reasonable opportunity to examine the answer and determine whether he would go to trial on the pleadings as they were then stated, or file a reply to the answer, or assail it by omission or demurrer. *Hall v. Chicago, etc., R. Co.*, 65 Iowa 258.

Close of Case for Prosecution. — If the defendant has failed to demand a jury at the proper time, there is no error in refusing the demand after the state has closed its case. *State v. Mays*, 24 S. Car. 194.

Jury Trial by Claim and Assent. — Under a statute (Laws of 1869, c. 410) providing that in the District Courts of the city of New York a jury trial may be had when claimed by one party and assented to by the other, the claim may be made at any time before trial. *Poyer v. New York Central, etc., R. Co.*, 7 Abb. N. Cas. (N. Y. C. Pl.) 371.

1. Right Absolute. — Where either party has a right to pray for a jury at any time before the cause is set for trial, the right cannot be denied, though delay be evidently the object. (Code Civ. Proc., §§ 494, 495.) *Reynolds v. Mahle*, 12 La. 424; *Wilson v. Alabama State Bank*, 3 La. Ann. 196.

Demand Before Discharge of Jury. — In *Allen v. Plummer*, 71 Tex. 546, the demand was made on the first day of the term and the jury had not been in fact discharged. The refusal to grant a new trial was held error, although the judge below was of the opinion that to grant the demand would have worked a continuance of the case.

Demand After Discharge of Jury. — In *Petri v. Fond du Lac First Nat. Bank*, 83 Tex. 424, it was held that there was no error in refusing a demand made two terms after the defendant had answered, and after disposition of the jury docket, and presumably the discharge of the jury for the term, when the fact of granting the demand would operate to continue the cause.

Demand on Day When Cause Set for Trial. — In *Petri v. Lincoln Nat. Bank*, 84 Tex. 153, the demand was made upon the day the cause was set down for trial, upon an assignment of the nonjury docket made by the court, and it was held that as the demand, if acceded to, would have continued the case, and prejudice would thereby have been sustained by the adverse party, the refusal of the demand was proper.

Allowing Interposition of Answer. — If, after a plea interposed by the defendant has been overruled, he is allowed to answer on the merits, his right to a trial by jury is not lost, though to obtain such a trial there must be a continuance. *Tricou v. Bayon*, 4 Martin (La.) 169.

Discretion of Court. — A jury may be prayed for in a supplemental answer; but its allowance is discretionary and will be refused where the jurors have been discharged for the term, and the trial would be delayed. *Davis v. Prevost*, 6 Martin N. S. (La.) 265; *Green v. Boudurant*, 7 Martin N. S. (La.) 230; *Hooper v. Hyams*, 1 Rob. (La.) 90.

2. Demand Must Be Specific. — Where a judge is authorized to proceed without a jury unless one is demanded and the fees therefor paid, there must be a demand before the judge can be held to have denied the privilege to a litigant. It must be shown that he was fully advised that the privilege was desired, and where the only evidence of that desire is that the judgment rendered in another county by another judge recited that there was a trial by jury, the complaining party cannot assert that he was deprived of his right. *Ellis v. Bonner*, 7 Tex. Civ. App. 539.

North Carolina Practice on Compulsory Reference. — The right to a trial by jury, under the provision of section 245 of the North Carolina Code Civ. Pro., that a compulsory reference shall not deprive either party of the right to a trial by jury of the issues of fact arising on

b. COMPLIANCE WITH STATUTES. — Where the mode of demand is pointed out by the legislature, and a substantial compliance with all the requirements of the statute is necessary, they should be so followed as to leave no question as to the intention.¹

the pleadings, may be waived, notwithstanding previous precautions to reserve the right, by omitting when filing exceptions to the report of the referee, to set forth specifically the points upon which the election to demand a jury trial is made. *Keystone Driller Co. v. Worth*, 117 N. Car. 517, *reaffirmed* in 118 N. Car. 746; *Yelverton v. Coley*, 101 N. Car. 248. See also *Carr v. Askew*, 94 N. Car. 194; *State v. Brown*, 70 N. Car. 27; *Green v. Castlebury*, 70 N. Car. 20; *Atkinson v. Whitehead*, 77 N. Car. 418.

Specification of Particular Issue. — The demand must indicate, in the exceptions, the particular issue as distinguished from issues raised by the pleadings, must be confined to issues thus raised, and must specify the issue either by tendering a formal one, or by stating what it is as clearly as if it had been formally drawn and tendered. *Taylor v. Smith*, 118 N. Car. 127.

Demand for the Trial of All Issues Raised by Exceptions. — In *Keystone Driller Co. v. Worth*, 117 N. Car. 515, on a compulsory reference, the referee filed a number of findings of fact, some of which related to questions not in issue under the pleadings. To those the defendant filed exceptions, and it was held that a demand at the end of the exceptions for a trial by jury to all the issues raised thereby was too general to entitle him to a new trial.

Sufficiency of Assent to Jury Trial. — Where, by the claim of one party and the assent of the other, there is a right to a jury, the assent will be sufficiently manifested by any conduct which will satisfy the trial judge, and which will justify him in taking means to procure a jury. *Poyer v. New York Cent., etc., R. Co.*, 7 Abb. N. Cas. (N. Y. C. Pl.) 371.

Demand by One of Two Defendants. — One of two debtors *in solido* cannot avail himself of the other's prayer for a jury. *Smith v. Scott*, 3 Rob. (La.) 258; *Mulhollan v. Henderson*, 3 Rob. (La.) 297.

1. *Doll v. Anderson*, 27 Cal. 248; *Powens v. Jones*, 10 Abb. N. Cas. (Oneida County Ct.) 458.

In Louisiana one sued as the maker

of a promissory note has no right to a trial by jury, unless he annex to his answer praying for it the affidavit required by the twenty-fourth section of the Act of March 20, 1839. *Kennard v. Gustine*, 9 Rob. (La.) 170; *Hennen v. Bourgeat*, 12 Rob. (La.) 522.

He must swear that he "expects to prove that the note has been obtained through error." *Williams v. Boozeman*, 18 La. Ann. 532.

The answer must be verified if the defense is want of consideration. *Letten v. Durbridge*, 18 La. Ann. 129; *Foster v. Levinson*, 10 La. Ann. 584.

In a suit on a written lease the defendant must make oath to the truth of the allegations of his answer. *Galot v. McCluskey*, 18 La. Ann. 260.

Necessity of Showing Certain and Unequivocal Defense. — Under the Act of March 20, 1839, § 24, No. 53, the defendant's affidavit for a jury must show that his defense is certain and unequivocal, and will affect the plaintiff's right to recover. *Amado v. Breda*, 16 La. 257; *Smith v. Scott*, 3 Rob. (La.) 258.

Demand by Telegram. — Where, by statute, the court is authorized to dispense with the jury on the failure of a party to appear at the trial in person or by counsel, if there has been no such appearance he may disregard a telegram demanding a jury, sent by the party the day before the trial. *McGuire v. Drew*, 83 Cal. 225.

Application to Particular Court. — Where an application is required to be made to a particular court in session within the county, if the application is made elsewhere at a time when the court in question is actually in session it is of no effect. *Greene v. Milford*, 139 Mass. 69.

The Rhode Island Judiciary Act requires that in all answered cases there shall be a decision of the court and judgment on the seventh day following, and that the entries on the docket or papers shall be deemed a decision. It was held that where there was a docket entry equivalent to a decision, but no entry of any judgment actually rendered, a claim for a jury trial made

Where the demand is required to be made in the pleadings,¹ or the cause is required to be placed on a special jury docket,² the failure to proceed in the manner prescribed will deprive a litigant of the desired right.

c. LEGAL AND EQUITABLE ISSUES.—Where causes of action triable by a jury and causes of action triable by the court are united, and a jury trial of the issues properly so triable is desired, the demand should be that the specific issues proper for a trial by jury should be so tried, and not that there should be a jury

two days after the entry on the papers should have been granted. *Lavelle v. Kimball*, 18 R. I. 786. But in action of account, after the court has noted its decision on the auditor's report, the right is gone. *White v. Eddy*, (R. I. 1895) 31 Atl. Rep. 823.

1. Demand in Pleadings—Docketing Cause.—A jury trial is properly refused when a jury has not been demanded in the pleadings as required by statute, and the cause has not been docketed on the docket specified in the act, but on the docket theretofore in use. *Travis v. Louisville, etc., R. Co.*, 9 Lea (Tenn.) 231.

Conclusion of Plea—A plea of not guilty, with a conclusion "and of this he puts himself upon the country," is an insufficient demand under a statute providing that "either party desiring a jury shall, in case of original suits, demand a jury in his first pleading, tendering an issue triable by jury." *Gleaves v. Davidson*, 85 Tenn. 380.

Effect on Second Trial of Failure to Object to Jury on First Trial.—In *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351, there was a trial without objection upon pleadings which did not demand a jury as required by statute. A new trial was granted and an amended declaration filed wherein no jury was demanded. It was held that the fact that the defendant failed to object to the jury on the first trial did not estop him from objecting on the second trial, and that it was error to submit the case to a jury over his objection.

Compliance with Statute as Confering Absolute Right to Jury.—In *Ex p. Ansley*, 107 Ala. 613, it appeared that a special act creating a city court provided that the demand for a jury should be made by the defendant on his appearance, by indorsing the demand on the plea, or demurrer, or other pleadings, and that the failure to demand a jury, as above directed,

should be deemed and held a waiver of the right to a jury. On the appearance of the defendant and the filing of his plea, he demanded of the clerk the trial of the cause by jury, and deposited the jury fee, in compliance with another provision of the act. It was held that the statute was mandatory, and that mandamus would not lie to compel the court to vacate an order transferring the cause to the nonjury docket.

Appeal from Justice.—Under a similar statute requiring the demand to be made at the commencement of the suit, and also providing that when a cause is transferred to such court the demand shall be made at the time of the application for the transfer, the statute is substantially complied with, in an action begun in a justice's court and appealed therefrom by filing the complaint in the appellate court, indorsed with the demand for a jury trial, before any trial of the cause could possibly have taken place under the pending orders and rules of practice of such court. *Nixon v. Killian*, 90 Ala. 484.

2. Motion in Open Court.—A demand made on the first day of the trial term by motion in open court, without entry on the trial docket as required by statute, and after the case has been called and both parties have announced that they were ready for trial, comes too late. *McGuire v. North Carolina, etc., R. Co.*, 95 Tenn. 707.

It is not sufficient to make the demand of the clerk, or to notify him of the demand and have the notice entered upon the docket, nor is the action of the clerk in placing and keeping the case on the jury docket sufficient. *East Tennessee, etc., R. Co. v. Martin*, cited in *McGuire v. North Carolina R. Co.*, 95 Tenn. 707. See also *Travis v. Louisville, etc., R. Co.*, 9 Lea (Tenn.) 231.

trial of all the issues in the case.¹

d. PAYMENT OF JURY FEES.—The Power of the Legislature to require payment of a reasonable jury fee as a condition to entitle a party to a jury trial, and to provide that the failure to do so shall constitute a waiver of the jury, is undoubted.²

Time of Payment.—When payment of such fees is a prerequisite to the right to a jury trial, it is ordinarily necessary that such payment be made at the time the request or demand for such a trial is made.³ A strict compliance with the requirements as to

1. *Chadbourn v. Zilsdorf*, 34 Minn. 43; *Lace v. Fixen*, 39 Minn. 46.

A Demand that a Jury Try All the Issues where some are triable by the court and some by the jury, without specifying any particular issues, is an improper demand and is rightfully denied. *Greenleaf v. Eagan*, 30 Minn. 316; *Peden v. Cavins*, 134 Ind. 494.

Submission to Jury by Agreement.—Where issues in a case are both legal and equitable, the parties, by agreement, may submit them to a jury, and thereafter will not be heard to complain. *Green v. Taney*, 7 Colo. 278.

Acquiescence in Disposition of Issues of Fact by Court.—Where there is a disputed question of fact material to the issues, there should be a distinct request that it be submitted to the jury. By treating the questions involved as questions of law only, and acquiescing in their disposition by the court as such, an objection that facts were involved which should have been submitted to the jury is waived. *Barnes v. Perine*, 12 N. Y. 18; *Grigsby v. Western Union Tel. Co.*, 5 S. Dak. 561.

The Erroneous Issuance of a Venire in compliance with a demand that issues be submitted to a jury is immaterial if the verdict rendered was directed by the court. *State v. Trimbell*, 12 Wash. 440.

2. *McGeagh v. Nordberg*, 53 Minn. 235; *Adams v. Corrison*, 7 Minn. 456.

Constitutionality of Act Requiring Prepayment.—An act requiring that the party demanding a trial by a jury of twelve men in a Probate Court be required to advance and pay into court the jury fee of twenty dollars is not in contravention of the seventh amendment of the Constitution of the United States, nor is the fee unreasonable in amount. *Venine v. Archibald*, 3 Colo. 163.

Refusal of Untimely Demands.—The fact that a defendant has failed to tender the jury fee is immaterial, where

the refusal of the court to grant the jury trial was based upon the ground that the jury was not demanded at the first term when issue was joined. *Brown v. Chenoworth*, 51 Tex. 469.

3. *Pitkin County v. Aspen First Nat. Bank*, 6 Colo. App. 423; *Fields v. Crescent Ins. Co.*, 3 Tex. App. Civ. Cas., § 125.

Demand Necessary.—Whether or not there is a right to a jury trial without prepayment of the jury fees cannot be considered, where it does not appear that a jury was demanded. *Joy, etc., Co. v. Blum*, 55 N. J. L. 518.

Deposit under Rule of Court.—On demand of a jury, the court may require the demandant to deposit a sum fixed by rule of court as jury fees. *Lassen County Bank v. Sherer*, 108 Cal. 513, following *Conneau v. Geis*, 73 Cal. 178.

In a Justice's Court if the demandant fails to pay the fees in advance, the justice may proceed to try the cause without a jury. *Rollins v. Nolting*, 53 Minn. 232.

Failure to make the payment at the time required by statute will be deemed a waiver of the right. *Kilpatrick v. Carr*, 3 Abb. Pr. (N. Y. C. Pl.) 117; *New York Dyeing, etc., Establishment v. Fox*, 6 Daly (N. Y.) 467.

Necessity of Payment of Jury Fee or Affidavit of Inability.—In *Doll v. Mundine*, 7 Tex. Civ. App. 96, the defendants excepted to the discharge of jurors on the regular panel, waived the right to a jury, and proceeded to trial before the judge. It appeared that the case had been on the nonjury docket for several years, and that the demand was made after the first day of the term at which the trial was had, but it did not appear that the jury fee had been paid, or that any affidavit of inability had been filed, or that the case had been placed on the jury docket, and it was held that the defendants were in no position to complain of the action of the court.

the time of payment is not always absolutely necessary, but non-payment within the time prescribed will be deemed unimportant where no prejudice has resulted and the court or its business has sustained no inconvenience,¹ and it has been held that the pay-

Effect of Failure to Compel Prepayment. — Although it may be the duty of the court to compel the plaintiff to advance the jury fees before the jury is impaneled, yet the failure to compel the prepayment will not disturb the validity of the judgment. *Pitkin County v. Brown*, 2 Colo. App. 473.

Under the Colorado General Statutes, § 1097, in divorce proceedings in the District Courts, the jury should be drawn and summoned under the County Court practice, and prepayment of the jury fees as required by the County Court Act is unnecessary. *Pleyte v. Pleyte*, 1 Colo. App. 70.

Constable's Fees. — In a Justice's Court the fees of the constable and of the jurors may be required to be delivered to the justice to be handed by him to the officer with the venire. *Powens v. Jones*, 10 Abb. N. Cas. (Oneida County Ct.) 458. But see *Moriarity v. Devine*, 1 Ohio Cir. Ct. Rep. 82, wherein it was held that the fees of the constable should not be demanded in advance.

1. Necessity of Payment at Time of Demand. — A demand may be in a manner prescribed by law, although the jury fee is not paid, since the most that can be insisted on would be to require payment before the jury should be called in the case or sworn; but whether this is so or not, the failure to pay at the time the demand is made cannot be considered as nullifying the demand. *Odell v. Reynolds*, 40 Mich. 21.

Denial of Jury Trial for Failure to Prepay Fees. — Under *Colorado Session Laws of 1891*, p. 248, which enact that in any action pending before a County Court, in a county of the first class, either party shall be entitled to a jury without advancing the fees therefor, the court has no authority to refuse a jury trial because of the failure to advance the fees. *Woods v. Tanquary*, 3 Colo. App. 515.

Failure to Pay Until After Expiration of Jury Term. — In *Cabell v. Hamilton Brown Shoe Co.*, 81 Tex. 104, a jury was demanded by the defendants at the time of filing the original answer, but the fee was not paid until more than a month thereafter, and after the

term allowed for a trial of jury cases had passed. It also appeared that counsel for the defendants were informed by the court that no case would be placed on the jury docket until the fee had been paid, and it was held that there was no error in refusing a jury.

Payment After Timely Demand. — Under a statute which requires a jury to be demanded on the first day of the term, but which does not negative the right of the party to deposit the fee after the first day, it is sufficient that one who has made a timely demand, and has informed the clerk that he will pay the fee, hands it to him the next day. *Gallagher v. Goldfrank*, 63 Tex. 474.

Payment After Time Limited by Statute. — Where, by statute, a justice may, in his discretion, in the absence of a demand by the parties, direct a trial by jury, the only requirement as to fees being that they shall be paid before rendition of judgment upon the verdict, it is not a good ground of complaint that the justice allowed a jury trial, on a proper demand made, although the fees were not tendered within the time required by statute. *Equitable Gas Light Co. v. French*, 10 Misc. Rep. (N. Y. C. Pl.) 749.

Misapprehension of Clerk as to Duty. — Where the demand for a jury trial was properly made by the defendant, but the clerk, through misapprehension, refused to receive the jury fees when properly tendered, it was held that the plaintiff could not complain that the justice thereafter directed the fees to be received by the clerk and issued a venire. *Equitable Gas Light Co. v. French*, 10 Misc. Rep. (N. Y. C. Pl.) 749.

Payment Before Motion to Strike Cause from Calendar. — In *Allyn v. Willis*, 65 Tex. 65, a payment of the fee before the filing of a motion to strike the case from the jury docket was held sufficient.

Nonpayment Where Prejudice Has Not Resulted. — Though a statute requires that the jury fee be deposited on the first day of term, the failure of the appellant thus to deposit it will not de-

ment on the day to which the trial of the cause has been adjourned,¹ or even at the time of the trial, was sufficient;² but it has also been held that the failure to comply with an order for the deposit of the fees will justify the denial of the application.³

New or Second Trial. — The fact that the fees have been paid at one trial will not authorize a jury on a new or second trial without payment of the fees for that trial also.⁴

Jury on Appeal. — Nor will the fact, of itself, that a jury trial was had in one court give the right to a jury on appeal without payment of the statutory fees.⁵

prive him of the right to do so later, if his failure has not prejudiced the adverse party nor unreasonably delayed or disturbed the business of the court. *Western Union Tel. Co. v. Everheart*, 10 Tex. Civ. App. 468; *Allen v. Plummer*, 71 Tex. 547.

Discretion of Court. — In *Hardin v. Blackshear*, 60 Tex. 132, it was held that though the failure to pay the jury fee at the time the jury is demanded will make it the duty of the court to refuse the jury, yet the court is vested with a discretion, and where no injury has resulted the action of the presiding judge in permitting the payment of the fee the day before the trial cannot be assigned as error.

1. If a jury is demanded in a justice's court at the time of joining issue and before adjournment, the jury fee may be paid on the day to which the case stands adjourned, at any time before the trial is entered upon by the swearing of witnesses. *Pontiac, etc., Plank-road Co. v. Hopkinson*, 69 Mich. 10.

2. Where, after a jury is prayed for, but the jury fee has not been advanced (Act Feb. 10, 1841, § 17, No. 16), the case is transferred to the court docket and taken up as a court case, it will be too late, at the moment of trial, to tender the fee and move for a retransfer. *Daniels v. Andrews*, 7 Rob. (La.) 160.

Tender of Fees at Trial. — In *Berry v. Texas, etc., R. Co.*, 60 Tex. 654, it appeared that an affidavit of inability had been made and filed under a wrong provision of the statute; that the cause had been on the jury docket for more than a year; that after both parties had answered "ready," and during the formation of the jury, the defendant objecting to a jury trial, the plaintiff asked leave to amend the affidavit, which was refused; when, the panel being in the box, he tendered and deposited the jury fees required, and

demanding a jury trial, which was also refused. It was held that the refusal was error.

3. **Failure to Deposit Fees in Compliance with Order.** — Where application for a jury is made at one term of the court, and overruled because of the failure to comply with the order of the court to make the deposit for jury fees on the day of the application the deposit of the jury fees before the trial of the case at a subsequent term of the court, without a new application, will not entitle the party to a jury. *Green v. Locke*, 31 La. Ann. 656.

4. A person who has demanded a jury in a justice's court, and has paid the fees thereon, cannot insist upon a trial by a second jury without the payment of an additional jury fee. *McGraw v. Sturgeon*, 29 Mich. 426.

Where a jury cause is called, jury fee paid, verdict rendered, and a new trial granted, a further jury fee must be paid when the case is called for another trial, before the jury can be sworn. *Schultz v. Bower*, 66 Minn. 281.

5. In *Wood v. Gamble*, (Tex. Civ. App. 1895) 32 S. W. Rep. 368, it was held that the fact that a trial by jury was had in the justice's court would not give the right, on appeal to the County Court, to have the cause placed on the jury docket without payment of the jury fee prescribed by statute.

Fees on Removal from County Court to District Court. — Under the *Texas Revised Statutes*, art. 3066, which provides for a jury fee to be paid in the District Court, and prescribes the amount, and also provides for the payment of the fee in the County Court, prescribing a less amount, a party who has paid the lesser amount in the County Court need not pay the difference in a cause removed to the District Court because of the disqualification of the judge. *Warner v. Crosby*, 75 Tex. 295.

Refusal of Judgment for Nonpayment. — Where the payment of the fee is not a condition precedent to the rendition of judgment, judgment cannot be refused because of nonpayment,¹ nor can a verdict and judgment entered thereon in favor of a party who has failed to make the payment be vacated and judgment rendered against him as if he were in default.²

Excessive Sum. — The court cannot, of course, insist on the payment of an excessive sum as fees.³

6. Repetition of Demand. — Where a jury trial has been properly demanded and refused, it is not usually necessary that the demand be repeated,⁴ unless in those cases where it is treated as referring exclusively to the term or the time at which it is made.⁵

7. Withdrawal of Demand. — In some jurisdictions, where one

1. Although a statute provides for the payment of the jury fee by the successful party as a prerequisite to judgment, to authorize the unsuccessful party to prosecute an appeal, where the successful party has failed to pay the fee, he must either coerce payment by the successful party or pay the fee himself, that a final judgment may be entered from which an appeal can be taken. *Gore v. Pettit*, 2 B. Mon. (Ky.) 25.

If the Payment of the Jury Fee Is Not Made a Condition Precedent to the rendition of judgment, and the justice may require the successful party to pay it, he cannot refuse to give judgment because of the nonpayment. *Robinson v. Kious*, 4 Ohio St. 594.

2. Where, by statute, the jury fee is required to be paid by the successful party before the verdict is recorded, and the statute is merely directory, if the verdict has been entered and likewise a judgment thereon, the vacation of the verdict by the court will not authorize it to render a judgment against the party in whose favor a judgment had previously been rendered, as if he were in default. *Stevens v. Breatheven, Wright* (Ohio) 733.

Where a justice refuses to try a cause of which he has jurisdiction, because of the refusal of the plaintiff to deposit the fees of the jurors who were summoned at the instance of the defendant, mandamus will issue to compel him to try it, although he may have entered a judgment of dismissal. *People v. Van Tassel*, 13 Utah 9.

3. It is reversible error to demand an excessive amount of fees for the jury, and on the refusal of payment thereof to proceed and try the cause without a

jury. *Powens v. Jones*, 10 Abb. N. Cas. (Oneida County Ct.) 458.

4. The filing of a written demand for a jury is a continued refusal to waive the right thereto, and where the court has denied the application once, it is necessary to repeat it. *Swasey v. Adair*, 88 Cal. 179.

Where an application made at one term is overruled because of noncompliance with an order requiring the deposit of the jury fees, the deposit of the fees before trial at a subsequent term, without a new application, will not give the right to a jury trial. *Green v. Locke*, 31 La. Ann. 656.

Proceeding with Trial After Refusal of Demand. — Where a party has once properly insisted on his right, he will not be deemed to have lost it by thereafter proceeding to trial. *Matter of Robinson*, 106 Cal. 493.

5. A demand for a jury must have reference to the term and time at which the demand is made. *Davidson v. Wright*, 46 Iowa 383.

A demand made at one term at which a case was continued will be deemed to have been waived by the failure to demand it again at the trial. *Davidson v. Wright*, 46 Iowa 383.

Rules of court the effect of which is to require a party to make repeated demands are oppressive and unauthorized. *Ten Eyck v. Farlee*, 16 N. J. L. 348.

Waiver at One Term — Subsequent Demand. — Under Acts 78 and 170 of the Fifteenth Legislature, the fact that at a preceding term a jury was waived will not control the right in the discretion of a party to demand a jury at a succeeding term. *Dean v. Sweeney*, 51 Tex. 242.

party complies with the statutory requirements and procures a case to be placed on the jury docket, the adverse party cannot be deprived of the right to a jury trial by the withdrawal of the application without his consent,¹ but it has been held that such a consent is not only unnecessary, but that the application may be withdrawn against his objection.²

8. Appeal and Review. — As in other cases, for the purpose of procuring a review of an alleged erroneous refusal of a proper demand, and the consequent denial of the right to a jury trial, the better practice requires that the party deeming himself aggrieved should reserve proper exceptions to enable him to render his objection available to the reviewing court,³ since to authorize a presumption that a jury was demanded there must at least be something upon which that presumption can be based.⁴

1. *Jones v. Hamby*, (Tex. Civ. App. 1895) 29 S. W. Rep. 75.

If the plaintiff prays for a jury and the defendant does not, the latter cannot be deprived of his right to one by the former's waiver of his prayer. *Sweeny v. Barbin*, 2 Martin (La.) 48.

The Applicant Cannot Waive the Jury at the Moment of Trial unless the other party consents. *Lewis v. Klotz*, 39 La. Ann. 259.

2. Where a jury can be demanded only at the time of joining an issue of fact, and a jury duly summoned at the instance of the plaintiff is in attendance, and the defendant procures an adjournment, the plaintiff may, upon payment of the fees for summoning a new jury, waive a jury trial on the adjourned day against the defendant's objection, and the judge may proceed to try the case alone. *New York Dyeing, etc., Establishment v. Fox*, 6 Daly (N. Y.) 467.

3. Objection First Taken on Appeal. — The question of the right to have the issues passed on by a jury cannot be raised for the first time in the appellate court. *Marshall v. Marshall*, 42 S. Car. 436.

Necessity of Exception to Refusal of Demand. — In *Meech v. Brown*, 4 Abb. Pr. (N. Y. C. Pl.) 19, it was held that no exception need be taken to the denial of a jury trial by a justice to enable the demandant to have the action of the justice reviewed. The court said: "The right of trial by jury is so sacredly secured that when it is denied, and that fact is brought to the notice of a court of review, it imposes a duty upon that court which is paramount to all technical rules of practice — to see that the denial was justified by the laws

of the land, and if not, to remedy the wrong by the exercise of its authority."

Effect of Failure to Except. — The failure to except to a ruling whereby a party is denied the right to a trial by jury at the time the ruling is made will not preclude him from raising the question on appeal from a final judgment. *Marshall v. Pitts*, 39 S. Car. 390.

Sufficiency of Bill of Exceptions. — A bill of exceptions which fails to state the reasons for refusing a jury trial, or the grounds on which the exception to the refusal was taken, will not be regarded. *Davis v. Millaudon*, 14 La. Ann. 820.

Showing that Demand Was Accompanied by Payment of Fee. — The Municipal Court Act provides that "the party demanding a jury in any civil action shall be required to advance and pay * * * a jury fee of three dollars; and unless such jury is demanded and such fee paid upon the calling of the calendar on the first day of the term at which the same is set for trial, it shall be considered to be, and the same shall be, waived, and said action tried by the court." It was held that an appellant who assigns as error the denial of his demand for a jury trial should make it appear from the record that his demand was accompanied by payment of the jury fee into court. *McGeagh v. Nordberg*, 53 Minn. 235.

Remedy by Habeas Corpus. — The denial of a jury in a trial before a justice on a charge of misdemeanor, wherein a jury may be waived, is mere error which cannot be reached by a writ of habeas corpus. *Ex p. Miller*, 82 Cal. 454; *Ex p. Brandon*, 49 Ark. 143.

4. Presumption of Demand. — In the absence of the record there is no pre-

V. WAIVER AND LOSS OF RIGHT TO JURY TRIAL — 1. Power to Waive Trial by Jury — a. CIVIL PROCEEDINGS. — It is generally conceded that in civil actions and proceedings, and in the absence of constitutional or statutory inhibition, the right of a party to have the issues of fact in a cause determined by a jury is a privilege of such a nature that he may waive it if he so chooses.¹

sumption for or against a jury's having been claimed by a party, or summoned at the instance of the court. *People v. Treadway*, 17 Mich. 480.

In the absence of any showing to the contrary by exception or otherwise, it will be presumed that a trial by jury was not demanded. *Latimer v. Motter*, 26 Ohio St. 480.

Failure of Record to Show Demand. — Where the record on appeal shows that the trial below was by the court, but fails to show that a jury was demanded, it will be presumed that the right was waived. *Willson v. Light*, 4 Ark. 158.

Sufficiency of Record to Show Denial of Demand. — A recital in the findings that a jury trial was waived will not prevail against the showing in a bill of exceptions that the demand for a jury was denied. *Downing v. Le Du*, 82 Cal. 471.

Sufficiency of Record to Show Proper Demand. — A record stating that "counsel for the defendant renewed the motion to send this case to the Circuit," etc., which fails to show that any such motion was priorly made, or that any demand for a jury trial was made on the part of the defendant, does not show a demand for a jury trial, and hence the right to such a trial will be deemed waived under subdivision 4 of section 1009 of the Code of Civil Procedure, which provides that the right to have issues tried by a jury may be deemed waived by the failure to claim it. *Hartman v. Manhattan R. Co.*, 82 Hun (N. Y.) 531.

1. *Alabama.* — *Stein v. Jackson*, 31 Ala. 24.

California. — *Russell v. Elliott*, 2 Cal. 245.

Indiana. — *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558.

Mississippi. — *Lewis v. Garrett*, 5 How. (Miss.) 434.

New York. — *Baird v. New York*, 74 N. Y. 386.

United States. — *Kearney v. Case*, 12 Wall. (U. S.) 275; *Burr v. Des Moines R., etc., Co.*, 1 Wall. (U. S.) 102; *Parsons v. Armor*, 3 Pet. (U. S.) 425; U. S.

v. Rathbone, 2 Paine (U. S.) 578; *Guild v. Frontin*, 18 How. (U. S.) 135; *Suydam v. Williamson*, 20 How. (U. S.) 427; *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Campbell v. Boyreau*, 21 How. (U. S.) 223.

"Shall" Construed to Have Meaning of "May." — A jury may be waived under a statute providing that an issue in a will contest "shall" be tried by a jury, the word "shall" having no other or greater force than the word "may." *Whipple v. Eddy*, 161 Ill. 114.

Objection After Proceeding to Hearing. — If waiver of a jury trial is permissible, it is too late, after the case has proceeded to a hearing, to object that the waiver was made a matter of record. *Phillips v. Preston*, 5 How. (U. S.) 278.

Right to Complain After Waiver. — Where a court has jurisdiction of the persons and the subject-matter, and the defendants voluntarily appear on the day set for trial of the cause, waive a jury, and submit to trial without objection, they cannot thereafter be heard in complaint. *Jensen v. Fricke*, 133 Ill. 171; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337.

Waiver by Failure to Demand. — It is only after a method of demanding a jury has been prescribed that the right to the jury is waived by failure to demand it. *Odell v. Reynolds*, 40 Mich. 21.

Where, by statute, it is declared that on trial of the right to personal property against an officer who has taken it under process, the verdict of the jury shall be an indemnity to the officer, and it is also directed that the jury shall consist of a prescribed number of persons, on a trial by a claimant of property against a constable who has taken it on execution, if the parties waive a jury the finding of the justice in favor of the officer is equivalent to a verdict by a jury. *Kreuchi v. Dehler*, 50 Ill. 176.

In *Kreuchi v. Dehler*, 50 Ill. 176, a statute providing that in a trial of the right of property against an officer who has taken it under process the jury shall consist of not less than six per-

b. CRIMINAL PROCEEDINGS GENERALLY. — Although there is some question as to the power to waive the right in criminal proceedings, the modern tendency is to apply the same rules as those governing proceedings civil in their nature, where the offense charged is a misdemeanor or a felony of a lesser grade.¹

c. CAPITAL FELONIES AND FELONIES OF THE HIGHER GRADES. — In the trial of capital felonies, however, and felonies of the higher grades, the same doctrine does not apply, and in such cases, especially where the punishment on conviction is death, or imprisonment for life or for a long term of years, the right to a trial by jury, which is guaranteed by constitutional provisions or otherwise, cannot as a rule be waived.²

2. Power to Waive Trial by Legally Constituted Jury — *a. GENERALLY.* — It follows from what has been said, that where, as in civil cases, a jury may be waived *in toto*, necessarily a litigant may

sons was held to prescribe absolutely that number only in cases where the parties are not present to agree upon a less number. It was also held that in a statute directing that in a specified proceeding the jury shall consist of six persons a provision authorizing the summoning of twelve persons did not preclude the parties from agreeing upon any number less than twelve, nor prevent them from waiving a jury altogether.

1. Constitutionality of Statute Authorizing Waiver. — A statute authorizing the accused to waive the right of trial by jury, and to elect to be tried by the judge, is not in violation of the Constitution. *State v. Robinson*, 43 La. Ann. 383, *affirming State v. White*, 33 La. Ann. 1218.

A Person Accused of Crime cannot waive any essential of the right of trial by jury, and no substantial and beneficial incident of that right can be divested by legislation. *Swart v. Kimball*, 43 Mich. 443.

In a Felony Case the accused cannot waive a trial by jury. *Williams v. State*, 12 Ohio St. 622.

The Issue Joined upon a Special Plea of a Former Trial can only be tried by a jury; the consent of the defendant cannot confer jurisdiction upon the court to try the issue without a jury. *Grant v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 527.

Where Issues of Fact in a Criminal Case are required by statute to be tried by a jury, a jury cannot be waived. *State v. Carman*, 63 Iowa 130; *State v. Larrigan*, 66 Iowa 426.

Right to Waive Trial by Peers. — In

the case of *Lord Dacres* (Kelyng's Rep. 59), the judges of the Court of King's Bench agreed that the prisoner could not waive a trial by his peers and be tried by the country, for the statute of Magna Charta was in the negative, and the prosecution was at the king's suit. See Woodeson's Lectures, vol. 1, 346, wherein it is said that the same was resolved on the arraignment of Lord Audley in the seventh year of the reign of Charles I., and that the reason was that the mode of trial was not so properly a privilege of the nobility as part of the indispensable law of the land, like the trial of commoners by commoners, enacted, or rather declared, by Magna Charta. See *Cancemi v. People*, 18 N. Y. 128; 3 Coke's Inst. 30.

2. *Cancemi v. People*, 18 N. Y. 128. And see notes *supra* and *infra*.

Coercion of Accused, Inducing Him to Waive Right to Common Jury. — Where a prisoner charged with a capital offense announced readiness for trial, and, on being informed by the court that unless he asked to be tried by a special jury the case would be continued, stated that he did not wish to waive his right, but for the purpose of getting a trial asked for a special jury, it was held error, because he was induced to ask for a special jury, thereby waiving his right to strike jurors from the panel, and acquiescing in the wrongful action of the prosecuting attorney in striking off jurors without cause. It was also held that the accused was not precluded from questioning the legality of the proceeding. *State v. Miller*, 6 W. Va. 600.

submit to trial by less than twelve men, notwithstanding that the legislature may have no power to compel him to accept less than the constitutional number.¹

b. CRIMINAL PROCEEDINGS.—In criminal proceedings, and especially in trials for felonies of the lesser grades, the decisions are at variance, and while there is a tendency to assimilate as near as may be the practice in civil cases to criminal proceedings of the class referred to, by recognizing the power of the accused to proceed to trial with less than the full complement of jurors,² the

1. *Cowles v. Buckman*, 6 Iowa 161; *Vaughn v. Scade*, 30 Mo. 600; *Huron v. Carter*, 5 S. Dak. 4; *Roach v. Blakey*, 89 Va. 767. See also *Mahoney v. San Francisco, etc., R. Co.*, 110 Cal. 471; *Kreuchi v. Dehler*, 50 Ill. 176.

Failure to Object.—Where a party sits by and allows less than the requisite number of jurors to be sworn to try the issue, and fails to object, he is held to have waived the irregularity. *The Ship Milwaukie v. Hale*, 1 Dougl. (Mich.) 306; *Sappington v. Elrod*, 9 Mo. App. 581; *Evans v. Gee*, 11 Pet. (U. S.) 80.

Where Only Nine Jurors Acted, and there was no waiver on the record, the judgment was reversed. *Oldham v. Hill*, 5 J. J. Marsh. (Ky.) 300.

Ignorance of Party of Deficiency in Number.—A verdict by eleven jurors, without the knowledge of either party as to the deficiency in the number of jurors, is not a waiver of the right to the full number. *Cowles v. Buckman* 6 Iowa 161.

Waiver of Absence of Juror by Motion for Verdict.—Where, after submission of the evidence and argument of counsel, the defendant objected to proceeding in the absence of a sick juror, there was held to be no waiver of the objection by a motion for judgment upon the findings of the other eleven. *Eshelman v. Chicago, etc., R. Co.*, 67 Iowa 296.

Power to Consent to Trial by Less than Twelve Jurors.—Where, by reason of the amount involved, a trial by six jurors cannot be had, a judgment on a verdict by that number must be set aside although the submission was by consent. *Falkenburg v. Cramer*, 1 N. J. L. 35.

2. *Iowa.*—*State v. Kaufman*, 51 Iowa 578; *State v. Grossheim*, 79 Iowa 75.

Kentucky.—*Murphy v. Com.*, 1 Metc. (Ky.) 365.

Massachusetts.—*Com. v. Dailey*, 12 Cush. (Mass.) 80.

Minnesota.—*State v. Sackett*, 39 Minn. 69.

Missouri.—*State v. Larger*, 45 Mo. 510.

Nevada.—*State v. Borowsky*, 11 Nev. 119.

United States.—*U. S. v. Shaw*, 59 Fed. Rep. 110.

And see *Tyra v. Com.*, 2 Metc. (Ky.) 1.

Waiver in Court of Special and Inferior Jurisdiction.—The provision in the New York Constitution, that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," means a common-law jury of twelve men, and does not apply to the petty offenses triable before a court of special sessions. *People v. Justices*, 74 N. Y. 406.

The Illinois Act of June 17, 1893, entitled "An act to provide a trial by jury in all cases where a judgment may be satisfied by imprisonment," and whereby a jury trial may be dispensed with by a formal waiver in writing, is applicable to all cases whether in a justices' court or a court of record, where a judgment may be satisfied by imprisonment. *Swan v. Mulherin*, 67 Ill. App. 77.

Consent Obtained by Intimidation.—The accused cannot consent to a proposition made by the prosecuting attorney to proceed to trial with less than a complete panel where the proposition is in the nature of an intimidating suggestion by the prosecuting officer. *State v. Davis*, 66 Mo. 684.

Consent by Counsel.—Though a defendant accused of a misdemeanor may consent to the discharge of a juror and to proceeding with eleven men, yet in his absence his counsel cannot so consent without his knowledge. *U. S. v. Shaw*, 59 Fed. Rep. 110.

Objection Must Be Timely.—Objection that the panel is less than twelve must

weight of authority holds to the view that in felony cases the constitutional right to a trial by a common-law jury of twelve cannot be waived, and that a conviction by a jury of less than that number must be set aside.¹

3. Mode and Sufficiency of Waiver — a. GENERALLY — The waiver of a jury should be clear and explicit, and should be evidenced by some unequivocal act showing an intention to abandon the right.²

b. BY IMPLICATION. — Although undoubtedly a waiver may be implied from circumstances,³ yet waiver by implication is not

be made by the accused before he announces himself ready for trial and accepts the jury, and cannot be urged on motion in arrest of judgment. *State v. Wright*, 45 La. Ann. 57.

In *Arkansas*, by statute, on a trial for a misdemeanor, the accused may be tried by less than twelve men, but the mere failure to object to a jury of less than twelve will not operate as a waiver of the right to a requisite number. *Warwick v. State*, 47 Ark. 568.

1. *Alabama*. — *Brazier v. State*, 44 Ala. 387; *Bell v. State*, 44 Ala. 393.

Arkansas. — *State v. Cox*, 8 Ark. 436; *Bond v. State*, 17 Ark. 290.

California. — *People v. O'Neil*, 48 Cal. 257.

Indiana. — *Brown v. State*, 16 Ind. 496; *Allen v. State*, 54 Ind. 461.

Kentucky. — *Murphy v. Com.*, 1 Metc. (Ky.) 365.

Maryland. — *League v. State*, 36 Md. 257.

Michigan. — *People v. Smith*, 9 Mich. 193; *Hill v. People*, 16 Mich. 351; *Swart v. Kimball*, 43 Mich. 443.

Minnesota. — *State v. Everett*, 14 Minn. 439.

Mississippi. — *Dowling v. State*, 5 Smed. & M. (Miss.) 664; *Hunt v. State*, 61 Miss. 577.

Missouri. — *State v. Mansfield*, 41 Mo. 471; *State v. Van Matre*, 49 Mo. 268; *State v. Meyers*, 68 Mo. 266; *State v. Robertson*, 71 Mo. 446.

Nevada. — *State v. McClear*, 11 Nev. 41.

New Hampshire. — Opinion of Justices, 41 N. H. 550.

New Mexico. — *Territory v. Ortiz*, (N. Mex. 1895) 42 Pac. Rep. 87.

New York. — *Cancemi v. People*, 18 N. Y. 128.

Ohio. — *Work v. State*, 2 Ohio St. 296; *Williams v. State*, 12 Ohio St. 622.

Consent that Record Should Show Trial by Twelve Jurors. — In *Cancemi v.*

People, 18 N. Y. 128, the conviction was set aside because the trial was had by less than a full jury of twelve, by consent of the prisoner, and although the record showed a trial and verdict by twelve jurors, the presiding judge certifying that during the trial one of the jurors was withdrawn under a stipulation, the prisoner consenting, and also consenting that the record should show that the trial had been by twelve jurors.

Withdrawal of Incompetent Juror During Trial. — In *People v. Graham*, 13 Wend. (N. Y.) 352, note, which was the trial of an indictment for murder, the incompetency of a juror was not discovered until the evidence had been introduced, and, by consent of the people and the defendant, the juror was withdrawn, his name left off the record, and the trial proceeded with, and a verdict of manslaughter rendered by the eleven remaining jurors.

Objection First Taken on Appeal. — Alleged error in trying a felony case with less than twelve jurors by consent will not be considered for the first time in the reviewing court. *Tyra v. Com.*, 2 Metc. (Ky.) 2.

2. *Hinchly v. Machine*, 15 N. J. L. 476; *Wheelock v. Lee*, 74 N. Y. 495; *U. S. v. Rathbone*, 2 Paine (U. S.) 578.

The right to a trial by a jury of the county or district wherein the crime is alleged to have been committed is waived by an application for a change of venue. *State v. Crinklaw*, 40 Neb. 759. And see *State v. Potter*, 16 Kan. 80.

3. *Lewis v. Garrett*, 5 How. (Miss.) 434; *Eysaman v. Small*, (N. Y. Supreme Ct.) 15 N. Y. Supp. 288.

Waiver by Implication Generally. — Constitutional provisions allowing the right of waiver in civil causes in the manner prescribed by law will not preclude courts from holding parties

avored, especially where the liberty of the citizen is at stake.¹

c. STATUTORY MODES. — Where the modes of waiver are prescribed by statute, they will usually be treated as exclusive of all other methods of dispensing with a jury, and before it will be concluded that the right to a jury has been lost it must appear that the mode upon which the waiver is predicated was one authorized by the legislature.²

to have waived, by their conduct or silence, the right to a jury trial, although the case is not provided for by statute. *Baird v. New York*, 74 N. Y. 386; *Greason v. Keteltas*, 17 N. Y. 491; *Barlow v. Scott*, 24 N. Y. 40; *West Point Iron Co. v. Reymert*, 45 N. Y. 705.

Instances. — A stipulation that the fees of a stenographer on a reference be taxed as costs will be taken as a submission to the court as to the amount which should be allowed, and as an implied waiver of a jury. *Trail v. Somerville*, 22 Mo. App. 1.

Where it is prescribed by statute that the damages in an injunction suit shall be assessed by a referee, a plaintiff who procures an injunction and files a undertaking therefor waives the right to have the damages occasioned by the injunction assessed by a jury. *Russell v. Elliott*, 2 Cal. 245.

In *Columbia Bank v. Okely*, 4 Wheat. (U. S.) 235, there was held to be an implied waiver of a right to a jury trial by making a note negotiable at a bank whose charter contained a provision authorizing the collection of such debts by a summary proceeding which did not admit of a jury trial.

In *Hiriart v. Ballon*, 9 Pet. (U. S.) 156, wherein a summary judgment was rendered against a surety in an appeal bond, it was held that the defendant, by becoming surety in a court whose rules provided for such summary judgment, had waived his right to a trial by jury.

By acceptance of an office under a law which authorizes removal from such office by the governor, the right to a trial by jury of questions involving the existence of cause for removal is waived. *State v. Wilson* (N. Car. 1897) 28 S. E. Rep. 554.

1. *Smith v. Polack*, 2 Cal. 92; *Hinchly v. Machine*, 15 N. J. L. 476; *Wheelock v. Lee*, 74 N. Y. 495.

Doubtful Implications. — The waiver of a right to trial by jury should not be predicated on doubtful implications. *Stedham v. Stedham*, 32 Ala. 525.

Where Silence Cannot Be Construed as a Waiver of the right, the failure to apply for a jury at the time the probate of a will is contested will not amount to an implied waiver of the right, nor authorize the court to refuse a jury when it is demanded at the trial. *Stedham v. Stedham*, 32 Ala. 525.

Failure of Accused to Demand Jury. — Where, by statute, it is provided that the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such a manner as may be prescribed by law, an implication of waiver in a criminal proceeding is not authorized by the silence of the defendant, or by his mere failure to demand the jury. *Ward v. People*, 30 Mich. 116.

2. *California.* — *Biggs v. Lloyd*, 70 Cal. 447; *Farwell v. Murray*, 104 Cal. 464.

Indiana. — *Shaw v. Kent*, 11 Ind. 80. *New York.* — *People v. Green*, (Supreme Ct.) 4 N. Y. Crim. Rep. 442.

North Carolina. — *Chasteen v. Martin*, 81 N. Car. 51.

South Carolina. — *Sale v. Meggett*, 25 S. Car. 72.

Washington. — *Meeker v. Gilbert*, 3 Wash. Ter. 369.

But see *Mackellar v. Rogers*, 109 N. Y. 468; *Boyd v. Boyd*, 12 Misc. Rep. (N. Y. C. Pl.) 119, 2 N. Y. Ann. Cas. 30.

In the United States Courts, in cases at law, the practice, pleadings, and modes of proceeding of the state courts are followed as nearly as practicable, yet the right to a jury to try issues of fact can only be waived in writing by the parties. *Lanning v. Lockett*, 11 Fed. Rep. 814. See also *U. S. v. Rathbone*, 2 Paine (U. S.) 578.

Under the statutes of the United States, issues of fact in civil cases may be tried and determined in the Circuit Court without the intervention of the jury whenever the parties or their attorneys of record file a stipulation in writing with the clerk, waiving a jury (13 Stat. at L. 501). *Hearn v. New*

d. NONAPPEARANCE AT TRIAL.—In most of the states, and usually by statute, the default or nonappearance of the party at the time the cause is called for trial will authorize the court to proceed without the intervention of a jury,¹ unless the right to have a jury pass on the facts is a strict matter of right, or there exist statutory requirements of an express waiver.²

England Mut. Marine Ins. Co., 3 Cliff. (U. S.) 320.

The act applies to the Circuit Courts only, and not to the District Courts. *Blair v. Allen*, 3 Dill. (U. S.) 101.

Acts Authorising the Waiver of a Trial by Jury must be complied with with reasonable strictness. *Flanders v. Tweed*, 9 Wall. (U. S.) 425.

1. *California*.—*Doll v. Feller*, 16 Cal. 432; *Waltham v. Carson*, 10 Cal. 178.

Colorado.—*Leahy v. Dunlap*, 6 Colo. 552.

Indiana.—*Willets v. Ridgway*, 9 Ind. 367.

Kansas.—*Green v. Bulkley*, 23 Kan. 130; *Weems v. McDavitt*, 49 Kan. 260.

Missouri.—*Jones v. St. Joseph F. & M. Ins. Co.*, 55 Mo. 342, *distinguishing* *Benton v. Lindell*, 10 Mo. 557, and *Pratte v. Corl*, 9 Mo. 164, which were decided under an early statute.

New York.—*Manny v. Dobie*, 3 Cal. (N. Y.) 219; *Kilpatrick v. Carr*, 3 Abb. Pr. (N. Y. C. Pl.) 117; *Helmick v. Churchill*, 92 Hun (N. Y.) 524.

Discharge of Veniremen on Nonappearance of Defendant.—Though a venire should not issue before the appearance of the defendant, if he fails to appear the justice may dismiss the jurors coming under the venire and try the cause himself. *Wills v. M'Dole*, 5 N. J. L. 577.

Insufficient Plea as a Failure to Appear.—The appearance of a party who interposes an insufficient plea and fails to plead further is not such a failure to appear, within a statutory provision that a jury may be waived by such a failure, as will authorize a judgment in the case where the intervention of a jury is proper. *Burgess v. Jacobs*, 14 B. Mon. (Ky.) 415.

Default of Plaintiff in Replevin—Iowa Statute.—Under statutory provisions giving the plaintiff in an action of replevin the right to dismiss his action without depriving the defendant of his right to have his damages assessed, and providing for the assessment of

damages by the court unless a jury is demanded by the party not in default, where the plaintiff dismisses his action after the delivery of the property to him, and at the next term the defendant moves to reinstate the cause for the purpose of assessing his damages, there is no error in refusing the demand of the plaintiff for a jury trial. *Wilkins v. Treynor*, 14 Iowa 391.

2. Absence from Courtroom where Jury Is Matter of Right.—Where a party is entitled to a jury trial as a matter of right, the mere absence from the courtroom of himself or his attorney when the case is reached and called for trial will not of itself constitute a waiver of the right to trial by jury. *Jones v. Hamby*, (Tex. Civ. App. 1895) 29 S. W. Rep. 75.

Absence of Defendant Who Has Demanded and Paid for Jury.—A defendant who has properly demanded a jury in a justice's court and who has paid the fees therefor is entitled to it, although he leaves the courtroom, and absents himself therefrom, and from subsequent proceedings in the case. *Boatz v. Berg*, 51 Mich. 8.

Entry of Judgment Nil Dicit.—If the defendant does not appear after issue joined when the case is called, a jury should be impaneled to try the issues and assess the damages, and it is erroneous to enter judgment *nil dicit*. *Taylor v. McLoughlin*, 2 Colo. 375.

Placing Cause on Equity Calendar.—In *Sweeney v. Stanford*, 60 Cal. 362, it appeared that when the calendar was called the plaintiff's attorney stated that a jury trial was waived, whereupon the cause was placed on the equity calendar for trial, and thereafter judgment was rendered for the plaintiff in the absence of the defendant and his attorney, neither of whom had any knowledge that the cause was on such calendar. It was held that the failure of the defendant to appear when the cause was called on the equity calendar did not operate as a waiver of a jury trial, for the reason that the cause was improperly on such calendar.

c. FAILURE TO CLAIM JURY—SUBMISSION TO COURT.—As before intimated, the intention to abandon the right to a jury trial should be indicated by some affirmative act, and where the right is not absolute, so that a jury trial is an incident of the action without the requirement of a demand, by failing to claim it, and by entering upon a trial by the court without objection, the right will be treated as if it had been specifically waived.¹

Statutory Requirement of Express Waiver.—In *Slocum v. Swan*, 4 Ohio St. 161, which was an action in ejectment, a plea of not guilty was interposed, and the plaintiff failing to appear when the cause was reached, the court rendered judgment without a jury, and it was held that in view of a statute authorizing the court to act without a jury in such a case only when the parties waived the intervention of the jury, etc., the court had no power to try the case.

1. *Alabama*.—*Cawthorn v. State*, 63 Ala. 157.

California.—*Pfister v. Dascey*, 65 Cal. 403; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Smith v. Brannan*, 13 Cal. 107; *Baker v. Joseph*, 16 Cal. 173.

Illinois.—*Heacock v. Hosmer*, 109 Ill. 245; *Jensen v. Fricke*, 133 Ill. 171; *Belford v. Beatty*, 145 Ill. 414.

Indiana.—*Madison, etc., R. Co. v. Whiteneck*, 8 Ind. 217; *Sheets v. Bray*, 125 Ind. 33; *Crim v. Fleming*, 123 Ind. 438.

Iowa.—*State v. Craig*, 58 Iowa 238; *State v. Ill*, 74 Iowa 441.

Louisiana.—*Le Blanc v. Johns*, 4 Martin N. S. (La.) 635; *Wallace v. Smith*, 8 La. Ann. 374.

Massachusetts.—*Walcott v. O'Connor*, 163 Mass. 21.

Michigan.—*People v. Judge*, 41 Mich. 31; *Van Sickle v. Kellogg*, 19 Mich. 49.

Minnesota.—*Banning v. Hall*, (Minn. 1897) 72 N. W. Rep. 817.

Missouri.—*Brown v. Home Sav. Bank*, 5 Mo. App. 1.

New York.—*West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Blanchard v. Richly*, 7 Johns. (N. Y.) 198; *Dayhash v. Enos*, 5 N. Y. 531; *Greason v. Keteltas*, 17 N. Y. 491.

Ohio.—*Ellithorpe v. Buck*, 17 Ohio St. 72; *Latimer v. Motter*, 26 Ohio St. 480; *Bonewitz v. Bonewitz*, 50 Ohio St. 373; *Longstreth, etc., Mfg. Co. v. Halsey*, 4 Ohio Cir. Ct. Rep. 307.

South Carolina.—*Aultman v. Salinas*, 44 S. Car. 299.

Texas.—*Langbein v. State*, 37 Tex. 162; *Connelley v. Drake*, (Tex. App. 1890) 16 S. W. Rep. 175.

Washington.—*Keane v. Brygger*, 3 Wash. 338.

Wisconsin.—*State v. Clark*, 67 Wis. 229; *Leonard v. Rogan*, 20 Wis. 540.

United States.—*Kearney v. Case*, 12 Wall. (U. S.) 284; *Mayhew v. Thatcher*, 6 Wheat. (U. S.) 129; *Bond v. Brown*, 12 How. (U. S.) 254.

A Garnishee Who Excepts to a Rule to Cross His Answers, on the ground that he is entitled to a jury, and does not pray for one, waives his right thereto. *Foulhouze v. Gaines*, 26 La. Ann. 86.

The Right to a Jury Trial in a Justice's Court may be lost by moving the discharge of an attachment, where the determination of the motion is conclusive. *Strauss v. Cooch*, 47 Ohio St. 115.

Statement of Nonexistence of Question for Jury.—Though the issues involved gave the right to a jury trial, yet when, at the time of the demand, "it was stated in open court that the only matters in issue were priorities of the different alleged liens," there was held to be no error in refusing a trial by jury. *Wiscomb v. Cubberly*, 51 Kan. 580.

Reliance on Demand by Adverse Party.—By waiting until the day set for trial the accused waives his right to demand a special jury, and he cannot be said to have relied on the demand made by the state where the record shows that he repudiated that demand from its inception. *Bond v. State*, 23 Ohio St. 349.

Necessity of Affirmative Act to Show Right Not Waived.—Where a statute respecting a special court treats the right to trial by jury in civil cases as waived unless demanded, an affirmative act by the party desiring a jury is necessary to entitle him to it. *Sutton v. Gunn*, 86 Ga. 652.

Thus, where a cause may be tried by a special court without a jury, if the contract declared upon is unconditional and in writing, and to procure a jury a demand must be made therefor, a

f. CONSENT—(1) Generally.—Whether the right to a jury trial be absolute or not, it may be waived by the consent¹ of both parties to a civil action or proceeding.²

(2) *Stipulation in Writing.*—It is sometimes required by statute, and it is undoubtedly the better practice, that a formal consent or stipulation in writing, clearly showing the intention to waive a jury, should be entered into and filed.³

judgment may be rendered without a jury in attachment proceedings, although the foundation of the attachment was a conditional obligation, and there was no appearance, plea, or demand for a jury trial. *Sutton v. Gunn*, 86 Ga. 652.

Submission of All Issues as Waiver of Jury Trial of Particular Issues.—By proceeding without objection to a trial by the court of the whole case, the right to a trial by a jury of any of the issues presented by the pleadings is waived. *Lewis v. Mott*, 36 N. Y. 395.

Irregularity in Placing Cause on Calendar.—Where the defendant appears at the time the case is called, waives a jury, and submits to a trial without objection, he waives any irregularity, if any occur, in placing the cause on the calendar for trial by the court. *Jensen v. Fricke*, 133 Ill. 171; *Belford v. Beatty*, 145 Ill. 414.

Case Improperly Docketed—Failure to Object in Time.—In *Walcott v. O'Connor*, 163 Mass. 21, it appeared that the defendant had claimed a trial by jury, but by a mistake the clerk had placed the case upon the "jury waived list," and thereafter the counsel was unable to find the notice given to the clerk. After proceeding to a trial by the court, but before the formal making and entry of its finding, the claim for a new trial was observed on the files and the attention of counsel called to it, and it was held that the refusal of the court to transfer the case to the jury list was not erroneous, since the defendant had made no objection to proceeding with the trial up to that time.

Action for Specific Performance.—Where, in an action for a strict specific performance of a covenant to renew a lease or for damages, the complaint made a case for damages and not for specific performance, and without objection the trial was had before the court without a jury, it was held to be a waiver of the right to a trial by jury. *Greason v. Keteltas*, 17 N. Y. 491.

Consolidation of Actions.—One having a constitutional right to a trial by

jury of the issues in an action wherein there has been a civil arrest does not lose or waive his right merely by agreeing that his suit may be consolidated with a habeas corpus proceeding, and that the two cases may be tried together. *Orr v. Miller*, 98 Ind. 436.

1. *Stein v. Jackson*, 31 Ala. 24; *Kreuchi v. Dehler*, 50 Ill. 176; *Ward v. People*, 30 Mich. 116; *Hosford v. Carter*, 10 Abb. Pr. (N. Y. C. Pl.) 452; *Sutton v. McConnell*, 46 Wis. 269.

Consent to Procure Trial in Another Jurisdiction.—The right to a jury trial may be waived by an agreement on the part of the defendant that a case peremptorily set for trial shall be transferred to another department of the court, there to proceed without the intervention of a jury, thus enabling the defendant to secure a delay in the trial. *Hawes v. Clark*, 84 Cal. 272.

Consent of Counsel—Mistake.—A party who, through his counsel, has assented to a trial without a jury cannot afterwards avoid this by showing that his counsel made a mistake about a fact relating to his own conduct in the case which due diligence on his part would have corrected. *Walcott v. O'Connor*, 163 Mass. 21.

Necessity of Special Authority.—The consent to waive a jury trial may be made by counsel without special authority. *Stevenson v. Felton*, 99 N. Car. 58.

2. *Warfield v. Hamlet*, 28 La. Ann. 815; *Gregory v. Lincoln*, 13 Neb. 352; *Boslow v. Shenberger*, (Neb. 1897) 71 N. W. Rep. 1012.

The Consent of Both Parties Alone Can Waive a Jury awarded at the instance of either, or by the court *proprio motu*. *Livaudais v. Spear*, 10 La. Ann. 24; *Mills v. Noles*, 1 Ohio 534; *Lewis v. Klotz*, 39 La. Ann. 259.

A Submission by Both Parties of the Case to the Court upon a statement of admitted facts will dispense with the jury. *St. Charles v. Hackman*, 133 Mo. 634.

3. *Chapline v. Robertson*, 44 Ark. 202. See in general article STIPULATIONS.

(3) *In Open Court.* — It may also be sufficient to dispense with a jury by oral agreement in open court.¹

(4) *Entry of Record.* — In case of either written stipulation or waiver in open court the fact of the waiver should be duly made to appear by a sufficient entry on the record.²

Sufficiency of Record — Formal Waiver in Writing. — A statement in the record that "the parties submitted the cause to the court for trial without a jury" does not show a substantial compliance with a statutory requirement that a jury trial may be waived only by the execution of a formal waiver in writing. *Swan v. Mulherin*, 67 Ill. App. 77.

The Illinois Act of June 17, 1893, entitled "An act to provide a trial by jury in all cases where a judgment may be satisfied by imprisonment," and providing that "no person shall be imprisoned for nonpayment of a fine or a judgment in any civil, criminal, quasi-criminal, or *qui tam* action, except upon conviction by jury. Provided, that the defendant * * * in any such action may waive a jury trial by executing a formal waiver in writing," etc., and that when such waiver is made imprisonment may follow judgment of the court without conviction by a jury, is not applicable to the trial of an indictment for assault with intent to kill wherein on conviction no fine was inflicted nor money judgment rendered. *Sloncen v. People*, 58 Ill. App. 315.

"Puts Himself upon the Country." — A paper reading: "The defendant, H. L., being in open court, waives arraignment and a trial by jury, pleads not guilty, and *puts himself upon the country*," is not vitiated as a waiver because, through inadvertence, the words italicized appear therein. *Logan v. State*, 86 Ga. 266.

Necessity of Written Waiver. — In *Ohio*, on a prosecution before a magistrate for cruelty to animals, under Rev. Stat. Ohio, § 3178a, the waiver of a jury need not be in writing, section 7147, requiring a written waiver on the charge of misdemeanor, being inapplicable. *Martindale v. State*, 2 Ohio Cir. Ct. Rep. 2.

Validity of Written Waiver Not Required by Statute. — By entering into a stipulation waiving a jury, and by submission to the court upon an agreed statement of facts, parties waive a trial by jury, even though there may be no legislative provision for waiving a jury

by written stipulation. *Henderson's Distilled Spirits*, 14 Wall. (U. S.) 44.

1. *Gregory v. Lincoln*, 13 Neb. 352; *Boslow v. Shenberger*, (Neb. 1897) 71 N. W. Rep. 1012; *Chase v. Chase*, (Supreme Ct.) 19 N. Y. Supp. 268.

Sufficiency of Inquiry by Court. — In *People v. Weeks*, 99 Mich. 86, on inquiry by the court as to whether he wanted a jury, the defendant, by his attorney, answered that the court could do as it chose about a jury, as he, the accused, would put in no defense, and on a like inquiry of the prosecuting attorney, the latter answered that he did not wish a jury. It was held that a jury was waived.

2. *Chapline v. Robertson*, 44 Ark. 202.

Power of Attorney to Consent. — Under a statute providing that a jury may be waived by oral consent in open court entered on the record, there may be a waiver by consent of the attorney in the manner prescribed. *Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270.

The statute is satisfied by an agreement by the attorneys entered into the day before the calling of the case in open court, and entered of record. *Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270.

Sufficiency of Record — Entry. — Any agreement of parties which is entered of record, by which they consent to any disposition of the cause plainly inconsistent with its submission for trial by jury, would constitute a waiver of the right. *Goodwin v. Hedrick*, 24 Ind. 121.

Appearance and Submission of Cause to Court. — An entry of judgment showing that the parties "appeared and submitted the case for trial to the court" sufficiently shows that a jury trial was waived. *Bruner v. Marcum*, 50 Mo. 405.

A recital in the judgment of the appearance of the defendant, and that "neither party requiring a jury, the cause is submitted to the court," is a sufficient entry of consent within a statute providing that a jury may be waived by consent in person or by attorney, filed with the clerk or by oral consent

(5) *In United States Circuit Courts.* — In the Circuit Courts of the United States the question of waiver is regulated by statute, and it is provided that in civil cases a jury trial of issues of fact may be waived by the parties or their attorneys of record by filing with the clerk a stipulation in writing to that effect.¹

g. REFERENCE OF CAUSE. — The right to jury trial may also be waived by consenting to the trial of the issues involved by a referee, auditor, or other like officer,² by the failure to object to

in court, and entered on the minutes. *Tower v. Moore*, 52 Mo. 118, *distinguishing* *Vaughn v. Scade*, 30 Mo. 600, and *Brown v. Hannibal*, etc., R. Co., 37 Mo. 298, wherein there was no waiver apparent of record.

Presumption from Silence of Record. — Where, by statute, the "defendant and prosecuting attorney, with the consent of the court, may submit the trial of misdemeanors to the court," there is no necessity that the submission be entered on the minutes, or that it shall in any manner become a matter of record, since from the silence of the record it will be presumed that the court proceeded regularly. *State v. Larger*, 45 Mo. 510.

Entry Nunc Pro Tunc. — Where the original entry showed a submission by both parties to a trial by the court, there was no error in making a *nunc pro tunc* entry showing in so many words that a jury trial had been waived, since the original would bear no other construction. *Bruner v. Marcum*, 50 Mo. 405.

1. Rev. Stat. U. S., § 649.

Effect of Act of March 3, 1875. — The right to waive a jury trial by stipulation under section 649 of the Revised Statutes of the United States was not repealed by the third section under the Act of March 3, 1875, respecting the jurisdiction of the Circuit Courts to regulate the removal of causes from said courts and for other purposes. *Phillips v. Moore*, 100 U. S. 208.

Necessity of Written Stipulation. — In *Kearney v. Case*, 12 Wall. (U. S.) 275, Mr. Justice Miller said: "We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation.

* * * If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it."

Absence of Counsel. — An issue of fact in a case at law cannot be determined by the court in the absence of the defendant's counsel, and without any written agreement to waive a jury trial. *Morgan v. Gay*, 19 Wall. (U. S.) 81.

Sufficiency of Stipulation — Instances. — A recital that "both parties in open court having waived a jury and agreed to trial before the court," etc., does not show compliance with the section. *Rush v. Newman*, 58 Fed. Rep. 158.

A Stipulation in Writing Signed by the Attorneys of the respective parties, submitting the case to the jury for trial on the agreed facts, is a sufficient waiver within the requirements of the section. *Wayne County v. Kennicott*, 103 U. S. 554.

A Stipulation that a Cause Be Tried by the Court is equivalent to an agreement to waive the jury. *Bamberger v. Terry*, 103 U. S. 40.

2. *Rivas v. Summers*, 33 Fla. 539; *Hewitt v. Egbert*, 34 Ind. 485; *Hatch v. Watkins*, 1 Martin N. S. (La.) 154; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337; *Green v. Castlebury*, 70 N. Car. 20; *State v. Brown*, 70 N. Car. 27; *State v. Roseman*, 70 N. Car. 34; *Atkinson v. Whitehead*, 77 N. Car. 418; *Overby v. Fayetteville Bldg., etc., Assoc.*, 81 N. Car. 56; *Grant v. Reese*, 82 N. Car. 72; *Carr v. Askew*, 94 N. Car. 194; *Grant v. Hughes*, 96 N. Car. 177; *Nissen v. Genesee Gold Min. Co.*, 104 N. Car. 309; *Rhodes v. Russell*, 32 S. Car. 585.

Power to Recall Consent. — A party at whose request an order of reference is made waives the right to trial by jury, which he cannot recall except by consent. *Collins v. Young*, 118 N. Car. 265.

Consent After Denial of Jury Trial. — Where objection to a reference and a

an order for that mode of trial,¹ or by submitting without objection to the jurisdiction of the referee.²

h. COMPULSORY REFERENCE — NORTH CAROLINA.— In North Carolina the right to a jury trial of the issues of fact arising on the pleadings is not lost by a compulsory reference, but may be waived by the failure to claim it properly on the coming in of the report.³

i. LEGAL AND EQUITABLE ISSUES INVOLVED — (1) Joinder of Legal and Equitable Issues.— If causes of action triable by the court and causes of action triable by a jury are joined, the joinder will not of itself deprive the parties so entitled to a determination by a jury of facts proper for their consideration.⁴

demand for a jury trial has been overruled, but the party subsequently consents to the appointment of a referee, there is an abandonment of the former objection and demand, and a waiver of the right to a jury trial. *Smith v. Burlingham*, 44 Kan. 487.

Consent to Reference as Condition of Leave to Amend Pleading.— Where leave to amend his answer was granted upon condition that the defendant stipulate to try the action before a referee, it was held that a subsequent stipulation by the defendant for the appointment of the referee was a waiver of any right which he might have had to demand a jury trial. *Deering v. McCarthy*, 36 Minn. 302.

Right to Jury Trial on Exceptions to Referee's Report.— It is doubtful whether the court has power to allow parties to agree that a trial by jury may be had on exceptions to a referee's report when the reference is by consent. *Harris v. Shaffer*, 92 N. Car. 30.

1. *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372.

Failure to Object to Order of Reference.— Where the parties were in court at the time an order referring the case was made, and the appellant was required to furnish a bill of particulars of the items of account claimed in the answer, and no objection was made by him to the course of the proceedings, it was held that there was an "oral consent in open court" within a statute providing that a trial by jury might be waived by such a consent. *Hauser v. Roth*, 37 Ind. 89.

Objection First Made on Appeal.— Objection to the submission to an auditor of issues which should have been decided by a jury comes too late on appeal. *Garrity v. Hamburger Co.*, 136 Ill. 499.

2. *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372.

3. North Carolina Code Civ. Pro., § 245.

Demand Must Be Specific.— A party who has duly objected to a compulsory reference may waive his right to a jury trial by failing to assert it definitely and specifically, and in each exception to the report of the referee. *Keystone Driller Co. v. Worth*, 117 N. Car. 515, *reaffirmed* in *Keystone Driller Co. v. Worth*, 118 N. Car. 746; *Yelverton v. Coley*, 101 N. Car. 248.

An entry on the record, "exceptions to the report * * * to be passed on by the court as of this term," followed by the judgment of the court, is conclusive that a jury trial has been waived. *Maxwell v. Maxwell*, 70 N. Car. 267.

4. *Bradley v. Aldrich*, 40 N. Y. 511; *Wheelock v. Lee*, 74 N. Y. 495; *Stevens v. New York*, 84 N. Y. 305.

Necessity of Determining Existence of Equitable Rights.— If the action is in its nature one triable by jury, the right to such trial will not be defeated because, in order to accomplish the main object of the action, it becomes necessary to determine issues as to the existence of equitable rights. *Yager v. Exchange Nat. Bank*, (Neb. 1897) 72 N. W. Rep. 211.

Withdrawal of Waiver.— A party who has consented to a trial by the court cannot thereafter insist upon a trial by jury because the complaint demands equitable relief as to some defendants and a money judgment as to others, where the former were not served with process and no change took place in the character of the action, nor in the issues to be tried. *St. Paul Distilling Co. v. Pratt*, 45 Minn. 215.

Right to Dispute with Jury After Sub-

(2) *Demand of Equitable Relief*.—Although a plaintiff entitled to either legal or equitable relief may waive a jury trial by bringing an action of a strictly equitable character, the defendant does not stand in the same position and cannot be deprived of his right in a proper case simply because the plaintiff has chosen to ask for equitable instead of legal relief.¹

(3) *Making Up Equitable Issues*.—The right to a jury trial may be lost by allowing equitable issues to be made up without objection.²

(4) *Interposition of Equitable Defense*.—The interposition of an equitable defense will not operate to defeat the right to a jury trial.³

(5) *Noticing Cause for Trial at Equity Term*.—The right to a trial of issues properly triable by a jury may be waived by noticing a cause for trial by a judge sitting in equity,⁴ or by failing to

mission of Evidence.—In proceedings under Rev. Stat. U. S., §§ 2325, 2326, to determine the right of adverse claimants to mineral locations, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, and the defendant does not challenge the complaint by motion or otherwise, but assents to calling a jury, and proceeds to trial as in an action at law, and both parties adduce their evidence on the questions of fact involved, it is then too late for the plaintiffs to move to have the case declared a proceeding in equity and to have it decided as such without the intervention of a jury. *Burke v. McDonald*, 2 Idaho 310.

The Request to Submit a Particular Question to a Jury—*i. e.*, as to whether a deed was executed—is a waiver of the right to a jury to try the case generally. *Spencer v. Robbins*, 106 Ind. 580.

Allowance of Legal and Denial of Equitable Relief.—Where, the plaintiff having shown himself entitled to common-law relief, the issues were sent to the Circuit to be tried by a jury, and a jury trial was there waived and a trial had by the court without a jury, a complaint that the plaintiff was allowed monetary damages only was held unavailable. *Phelps v. New York*, 61 Hun (N. Y.) 521.

1. *Davison v. Associates, etc.*, 71 N. Y. 333.

2. *Frye v. Hill*, 14 Wash. 83.

3. *Wolff v. Schaeffer*, 4 Mo. App. 367, affirmed in 74 Mo. 154; *Carter v. Prior*, 78 Mo. 222; *Moline Plow Co. v. Hart*

man, 84 Mo. 610; *Smith v. St. Louis Beef Canning Co.*, 14 Mo. App. 522.

4. **Notice by Both Parties**.—Where the issues tendered, though triable by a jury, might be tried by consent of the parties before a court, without a jury, and each party notices the case for trial to the court, the notice which takes the case there will be deemed an unequivocal election by both parties to have the case so tried. *Mackellar v. Rogers*, 109 N. Y. 468.

Failure to State Issues.—Where an action triable by jury is noticed by both sides for trial at the equity term of the court without stating any issues, the right to a trial by jury is waived. *Collins v. Collins*, 131 N. Y. 648, 30 N. E. Rep. 863, affirming (Supreme Ct.) 13 N. Y. Supp. 28.

Withdrawal of Notice After Answering "Ready".—Where a case on the equity calendar at a term for which it had been noticed by both parties, after being marked "ready" and passed from day to day was finally set down for trial, and on the day set was marked off, on the defendants' motion, because of the illness of their attorney, it was held that the right to a trial by jury was waived, and that the waiver was unaffected by the fact that after the term the defendants withdrew their notice of trial for the equity term. *Boyd v. Boyd*, 12 Misc. Rep. (N. Y. C. Pl.) 119, 2 N. Y. Ann. Cas. 30.

Express Waiver at Trial.—A defendant cannot complain that his right of trial by jury is impaired where it appears that both parties noticed the case for trial at an equity term of the court,

object to its being there sent,¹ or by failing to insist on or to make any effort to obtain a jury,² or by consenting that the cause be tried in that forum.³

(6) *Placing Cause on Equity Calendar by Consent.* — It has, however, been held that by consenting that a cause wherein the

and one count of the complaint has equitable features properly triable without a jury, and at the opening of the trial the right to a jury trial on the remaining count is expressly waived. *Collins v. Collins*, (Supreme Ct.) 13 N. Y. Supp. 28.

Claim of Jury After Entering on Trial. — Where both parties have noticed the case for trial by the court, it is too late for the defendant, after the conclusion of the evidence introduced on behalf of the plaintiff, to ask for a jury trial. *Webster v. White*, 8 S. Dak. 479.

Notice by One Party. — The defendant is not precluded from demanding a jury trial of issues involved where the plaintiff has noticed the cause for trial at an equity term, and the defendant does not move for a jury until after the cause has appeared on the equity calendar and has been set down for trial, no notice having been given on his behalf. *Bradley, etc., Co. v. Herter*, 23 Civ. Pro. Rep. (N. Y. Super. Ct.) 408.

1. The right to a jury trial may be waived by voluntary submission to the equity jurisdiction of the court. *North British, etc., Ins. Co. v. Lathrop*, 63 Fed. Rep. 508.

After submitting a cause to the equity side of the court and proceeding to a hearing and decree without objection, a party cannot complain that he was illegally deprived of the right to a trial by jury. *Perego v. Dodge*, 163 U. S. 160.

It is too late after submitting to the hearing by a chancellor to claim the right to be heard by a jury. *Tabler v. Anglo-American Assoc.*, (Ky. 1895) 32 S. W. Rep. 602.

By failure to object to the trial of a cause as an equitable action within the time prescribed by law, the defendant waives his right to a trial by jury. *Gibbs v. Coonrod*, 54 Iowa 736.

Allowing Case to Proceed Before Court Without Objection. — Where the complaint contains both an equitable and a legal cause of action, the defendant is entitled to a trial by jury of the latter; but if the case proceeds to trial by the court without objection, he will be

deemed to have waived a jury. *Peterson v. Ruhnke*, 46 Minn. 115.

2. *Love v. Bryson*, 57 Ark. 589.

Failure to Insist on Right to Jury. — Where the plaintiff insisted that a cause should be tried as a proceeding and a trial in equity, and the defendants insisted that it should be tried as a special proceeding at law, but stated that it was immaterial to them which way the court ordered it to be tried, not consenting, however, to its trial as an equity case, but at no time demanding a jury, it was held that an objection that a trial by jury was denied was untenable. *Lothian v. Lothian*, 88 Iowa 396.

In *Smith v. Barclay*, 54 Minn. 47, the court proceeded upon the theory that the case was a "court case," but one in which it might in its discretion order some specific question of fact to be tried by a jury, to which view no objection was made by the parties complaining, who, after the close of the evidence, proceeded on the same line by asking that specific questions of fact be submitted to the jury. It was held that they could not thereafter be heard to assert what they had not asserted below, *i. e.*, that the case was a "jury case" and that they were entitled to a jury trial as a matter of right.

3. **Consent to Delay Trial.** — In *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274, there was held to be a waiver in open court, it appearing that, the plaintiff pressing the case for trial, the defendants, who had demanded a jury, consented that the case, which was then on the jury calendar of the court, should go over and be tried at an equity term to be subsequently held.

Presumption. — Where no objection is made to an order setting a case for trial by the court, it will be assumed that the order was upon consent. *Foster v. Hinsin*, 75 Iowa 291.

Submission by Advice of Judge. — By submitting to a trial by a court sitting in equity with the advice of the judge, there is a waiver of the right to trial by a jury. *Sprague v. Pritchard*, 108 Ind. 491.

facts require both equitable and legal relief shall be placed on the equity calendar for trial, and by noticing the cause for trial on the equity side of the court, there is no waiver of the right that the issues as to which legal relief may be granted shall be tried by a jury;¹ and if it is evident that justice requires that a jury trial shall be had of any of the issues involved, the court may and should direct the determination of such issues in that mode.²

j. WAIVER UNDER SPECIAL CIRCUMSTANCES — (1) By Estoppel.—A party may be estopped from claiming a jury trial by suffering the adverse party to proceed without a jury, without signifying any intention of claiming the right.³

(2) By Preventing Procurement of Jurors.—Likewise a party may preclude himself of the right to a jury, to which, otherwise,

1. *Wheelock v. Lee*, 74 N. Y. 495; *Underhill v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 478, 21 Civ. Pro. Rep. (N. Y.) 441.

Where There Is No Independent Common-law Cause of Action involved, but the entire cause is equitable in its character, and only some of the questions of fact are triable by a jury, the right to a jury trial is not waived by noticing the case for trial at the equity term. *Eggers v. Manhattan R. Co.*, 27 Abb. N. Cas. (N. Y. Super. Ct.) 463, 21 Civ. Pro. Rep. (N. Y.) 403.

2. Where the distinction between the forms of actions at law and suits in equity is abolished, if an action in which both equitable and legal relief is sought is brought to trial on the equity side of the court and the defendant demands a jury trial, the judge must determine whether any of the grounds on which a recovery is sought can be redressed solely by an action at law, and if so should direct the cause to be tried by a jury at the Circuit, or, at all events, should refuse to try the cause without a jury. *Wheelock v. Lee*, 74 N. Y. 495; *Hudson v. Caryl*, 44 N. Y. 553.

But should the judge decide erroneously in this respect, and on plaintiff's motion proceed to try without a jury a cause which should be tried with a jury, it would not operate as a waiver of any of his legal rights; and should he fail to show himself entitled to any equitable relief, but should show a right to legal relief, the complaint should not be dismissed but the court should order the case to be tried by a jury as an action at law. *Davis v. Morris*, 36 N. Y. 569.

Discretion of Court to Grant Jury Trial.

—Where a defendant waives his right to a jury trial by noticing a case for the equity term, it is discretionary with the court to deny the application for a trial of all or any of the issues by a jury. *Boyd v. Boyd*, 12 Misc. Rep. (N. Y. C. Pl.) 119, 2 N. Y. Ann. Cas. 30.

3. *Pegram v. New York El. R. Co.*, 147 N. Y. 135.

Allowing Party to Proceed in Ignorance of Demand Priorly Made.—In *Shannon v. Kennedy*, 1 E. D. Smith (N. Y.) 346, the court refused to reverse where the defendant had demanded a jury in the absence of the plaintiff and had subsequently gone to trial without objection, and without knowledge of the demand on the part of the plaintiff until after a trial on the merits, when the defendant objected for the first time on appeal to the refusal of the justice to order a jury.

Silence as to Right to Jury Trial and Consent to Reference.—In a proceeding for a partition of land, the defendant not only remained silent as to any right to a trial of the title at law, but, after the testimony had been taken before an examiner, the cause was tried by a referee appointed by the chancellor on the application of the parties plaintiff and defendant for such reference. It was held that by such reference and trial the defendant waived any constitutional right that he might have had to a trial of the question of title by a jury. *Rivas v. Summers*, 33 Fla. 539.

A Devisee, by appearing and taking part in proceedings instituted by an executor to prove a will, does not waive the right to a trial by a jury upon questions as to the validity of the devise after the refusal of probate by the surrogate. *Corley v. McElmeel*, 149 N. Y. 228, 87 Hun (N. Y.) 23.

he would be entitled, by attempting to defeat measures taken to procure jurors.¹

(3) *By Defeating Formation of Jury.* — So a party may waive his right to a jury by such conduct as may be calculated to defeat the formation of a jury from the veniremen in attendance.²

(4) *Improperly Setting Cause Down — Futile Demand.* — The right to a jury may also be lost or waived by setting a cause down for trial or making the demand at a term when it is known or is reasonably to be expected that a jury cannot be procured,³

1. *Suppression of Venire in Justice's Court.* — Where the justice issued a venire and delivered it to the defendant, who had demanded a jury, instead of to the constable, and it was suppressed *mala fide* by the defendant for the purpose of preventing a trial, it was held that although the justice might have issued another venire he was not bound to do so, but was justified in considering that the jury had been waived. *Coon v. Snyder*, 19 Johns. (N. Y.) 384.

Where a justice of the peace delivered the venire to the defendant, it was held error for him to proceed in the absence of the jury where there was no suggestion that the venire had been improperly suppressed by the defendant. *Sebring v. Wheedon*, 8 Johns. (N. Y.) 460.

Demand Not Made in Good Faith — Defeating Service of Venire. — In *Daniels v. Scott*, 12 N. J. L. 27, it was assigned for reversal that the justice proceeded to hear and determine the cause after a trial by jury had been demanded, but the court declined to grant relief, it appearing that the demand was not made in good faith, and that when granted the service of the venire was defeated by the conduct and contrivance of the complaining party.

Obstructing Efforts to Procure Jury. — In *Babcock v. Hill*, 35 Barb. (N. Y.) 52, it appeared that on the adjourned day, after the commencement of the trial in a justice's court, one juror failed to appear because of illness, and the defendant refused to go on with the jurors present; he also objected to the issuance of a new venire returnable forthwith, or that a talesman might be summoned, and at his request the jury was dismissed. Thereafter he applied for an adjournment to secure the attendance of absent witnesses, which the justice offered to grant on terms, but which offer he refused, and it was held that the justice properly proceeded to

try the cause without a jury, the defendant's conduct amounting to a waiver.

2. *Persistently Challenging and Refusing to Change Venue.* — In *Fountain County v. Loeb*, 68 Ind. 29, it was held that where a municipal corporation which is a party to an action persistently challenges jurors for cause, *i. e.*, because they are residents and taxpayers within the corporation, and refuses to apply for a change of venue, the court may proceed to hear and determine the cause without the intervention of a jury.

3. *Failure to Demand as Prescribed by Law.* — A demand for a jury at a time which by no possibility can be complied with, and which is inapplicable to the case, is not a demand in the manner prescribed by law within a constitutional provision that the right to a jury trial will be deemed waived if not demanded in the manner prescribed by law. *Odell v. Reynolds*, 40 Mich. 21.

Demand After Discharge of Jury for Term. — Where, by statute, a jury must be demanded before the discharge of the jury for the term, the court may properly refuse to impanel a new jury, after the discharge of the jury for the term, where no demand was made prior to such discharge. *Cushman v. Flanagan*, 50 Tex. 389.

In *Cole v. Terrell*, 71 Tex. 549, it appeared that an action which had been pending for several years was set down for trial on the second week of a term for which a jury had been drawn for the first week only, and had been discharged some time during that week, and that on Friday of the same week the defendant deposited the jury fee with the clerk, no demand having previously been made, and it was held that a motion to place the cause on the jury docket and for a continuance was properly overruled.

A demand made after the jury service for the term has been concluded

but the fact that a jury trial cannot be afforded simply for want of a legal jury will not deprive a party otherwise entitled of his right to such a trial, nor warrant the court in trying the case alone.¹

(5) *By Requesting Direction of Verdict.* — As to waiver of submission to jury by requesting direction of verdict, see article DIRECTING VERDICT, vol. 6, p. 703.²

4. **Effect of Waiver** — *a. GENERALLY.* — The effect of the waiver is to submit to the presiding judge the questions involved in the case, and to substitute him as the trier of the facts.³

b. POWER OF COURT TO DISREGARD WAIVER. — Where the court or a justice is empowered, by statute or otherwise, to require the intervention of a jury to pass on the questions of fact, there may be a direction that the issues be so tried although no jury may have been demanded, and even though a trial by jury has been expressly waived.⁴

and a jury has been discharged, so that if complied with a continuance of the case would be necessary, comes too late. *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223.

Setting Case for Trial at a Time When Jury Cannot Be Expected. — Litigants are chargeable with knowledge of the standing orders of the court, and where the parties by consent set down a case for a trial at a day when no jury is to be expected, no complaint can be made that the court proceeded without a jury. *Cole v. Terrell*, 71 Tex. 549.

An Agreement to Set a Cause Down for Trial at a Day Convenient to the Court, at which time no jury was expected to be in attendance, is not a waiver of the right to a jury trial. *Platt v. Havens*, (Cal. 1897) 51 Pac. Rep. 342.

1. *Western Union Tel. Co. v. Everheart*, 10 Tex. Civ. App. 468.

When, by agreement, a case is put upon jury docket, and when called no objection to its trial by jury is made, either by the court or the parties, the demandant is entitled to a jury trial where the regularly selected jury had not been discharged in consequence of the setting down of the case. *Western Union Tel. Co. v. Everheart*, 10 Tex. Civ. App. 468.

2. **An Admission of the Facts upon Which a Motion to Dismiss an Action Is Founded** cannot be considered as a waiver of a trial by jury, nor an agreement to substitute the court as the trier of the facts. *Moore v. Helms*, 74 Ala. 368.

3. *Loring v. Whittemore*, 13 Gray (Mass.) 228.

A party who has requested the withdrawal from the jury of the trial of issues properly triable by them cannot question the propriety of the action of the presiding judge in acceding to his demand. *Stepp v. National L., etc., Assoc.*, 37 S. Car. 417.

Court Should Render Judgment and Not Verdict. — Where, by a statutory provision that when a jury is waived the cause shall be heard and determined by the court, and judgment entered as in the case of a verdict by a jury, the court should render a judgment and not a verdict. *Bearce v. Bowker*, 115 Mass. 129.

Review of Ruling of Judge. — Prior to the Act of Congress of March 3, 1865 (Rev. Stat., § 649), no review of the decision of the court below could be had of any ruling at the trial, where the parties had consented to accept the court instead of the jury to decide issues of facts. *Campbell v. Boyreau*, 21 How. (U. S.) 223. See also *Flanders v. Tweed*, 9 Wall. (U. S.) 425; *Kearney v. Case*, 12 Wall. (U. S.) 275.

4. *Davis v. Prevost*, 6 Martin N. S. (La.) 265; *Burke v. Breazeale*, 1 Rob. (La.) 73; *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385.

After Waiver and Objection of Parties. — Notwithstanding a statutory provision that an action must be tried by a jury unless a jury trial is waived or a reference ordered, etc., where both parties waive a jury the court, against protest and objection, may call a jury and proceed to trial with it. *Bullock v. Consumers' Lumber Co.*, (Cal. 1892) 31 Pac. Rep. 367.

c. EFFECT AS TO SUBSEQUENT TRIAL OR TERM. — Ordinarily, in the absence of any statutory regulation or special circumstance authorizing a different conclusion, an agreement to waive the right of trial by jury will be construed to apply only to the particular trial or the particular term at which it was made.¹

5. Withdrawal of Waiver — a. GENERALLY. — Though possibly not a strict matter of right, there appears to be no good reason why a waiver of the right to a jury may not be withdrawn and a jury trial be demanded and had.² Cases may arise, however,

Failure of Party to Make Timely Demand. — The failure to demand a jury in a justice's court until after the term limited by statute is a waiver of the right, but in his discretion the justice may direct a jury to be summoned for the trial of the cause. *Van Sickle v. Kellogg*, 19 Mich. 49.

Direction by Justice of Jury in Second Trial. — An objection to a jury in a second trial had in a justices' court, for the reason that no jury acted in the first trial, is unavailable where by statute the justice, in his discretion, may direct that the trial be had by a jury. *New York Small Stock Co. v. Third Ave. R. Co.*, 16 Misc. Rep. (N. Y. Supreme Ct.) 64.

Ordering Jury After Commencement of Trial by Court. — A court may, at the instance of a party, order a jury even after the trial has commenced by the court alone. *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216; *Livaudais v. Spear*, 10 La. Ann. 24.

Right to Complain of Intervention of Jury. — In the absence of any constitutional or statutory right on the part of the accused to require a justice to dispense with the aid of a jury in the trial of questions of fact, the defendant cannot complain that the trial was had by the intervention of the jury. *Grand Rapids v. Bateman*, 93 Mich. 135.

But where, by statutory provisions respecting criminal prosecutions in justice's courts, a justice may try the issue if no jury is demanded, and unless he waives it the accused is entitled to a jury trial, the justice has no authority to order a jury against the protests of a defendant who has demanded to be tried by the court without a jury. *People v. Steele*, 94 Mich. 437, *distinguishing* *Grand Rapids v. Bateman*, 93 Mich. 135.

Waiver of Right to Be Tried by Judge Alone. — A statutory right that the ac-

cused may be tried by the judge is waived by submitting to be tried by a jury. *Taffe v. State*, 90 Ga. 459.

An Objection that an Action Is an Equitable One is not waived by going to trial with a jury after the objection has been overruled. *Fraedrich v. Flieth*, 64 Wis. 184.

1. Reason for Doctrine. — In *Cross v. State*, 78 Ala. 430, it is said, in effect, that while litigants may be willing for the particular judge who sits at one trial to act as both judge and jury, they may be entirely unwilling to risk his successor who might sit in judgment upon their rights at a subsequent trial.

Parties Not Identical on Second Trial. — The defendants in a second trial are not bound by an agreement to waive a jury entered into on the first trial, especially where the parties are not identical. *Martin v. King*, 72 Ala. 354.

New Trial Where Appellate Court Has Made No Final Disposition of Case. — In *Brown v. State*, 89 Ga. 340, it appeared that a person charged in the County Court with a misdemeanor waived trial by jury in the mode required by statute; that after a trial and a finding of guilty the case was taken to the Superior Court and the judgment there reversed without any special order for its final disposition; that when the case returned to the County Court for a new trial, notice was given of intention to demand a jury trial, and when the case was called the demand was actually made, together with a motion to withdraw the waiver, and that no point was made as to delay. It was held error for the county judge to overrule the motion, deny the demand for trial by jury, and proceed to try the accused a second time.

2. Waiver Unadvisedly Made — Persistence in Waiver. — If convinced that the waiver has been unadvisedly made, it might be the duty of the judge to per-

where the right to withdraw may be denied because of inconvenience to the court or of prejudice to the adverse party.¹

b. CHANGE IN ISSUES BY AMENDMENT. — The waiver of a jury when a cause is called for trial is a waiver of jury trial only of the issues then formed, and not an agreement to waive it as of new and different issues that may be formed thereafter under amended pleadings.²

mit its withdrawal on timely application, *i. e.*, made in such season as not substantially to impede or delay the course of justice; but a defendant who, with full benefit of counsel, has persisted in his waiver until after trial and judgment, certainly stands in no position to complain. *State v. Robinson*, 43 La. Ann. 383.

Withdrawal by Accused After Assignment of Counsel. — Although when the cause was first called the accused declined appointment of counsel for him, waived his right to a jury trial, and subsequently counsel was appointed, it was held that the waiver previously made might be withdrawn where it did not appear that by that course the state would be in any wise prejudiced. *Butler v. State*, 97 Ga. 404.

Withdrawal Before Expiration of Right to Demand. — Before expiration of the time within which a demand for a jury may be made, a waiver previously made may be withdrawn. *People v. Molinet*, 13 N. Y. Misc. Rep. (Queens County Ct. Sess.) 301.

Waiver at Former Term. — Under Acts 78 and 170 of the fifteenth legislature (*Texas*) the fact that at the preceding term the jury had been waived or demanded should not control the right, in the discretion of the party, to demand at a succeeding term a trial by jury which had before been waived, or to waive such trial which had been before demanded. *Dean v. Sweeney*, 51 Tex. 242; *Brown v. Chenoworth*, 51 Tex. 469.

1. Withdrawal as Of Right. — Where the parties to an action have once waived a trial by jury and selected another mode of trial, afterwards neither can, as a matter of right, demand a jury trial. *Stevenson v. Felton*, 99 N. Car. 58.

Case Must Be Special. — Where a trial by a jury has been waived by both parties, except in special cases, neither party will be permitted to withdraw the waiver. *Hauser v. Metzger*, 1 Cinc. Super. Ct. Rep. 164.

Withdrawal After Adjournment. —

Where the right of trial by jury has been voluntarily relinquished and the cause adjourned, on the adjourned day the accused cannot withdraw the waiver and by demanding a jury trial become entitled to it. *State v. Bannock*, 53 Minn. 419.

2. McGeagh v. Nordberg, 53 Minn. 235.

Where the statute prescribed that, with the consent of the court, the jury may be waived by failure to appear at the trial, by written stipulation filed, or by oral consent in open court entered in the minutes, and a jury has been demanded by the defendant at a time when the cause was pending on the original pleadings, but the complaint is thereafter amended in order to make the grounds for equitable relief more fully appear, and the defendant answers the complaint, he does not waive his right to a jury by going to trial without a new demand therefor and by requesting the appointment of a reporter to take testimony. *Meeker v. Gilbert*, 3 Wash. Ter. 369.

Discretion of Court on Allowance of Amendments Changing Issues. — By the *Massachusetts* statutes, if a party does not file a notice that he desires a trial by jury before the parties are at issue, or within such time thereafter as the court may by general or special order direct, he takes the risk of any amendment that may thereafter be allowed by the court; and after the time provided for filing such a notice by the general rule of the court has elapsed, it is in the discretion of the court, on amendments being allowed which change the issues or introduce new issues, to grant or deny to any party the right to file the notice required by the statute. *Cleverly v. O'Connell*, 156 Mass. 88.

Addition of Party Plaintiff. — Where, after an order by consent for a trial by the court and the discharge of the jury for the term, the petition is amended by the addition of a party plaintiff, but no material change is made in the issues, the defendant is not entitled to

6. Appeal and Review — Sufficiency of Record — Presumptions. — The record on appeal should be explicit, and when silent as to the fact that a court trial was had by consent and waiver of a jury, or when it fails to show that a jury trial was erroneously denied, or, if a demand is necessary, that the demand was duly made and refused,¹ or if the record fails to show that any objection was made or any exception taken to proceeding with the trial without a jury,² a waiver of the intervention of a jury may be presumed in order to sustain the jurisdiction of the primary court,³

a jury trial as a matter of right. *Foster v. Hinsden*, 75 Iowa 291.

1. *Chapline v. Robertson*, 44 Ark. 202; *McGuire v. Kemp*, 3 Greene (Iowa) 219; *Hawkins v. Rice*, 40 Iowa 435; *State v. Craig*, 58 Iowa 238; *Brown v. Home Sav. Bank*, 5 Mo. App. 1; *Barlow v. Scott*, 24 N. Y. 40; *Billigheimer v. State*, 32 Ohio St. 435.

There should be an affirmative showing of the demand and refusal. *Chapline v. Robertson*, 44 Ark. 202.

Failure to Show Demand — Presumption of Waiver. — Where the judgment shows that the cause "came on regularly to be heard before the court sitting without a jury," and it in no way appears that the plaintiff demanded a jury, the presumption is that a jury was waived. *Leadbetter v. Lake*, (Cal. 1897) 50 Pac. Rep. 686.

Ignorance of Incompleteness of Jury. — A waiver of a full complement of jurymen cannot be inferred where it does not appear that the party had knowledge of the deficiency. *Cowles v. Buckman*, 6 Iowa 161.

2. *State v. Craig*, 58 Iowa 238; *Barlow v. Scott*, 24 N. Y. 40; *White v. Morris*, 107 N. Car. 92; *Crump v. Thomas*, 85 N. Car. 272; *Kearney v. Case*, 12 Wall. (U. S.) 275.

If the record on appeal fails to contain a written consent to waive a jury, and no objection appears to have been raised on that account in the court below, the existence of the consent may be presumed in order to sustain the exercise of jurisdiction by the primary court. *Heyman v. McBurney*, 66 Ala. 511.

Failure to Except — Party Absent from Court. — Where no bill of exception is taken by the plaintiff to the trial without a jury, the court will presume that the trial by jury was waived, although the plaintiff was absent from court. *Huppenbauer v. Durlin*, 26 La. Ann. 541.

Objection Not Made Below. — Where no demand is made by either party and the cause proceeds to trial without objection, the mere fact that there was a right to a jury will not furnish a reason for reversing the judgment where no objection was made below. *Brown v. Home Sav. Bank*, 5 Mo. App. 1.

Objection neither Before nor After Judgment. — Where the facts are found by the judge without any objection made either before or after the rendition of the judgment during the term, and without appeal, the judgment must be taken to have been rendered by consent and a waiver. *White v. Morris*, 107 N. Car. 92. See also *Crump v. Thomas*, 85 N. Car. 272.

Trial by Eleven Jurors. — If it appears that but eleven jurors acted it will not be presumed on appeal that the appellant was compelled to go to trial with that number against his consent, if the record not only fails to show objection or exception on that point, but states that a jury of eleven was regularly impaneled and sworn to try the cause. *Hitchcock v. Caruthers*, 82 Cal. 523.

Trial by Nine Jurors. — But in *Oldham v. Hill*, 5 J. J. Marsh. (Ky.) 300, wherein but nine jurors acted, and no waiver appeared on the record, the judgment was reversed.

Consent to Try Without Jury at Future Day. — In *Hudson v. Roos*, 76 Mich. 173, it appeared that when the case, regularly assigned for trial by a jury, was reached, counsel for the defendant, being otherwise engaged, to save default consented to try the case without a jury at a day later, but the bill of exceptions did not show any application to the court to have the case held over or adjourned, nor any refusal of such application by the court, nor any objection or exception to the trial by the court subsequently had, and it was held that there was a voluntary and complete waiver.

3. **From the Silence of the Record it**

the sufficiency of the record in any given case being, of course, dependent upon the construction of the language contained therein.¹

VI. SELECTION AND DRAWING — 1. Common-law Practice. — At common law when issue was joined the court awarded a writ of *venire facias* upon the roll or record, commanding the sheriff to cause to come on a specified day twelve free and lawful men, not of kin to either party, to inquire into the truth of the controversy between them, and, in obedience to the command, the sheriff returned the names of the specified number, which return was known as the panel.² If the sheriff was disqualified in any

will be presumed that the court acted regularly. *State v. Larger*, 45 Mo. 510.

Presumption as to General Character of Waiver. — In the absence of anything in the record to show the character of a waiver, it will be presumed that it was general and not confined to the term at which it was made. *Boslow v. Shenberger*, (Neb. 1897) 71 N. W. Rep. 1012.

Issues Made to Court. — Where it is not assigned for error that no jury was called to try the issues and the record shows that an issue was "made to the court, on law and fact, by consent of parties," it will be inferred that a jury was waived and that the issues of fact were tried by the court as well as the issues of law. *Saum v. Jones County*, 1 Greene (Iowa) 165.

Federal Courts — Failure to Show Presence of Party or Counsel at Trial. — If the state of the pleading presents issues of fact to be tried, and there is nothing to show that the party complaining of the error was present by himself or counsel at the trial, and no jury was called, it is error to try the issues without a jury, because there can be no presumption that the party has waived his legal and constitutional right to a jury. *Kearney v. Case*, 12 Wall. (U. S.) 275.

1. Sufficiency of Record — Instances — "Plaintiff's Waiver," etc. — Where the record contains an entry that the "plaintiff waives his right to a jury trial," the appellate court is precluded from further inquiry, since the record will be deemed conclusive. *Henry v. Beers*, 48 Mo. 366.

"Defendant Not Demanding Jury," etc. — Where, by statute, it is provided that, upon a plea other than that of guilty, if the defendant does not demand a trial by jury the judge may proceed to try the case, a record stating that the "case went to trial, and de-

fendant not demanding a jury," etc., sufficiently shows that a jury trial was waived. *Dailey v. State*, 4 Ohio St. 57.

"Neither Party Demanded or Waived," etc., but "Submitted Case to Court." — In *Bonewitz v. Bonewitz*, 50 Ohio St. 373, the language of the entry was: "Neither party demanded or waived the intervention of a jury, but without objection submitted the cause to the court upon the pleadings, evidence, and arguments of counsel;" and it was held that there was a sufficient waiver of a jury; the statement that neither party waived, etc., meaning no more than that no waiver was made in words.

"Jury Having Been Waived in Writing," etc. — A statement in the record that an issue was "called for trial by the court, the jury having been waived in writing," etc., is, where nothing to the contrary is shown, conclusive that an agreement to waive the jury was properly made. *Fleitas v. Cockrem*, 101 U. S. 301.

Stipulation Required. — That the stipulation required by section 649 of the Revised Statutes was filed is not shown by a statement in the record and bill of exceptions that "the issue joined by consent is tried by the court, the jury being waived," or that the case came on for trial "by agreement of parties, by the court, without the intervention of a jury." *Bond v. Dustin*, 112 U. S. 604.

2. 3 Black. Com. 354; Bac. Abr., tit. Juries (B); Co. Litt. 158.

Originally, where an issue was joined by the words "and this the said A prays may be inquired of by the country," or "and of this he puts himself on the country, and the said B does the like," the court awarded a writ of *venire facias* upon the roll or record commanding the sheriff "that he cause

way the duties were intrusted to a coroner, and if the latter officer was likewise disqualified, the court appointed two indifferent persons, called *elisors*, to execute the writ.¹ At this day, where no constitutional or statutory provisions have been made for the selection and drawing of jurors, or the mode of procuring a jury according to statutory provisions has failed, unless in some wise expressly inhibited, the common-law method of procuring a jury by open venire may be resorted to.²

2. Modern Practice — a. LEGISLATION. — The right to a trial by jury is now generally preserved by constitutional provisions, under which the legislature is vested with power to pass laws

to come *here*, on such a day, twelve free and lawful men, *liberos et legales homines* of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A nor the aforesaid B, to recognize the truth of the issue between the said parties." 3 Black. Com. 351; Bac. Abr., tit. Juries (B).

Changed by Statute. — However, after various statutory enactments having for their object the correction of prevalent abuses in the system (3 and 4 Anne, 7 and 8 William III., 3 Geo. II., 6 Geo. II.), by the statute of 6 Geo. IV., c. 50, there was delivered annually to the sheriff of the county a book made up from lists returned from each parish, called "the jurors' book," and on the receipt of a venire facias the sheriff was required to return names contained in the book for the current year, or if there was no book for the current year, from the book for the preceding year. Bac. Abr., tit. Juries (B) 3.

1. 3 Black. Com. 351; Bac. Abr., tit. Juries (B); Co. Litt. 158.

Blackstone calls the system an admirable one and assigns as one reason that "the person returning the jurors is a man of some fortune and consequence, that so he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty." 3 Black. Com. 355.

2. *Beery v. U. S.*, 2 Colo. 186; *Babcock v. People*, 13 Colo. 515; *U. S. v. Beebe*, 2 Dakota 292; *Simmons v. Cunningham*, (Idaho 1895) 39 Pac. Rep. 1109; *Territory v. Carmody*, (N. Mex. 1896) 45 Pac. Rep. 881. See also *infra*, VI. 4. *Territorial Courts*.

If a Jury Cannot Be Formed from the Regular Panel, an open venire may

issue for additional jurors. *Housh v. People*, (Colo. 1897) 50 Pac. Rep. 1036.

When the District Court of a Territory Is Unable to Obtain a Trial Jury according to the Act of Congress of June 23, 1874, because of the exhaustion of the jury list, it has implied power to issue a venire to obtain the requisite number to complete the jury, such power being incident to its authority. *Clawson v. U. S.*, 114 U. S. 477; *U. S. v. Clawson*, 4 Utah 34. And see *Carter v. Territory*, 3 Wyoming 193.

Direction for Open Venire by Judge Disqualified to Sit at Trial. — The disqualification of a judge to preside at the trial of a cause will not affect his right to order an open venire to issue. *Littrell v. Wilcox*, 11 Mont. 77.

In Louisiana, under the statutes in force in 1847, no writ for selecting and summoning a jury, nor any order therefor under the seal of court, was necessary. The clerk and sheriff or deputy sheriff drew, at stated periods, the requisite number of jurors who were to be summoned. *State v. Folke*, 2 La. Ann. 744; *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266.

In Nevada, under the statute of 1881, additional jurors could be selected under an open venire. *State v. Angelo*, 18 Nev. 425.

In the United States Courts in Pennsylvania, and until the passage of the Act of June 30, 1879, the common-law mode of obtaining juries by open venire prevailed, with the express sanction of Congress. See *U. S. v. Beebe*, 2 Dakota 292.

When the Power of the Commission Has Been Exhausted in Filling the Regular Panel, resort may be had to an open venire as at common law. *Clawson v. U. S.*, 114 U. S. 477. See also *Brother-ton v. State*, 30 Tex. App. 369.

prescribing the officers by whom and the manner in which jurymen shall be procured, the object of which laws is to correct the abuses which developed under the common-law system and to secure to litigants and persons accused of crime their guaranteed right to trial by a fair and impartial jury.¹

b. CHANGES IN EXISTING LAWS. — In the exercise of the authority thus conferred such changes may be made, from time to time, in existing laws as the legislature may deem expedient, so long as the constitutional right is not abrogated or impaired.²

c. EFFECT OF CHANGES. — The effect of such changes on the legality of proceedings already had, or on the qualifications of

1. *Alabama.* — *Evans v. State*, 80 Ala. 4.

Connecticut. — *Colt v. Eves*, 12 Conn. 251.

Louisiana. — *State v. Thibodaux*, 49 La. Ann. 15; *State v. Wright*, 41 La. Ann. 600.

Michigan. — *People v. Reilly*, 53 Mich. 260; *People v. Harding*, 53 Mich. 48.

Mississippi. — *Dowling v. State*, 5 Smed. & M. (Miss.) 682; *Cooper v. State*, 59 Miss. 267.

Nevada. — *State v. McClear*, 11 Nev. 39.

New York. — *Stokes v. People*, 53 N. Y. 164; *People v. Fisher*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 406.

Tennessee. — *Neely v. State*, 4 Baxt. (Tenn.) 174.

Wisconsin. — *Perry v. State*, 9 Wis. 21.

See also *Heyl v. State*, 109 Ind. 589.

Object of Statutory Provisions. — In *Smith v. Bates*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044, it is said that the *Texas* statute providing for the selection of jurors by commissioners was passed for the purpose of preventing and avoiding the well-known evils resulting from the summoning of jurors by sheriffs. See also *Gulf, etc., R. Co. v. Greenlee*, 70 Tex. 553.

In *Maryland*, prior to the Act of 1867, c. 329, the sheriff made the selection of the panel after the common-law method. The legislature, deeming it wise to guard the formation of juries more effectually against personal and political influences, adopted, by that act, the present system, by which the judges of the Circuit Court make the selection from certain lists furnished them. *Cooper v. State*, 64 Md. 40.

Special Legislation for Particular Courts. — A statute creating a special court

which allows every facility for getting an impartial jury is not unconstitutional because it does not follow methods which are provided for other courts. *State v. Jones*, 97 N. Car. 469.

The "Selection" of a Jury Otherwise than by Lot or Chance is not in violation of constitutional provisions for the preservation of trial by jury. *Perry v. State*, 9 Wis. 19.

2. *Colt v. Eves*, 12 Conn. 251; *People v. Harding*, 53 Mich. 48; *State v. Kemp*, 34 Minn. 61; *Dowling v. State*, 5 Smed. & M. (Miss.) 682; *State v. McClear*, 11 Nev. 39; *Copp v. Henniker*, 55 N. H. 198; *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155; *Stokes v. People*, 53 N. Y. 164; 66 N. Y. 342; *People v. Petrea*, 92 N. Y. 128.

Preservation of Particular Mode of Selection. — To preserve the right of trial by jury, it is unnecessary to preserve a particular mode of selecting jurors which was in force at the time of the adoption of the Constitution. *State v. McClear*, 11 Nev. 39.

Substitution for Drawing from "Body of County." — A legislature empowered to regulate the mode of obtaining a jury of the county may provide for the drawing from a box containing the names selected by the board of supervisors of a county, instead of requiring the jury to be drawn from the body of the county. *Cooper v. State*, 59 Miss. 267.

Effect of Constitutional Change in Judicial System. — Where, by a constitutional provision, existing laws relative to the judicial system then in force were made applicable to a new system therein provided for, it was held that a code provision respecting the selection of jurors did not become unconstitutional. *People v. Durrant*, 116 Cal. 179.

persons originally selected, will usually be determined by the laws in existence at the time of the selection or drawing.¹

d. SPECIAL ACTS — RESORT TO GENERAL LAWS. — Where special acts relative to jury service by a particular class of jurors contain no direction as to the manner of their procurement, resort may be had to the general provisions of law on the subject.²

e. STATUTES MANDATORY. — In some of the states there are decisions to the effect that statutes which prescribe the powers and duties of jury commissioners and corresponding officers to whom is intrusted the selection or drawing of suitable persons as jurors, and which prescribe the time and manner of exercising such powers and performing such duties, are mandatory, and that strict adherence to the statutory requirements is essential to support the regularity and validity of the proceedings.³

1. *State v. Judge*, 30 La. Ann. 603.

The drawing of a jury before an act directing changes in the terms of courts is made effective is not invalid where the jury drawn is in attendance at the term fixed by the rules in force at the time of the drawing, and that time coincides with the term fixed by the orders of the court under the act. *State v. Desroche*, 47 La. Ann. 651.

Jurors are not public officers within the *Connecticut* Constitution; hence when the mode of selecting jurors is changed by statute, the jurors selected thereunder will supersede the existing jurors. *State v. Bradley*, 48 Conn. 535.

Legislative Intention Indicated by Terms of Act. — Where the selection is made prior to an act which plainly indicates that a selection under the old law shall remain intact, unless for some good reason the commissioner sees fit to set it aside and make a new one, complaint cannot be made successfully as to the original selection. *State v. Straub*, 16 Wash. 111.

Effect of Statutory Change on Selection Made. — A jury drawn under the statute then in force continues in existence as a lawfully selected jury until superseded by a jury drawn under a new law, unless its term of office has previously expired. *McCrary v. Anderson*, 103 Ind. 12.

The Creation of a New Court After the Selection of the list will not affect a list already made. *Woodward v. State*, 33 Fla. 508.

Passage of Statute After Commission of Offense. — The venire will not be quashed because the trial jurors were drawn and summoned under and in compliance with a statute passed after

the commission of the offense. *Hawes v. State*, 88 Ala. 37; *Lore v. State*, 4 Ala. 173; *South v. State*, 86 Ala. 617; *Jesse v. State*, 20 Ga. 156.

2. *Peters v. State*, 100 Ala. 10. And see *Linehan v. State*, 113 Ala. 70, wherein it was held that where such provision has been made, jurors cannot be drawn under provisions respecting the supply of deficiencies in regular juries or the formation of new juries.

Jury for Particular Court. — Where the mode of procuring jurors for a particular court is specially provided for by statute, and under its provisions no jury can be presently obtained, a jury may be summoned according to the requirements of the general law. *State v. Burns*, 54 Mo. 274.

Procuring Special Jury. — A statute conferring the right to a special jury under certain conditions is not invalid because it fails to prescribe the method of summoning the jurors if service can be accomplished by resort to the general provision respecting the procurement of the attendance of persons to serve as jurors, and the officer need not follow the modes in vogue at common law for the summoning of special or struck juries. *Vierling v. Chas. G. Stifel Brewing Co.*, 15 Mo. App. 125.

3. *Alabama.* — *Brazier v. State*, 44 Ala. 392; *Johnson v. State*, 102 Ala. 1; *Steele v. State*, 111 Ala. 32.

California. — *People v. Davis*, 73 Cal. 355.

Connecticut. — *McGann v. Hamilton*, 58 Conn. 69.

Florida. — *Gladden v. State*, 13 Fla. 624. But see *Reeves v. State*, 29 Fla. 527.

Indiana. — *Mitchell v. Likens*, 3

f. **STATUTES DIRECTORY.**—But notwithstanding these decisions the great weight of authority is to the effect that the mere fact that officers intrusted with the several duties prescribed failed to conform precisely to such requirements will not invalidate their action, unless it appears, or may be reasonably inferred from the circumstances, that the complaining party has been prejudiced, or that injury has been sustained by reason of neglect or omissions charged.¹ In brief, courts will not sanction a palpable

- Blackf. (Ind.) 258; *Jones v. State*, 3 Blackf. (Ind.) 37.
Louisiana.—*State v. Judge*, 30 La. Ann. 603; *State v. Da Rocha*, 20 La. Ann. 356; *State v. Conway*, 35 La. Ann. 350.
Michigan.—*Houghton v. Huron Copper Min. Co.*, 57 Mich. 547.
Mississippi.—*Stevens v. Richer*, 1 How. (Miss.) 523.
Montana.—*Kennon v. Gilmer*, 4 Mont. 433.
North Carolina.—*State v. Haywood*, 73 N. Car. 437.
Pennsylvania.—*Eaton v. Com.*, 6 Binn. (Pa.) 447; Opinion of Ct., 1 Browne (Pa.) 121; *Com. v. Freeman*, 166 Pa. St. 332.
South Carolina.—*State v. Pratt*, 15 Rich L. (S. Car.) 47.
Texas.—*Elkins v. State*, 1 Tex. App. 539; *Shackleford v. State*, 2 Tex. App. 385; *Harrison v. State*, 3 Tex. App. 558; *Hunter v. State*, 34 Tex. Crim. Rep. 599.
Virginia.—*Jones v. Com.*, 87 Va. 63; *Vawter v. Com.*, 87 Va. 245.
United States.—*U. S. v. Woodruff*, 4 McLean (U. S.) 105; *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434.
And see *Murphy v. State*, 86 Ala. 45; *Wells v. State*, 94 Ala. 1.
Discretion of Officers.—Statutes which establish a rule for drawing jurors leave no discretion in the officers designated to conduct the drawing, but plainly indicate how the proceeding shall be conducted. *People v. Labadie*, 66 Mich. 702; *People v. Hall*, 48 Mich. 486.
Strict Compliance Favored.—Although an act authorizing the drawing of a special venire from the box is not mandatory, yet the practice is to be commended and is favored by the courts. *State v. Brogden*, 111 N. Car. 656.
Duty of State Judge to Follow Laws of the United States.—The action of a state judge in selecting jurors is ministerial, and in the exercise of the authority conferred upon him by the state he is bound to obey the Constitution of the United States and laws passed in pursuance thereof. *Ex p. Virginia*, 100 U. S. 339.
1. *Alabama*.—*State v. Williams*, 3 Stew. (Ala.) 454; *Bales v. State*, 63 Ala. 34; *Sale v. State*, 68 Ala. 530; *Long v. State*, 86 Ala. 36; *Wilkinson v. State*, 106 Ala. 23.
California.—*Mowry v. Starbuck*, 4 Cal. 274.
Connecticut.—*Colt v. Eves*, 12 Conn. 243.
Florida.—See *Reeves v. State*, 29 Fla. 527.
Georgia.—*Rafe v. State*, 20 Ga. 60.
Illinois.—*Wilhelm v. People*, 72 Ill. 468; *Mapes v. People*, 69 Ill. 523; *Ochs v. People*, 25 Ill. App. 379.
Iowa.—*Claussen v. La Franz*, 1 Iowa 226; *State v. Carney*, 20 Iowa 82; *State v. Rockwell*, 82 Iowa 429; *State v. Harris*, 64 Iowa 289; *Brentner v. Chicago, etc., R. Co.*, (Iowa 1886) 27 N. W. Rep. 605, on rehearing. See also *State v. Ryan*, 70 Iowa 155; *State v. McCahill*, 72 Iowa 111.
Louisiana.—*State v. Pruett*, 49 La. Ann. 283; *State v. Harris*, 34 La. Ann. 118; *State v. Dozier*, 33 La. Ann. 1362; *State v. Smith*, 33 La. Ann. 1414; *State v. Miller*, 26 La. Ann. 579; *State v. Johnson*, 47 La. Ann. 1092; *State v. McCarthy*, 44 La. Ann. 323; *State v. Taylor*, 44 La. Ann. 783; *State v. Hall*, 44 La. Ann. 976; *State v. Green*, 43 La. Ann. 402; *State v. Simmons*, 43 La. Ann. 991; *State v. White*, 46 La. Ann. 1273; *State v. Vegas*, 19 La. Ann. 105; *Pratt v. Grappe*, 12 La. 451.
Maryland.—*Green v. State*, 59 Md. 123.
Missouri.—*State v. Reilly*, 4 Mo. App. 392; *State v. Pitts*, 58 Mo. 556; *State v. Breen*, 59 Mo. 413; *State v. Knight*, 61 Mo. 373; *State v. Matthews*, 88 Mo. 121; *State v. Gleason*, 88 Mo. 582; *State v. Bleekley*, 18 Mo. 428.
Nevada.—*State v. Squaires*, 2 Nev. 226.
New Jersey.—*Johnson v. State*, 59 N. J. L. 271; *Gardner v. State*, 55 N. J.

disregard of essential statutory provisions nor overlook material departures therefrom, but if there is a substantial compliance with the statutes, mere irregularities in the procedure, or mere informalities on the part of the officers charged with the selection and drawing, will be deemed unimportant.¹

g. EXCLUSIVENESS OF STATUTORY MODES. — It has been held that where officers have neglected their duty in failing to provide jurors, or from any cause jurors are not selected in the manner and at the time prescribed by statute, the court has authority to procure a jury for the transaction of business before it,² but

L. 17; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563.

New York. — *People v. Ransom*, 7 Wend. (N. Y.) 417; *Cole v. Perry*, 6 Cow. (N. Y.) 584; *Friery v. People*, 54 Barb. (N. Y.) 319; *People v. Tweed*, 50 How. Pr. (N. Y. Supreme Ct.) 262; *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 370.

North Carolina. — *State v. Potts*, 100 N. Car. 457; *State v. Brogden*, 111 N. Car. 656.

Ohio. — *McHugh v. State*, 42 Ohio St. 154.

Oregon. — *Hart v. Territory*, 1 Oregon 122.

South Carolina. — *State v. Massey*, 2 Hill L. (S. Car.) 379; *State v. Cardoza*, 11 S. Car. 195; *State v. Campbell*, 35 S. Car. 28; *State v. Smalls*, 11 S. Car. 262.

Tennessee. — *Hardwick v. State*, 6 Lea (Tenn.) 106.

Texas. — *Pocket v. State*, 5 Tex. App. 552; *Charles v. State*, 13 Tex. App. 658.

Washington. — *State v. Bokien*, 14 Wash. 403.

Wisconsin. — *Burlingame v. Burlingame*, 18 Wis. 285; *Mills v. Johnson*, 17 Wis. 598.

Qualifications of Commissioners. — The requirement of 21 U. S. Stat. at L. 43, that a jury commissioner appointed by the court shall be a person of good standing, resident in the district, and a well-known member of the principal political party opposing that to which the clerk may belong, is directory and not mandatory. *U. S. v. Chares*, 40 Fed. Rep. 820.

1. *Alabama.* — *Long v. State*, 86 Ala. 36; *Wilkinson v. State*, 106 Ala. 23.

Illinois. — *Mapes v. People*, 69 Ill. 523.

Iowa. — *State v. Carney*, 20 Iowa 82.

Kansas. — *State v. Jenkins*, 32 Kan. 477; *State v. Yordi*, 30 Kan. 221.

Kentucky. — *Risner v. Com.*, 95 Ky. 539.

Maryland. — *Friend v. Hamill*, 34 Md. 298.

Michigan. — *People v. Fuhrmann*, 103 Mich. 593; *People v. Williams*, 24 Mich. 156.

Minnesota. — *State v. Schumm*, 47 Minn. 373; *State v. Greenman*, 23 Minn. 209.

New York. — *Friery v. People*, 54 Barb. (N. Y.) 319.

North Carolina. — *State v. Potts*, 100 N. Car. 457; *State v. Brogden*, 111 N. Car. 656.

Pennsylvania. — *Com. v. Miller*, 4 Phila. (Pa.) 210.

South Carolina. — *State v. Cardoza*, 11 S. Car. 246; *State v. Smalls*, 11 S. Car. 262.

Washington. — *State v. Payne*, 6 Wash. 563.

Necessity of Following Statute. — Statutory provisions respecting the constitution of the panel should be followed. *State v. Jennings*, 15 Rich L. (S. Car.) 42; *State v. Pratt*, 15 Rich L. (S. Car.) 47.

Liberal Construction of Statutes. — Laws respecting the drawing of jurors will be so construed as equally to conserve the interests of the public in the vindication of law and order and to guard the right of individuals to a fair and impartial trial. *State v. Brooks*, 36 La. Ann. 334.

Where the Difference between Two Modes of Procedure by commissioners is formal and not substantive, and the form is not made material by the statute, the substance of their action will alone be looked at. *State v. Cardoza*, 11 S. Car. 195.

2. See *supra*, VI. 1. *Common-Law Practice*. And see *People v. Devine*, 46 Cal. 46; *Claussen v. La Franz*, 1 Iowa 226; *Exp. Crawford*, 12 Neb. 379; *Rountree v. Gilroy*, 57 Tex. 176.

where it is expressly required by statute that jurors shall be

In Illinois, by statute, the default of officers charged with the duty of drawing and summoning jurors will not preclude the court from obtaining a jury where one is demanded. *Fanning v. People*, 10 Ill. App. 70.

In Louisiana there is no constitutional limitation on the power of the legislature to authorize a district judge to cause a jury to be drawn at any term of court or at any time during the term. *Soniat v. Supple*, 48 La. Ann. 296.

Failure to Provide Jury for Extended Term.—Where commissioners have failed to provide a jury for an extended term of the court, the judge will have authority to provide a jury for the transaction of business. *Leach v. Linde*, 108 N. Car. 547.

Failure to Appoint Commissioners.—Under a statute requiring an appointment of jury commissioners and selection by them at stated terms, and providing that if there be a default in the number of jurors in attendance the sheriff may be directed to summon sufficient persons to complete the panel, it was held that where, because of an oversight, jury commissioners had not been appointed, as required by law, the court might direct the sheriff to procure jurors for the purpose of transacting the business before it. *Western Union Tel. Co. v. Everhart*, 10 Tex. Civ. App. 468.

Under the Texas Revised Statutes, § 3022, which provides that on the failure to appoint jury commissioners, or the failure of the commissioners to select jurors, the court may authorize the sheriff to summon a sufficient number of jurors for the term, etc., where either of the contingencies provided for arises the court may have a venire summoned through the sheriff. *Smith v. Bates*, (Tex. Civ. App. 1894) 28 S. W. Rep. 64 (on rehearing), *modifying and correcting* the opinion in *Smith v. Bates*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044, and *overruling* *Daniel v. Bridges*, 73 Tex. 149, and *Lewis v. Merchant*, (Tex. App. 1890) 16 S. W. Rep. 173, which followed the latter case. See also *Houston, etc., R. Co. v. Vinson*, (Tex. Civ. App. 1896) 38 S. W. Rep. 540.

In *Daniel v. Bridges*, 73 Tex. 149, wherein it was held that "the law invests no court with the power to order

the sheriff to summon a venire for the trial of a civil cause," it appeared that a special judge had caused a jury to be summoned by the sheriff when there was in attendance a jury for the week regularly drawn, but which was being used by the regular judge, instead of waiting until the regular jurors could be obtained. However, in *Western Union Tel. Co. v. Everhart*, 10 Tex. Civ. App. 468, the court said that the state of facts in the foregoing case did not require so broad a declaration of the law as was contained in the sentence quoted and that the statement was *obiter dictum*.

Necessity for New List When There Is a List in Existence.—In *Sale v. State*, 68 Ala. 530, it was held that a statute requiring that when a jury trial is demanded the court shall order the sheriff to draw *instantly* a specified number of qualified voters from the county, provided, however, that whenever the court deems that the business of the court requires, it may direct the sheriff to prepare a list, etc., from which petit jurors may be selected for the next ensuing term, was merely directory, and that where there was a list of such jurors already prepared the sheriff need not procure and furnish a new list whenever and as often as there was an order to draw additional jurors for the term.

Failure of Board to Meet After Making of Order.—In *People v. Lopez*, 59 Cal. 362, it was held that a challenge to the panel was properly overruled when it appeared that the court had made an order designating the number of grand and trial jurors, but that the board of supervisors had not met after the making of the order, and that no jurors had been selected to serve, but that at the time of the order there were in the jury box the names of about two hundred persons who had been duly selected by the board for the prior year.

Where the Regular Jury for the Week Has Been Discharged, the sheriff may be directed to summon a jury. *Wyatt v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 598.

Discharge of Panel.—Although no necessity exists for discharging a panel of jurors because drawn less than a prescribed time before the term, yet a discharge under such circumstances and the summoning of another panel

selected by commissioners, a selection in any other manner may invalidate the array.¹

3. United States Courts. — By the Judiciary Act of 1789, jurors in all cases to serve in courts of the United States were required to be designated by lot or otherwise, in each state respectively, according to the mode of forming juries therein then practiced, so far as the laws of the same would render such designation practicable by the courts or marshals of the United States.² By the subsequent Act of July 20, 1840, and the various amendments thereto, it is provided that jurors shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practiced and hereafter to be practiced in the highest courts of law of each state, in so far as such mode may be practicable by the courts of the United States or the officers thereof, and the courts are empowered to make all necessary rules for conforming the designation and impaneling of juries in substance to the laws and usages from time to time in force in the states.³ But in the absence of a rule or order adopt-

by open venire is not necessarily such error as will require reversal of a conviction. *Babcock v. People*, 13 Colo. 515.

An Objection that a Special Venire was Not Drawn from the Box as provided by statute is unavailable where such a drawing is discretionary with the judge. *State v. Smarr*, 121 N. Car. 669.

1. *Anderson v. State*, 34 Tex. Crim. Rep. 96.

As Where the Selection Is by the Sheriff. — *Elkins v. State*, 1 Tex. App. 339; *Shackleford v. State*, 2 Tex. App. 385. And see *Smith v. Bates*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044; *Daniel v. Bridges*, 73 Tex. 149.

In *Indiana* it has been held that where by statute the jurors for the second week of the term are required to be selected by commissioners, their failure to make the selection will not authorize the court to order that a jury be summoned and impaneled. *Wright v. Stuart*, 5 Blackf. (Ind.) 120.

2. Necessity of Strict Adherence to State Practice. — The provisions of this act, so far as they required conformity with the state practice, were obligatory only as to its most substantial requisites, *i. e.*, qualifications of the jurors and the mode of selection, and did not require a strict adherence to the state practice as to number, respecting which the rules of the common law governed. *U. S. v. Insurgents*, 2 Dall. (U. S.) 335; *U. S. v. Fries*, 3 Dall. (U. S.) 515; *U. S. v. Dow*, Taney's Dec. (U. S.) 34.

3. Rev. Stat. U. S., § 800. See also *U. S. v. Shackleford*, 18 How. (U. S.) 588; *U. S. v. Woodruff*, 4 McLean (U. S.) 105; *U. S. v. Douglass*, 2 Blatchf. (U. S.) 208; *Brewer v. Jacob*, 22 Fed. Rep. 234; *U. S. v. Richardson*, 28 Fed. Rep. 69.

The Amendment Act of June 30, 1879 (21 Stat. at L. 43), provides that all jurors, "including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state."

Validity of Rule. — Under the Act of

ing the state practice, such practice is in no wise obligatory on the federal courts.¹ By section 802 of the Revised Statutes of the United States, jurors may be returned from such parts of the district as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur any unnecessary expense, or unduly burden the citizens of any part of the district with such services.²

1840 it was held that a court sitting in *Georgia* had power to make a rule that five hundred persons, qualified under the state law, might be selected by the marshal and clerk to be drawn by lot as jurors by such officers. *U. S. v. Collins*, 1 Woods (U. S.) 499.

Necessity of Employment of State Officers. — Under the Act of 1840 it is not necessary that state officers should be employed, but the duties may be imposed entirely on federal officers. *U. S. v. Collins*, 1 Woods (U. S.) 499.

Binding Force of State Statute. — A requirement of a state law that the names of jurors shall be taken from the books of the tax receiver is not obligatory on the federal courts, which are only required to take care that their jurors have the same qualifications as jurors in the state courts. *U. S. v. Collins*, 1 Woods (U. S.) 499.

Literal Conformity to the mode of selecting and drawing jurors prescribed by state laws is not required. *U. S. v. Tallman*, 10 Blatchf. (U. S.) 21.

The Duty of Jury Commissioners in preparing the jury box is mandatory. *U. S. v. Ambrose*, 3 Fed. Rep. 283. And see *U. S. v. Chaires*, 40 Fed. Rep. 820.

1. **Necessity of Adoption of State Practice by Rule or Order.** — The laws and usages relating to the respective state courts are not applicable to the courts of the United States excepting so far as the court shall show by general standing rule, or by special order, in a particular case adopting the statute practice in that regard. *St. Clair v. U. S.*, 154 U. S. 134; *U. S. v. Shackelford*, 18 How. (U. S.) 588; *U. S. v. Richardson*, 28 Fed. Rep. 61; *U. S. v. Collins*, 1 Woods (U. S.) 499.

In *U. S. v. Woodruff*, 4 McLean (U. S.) 105, on objection that the jury had not been selected in conformity with the state practice "as near as may be," the cause was continued, and the court adopted a rule that at a proper time before each term names of suitable persons should be selected throughout the state by the clerk and

marshal, put in a box, and a sufficient number drawn out and inserted in the venire as jurors.

In the Absence of a Rule or Order adopting the state practice respecting the designation and impaneling of jurors in trials had in the courts of the United States, the mode is within the control of those courts, subject only to the restrictions Congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries. *Pointer v. U. S.*, 151 U. S. 396.

Exception in Pennsylvania. — The Act of 1840 excepted from its operation, so far as respected the mode of obtaining jurors, the courts of the United States in the state of Pennsylvania, and a jury could there be obtained on open venire until the Act of June 30, 1879, § 2 (21 U. S. Stat. at L. 43). See *U. S. v. Beebe*, 2 Dakota 292.

Change in State Statute After Order to Procure Jury. — In *Alston v. Manning*, Chase's Dec. (U. S.) 460, it appeared that before a direction had been made to procure a jury the statutory requirements and the practice under which the direction was made had been materially changed, but it was held that, the new practice not having been adopted by rule or otherwise, an objection to a jury so procured was untenable.

2. **Judiciary Act of 1789, as Affected by Act of 1840.** — That portion of the Judiciary Act (1 U. S. Stat. at L., § 29) which provides for drawing jurors from such parts of the district as the court shall direct was not repealed by the Act of Congress of July 20, 1840 (5 U. S. Stat. at L. 394), but is still in force. *U. S. v. Stowell*, 2 Curt. (U. S.) 153. And see *U. S. v. Richardson*, 28 Fed. Rep. 69.

Failure to Select from County Wherein Crime Committed. — A plea setting forth that the defendants were citizens of a designated county within the district wherein the offense charged was com-

4. Territorial Courts. — Territorial courts sitting for the trial of causes arising under the Constitution and laws of the United States are controlled, in procuring juries for the transaction of their business, by the acts of Congress.¹ But these acts have no application to the trial of cases arising under or for offenses against the laws of the territory.²

5. The Officers — *a.* CONSTITUTION OF OFFICIAL BODIES. — The constitution or establishment of boards, commissions, or the like, vested with power to select persons for jury service, must be in accordance with constitutional or statutory provisions relative thereto.³ The office of jury commissioner is usually an appointive and not an elective one, the appointment being made by the court, which is necessarily vested with a large discretion, controlled only by the observance of statutory provisions respecting the qualifications of the appointee.⁴

mitted, and that none of the names from which the jury was drawn were those of residents of the county in question, but which fails to aver injury or prejudice, is faulty. *U. S. v. Chaires*, 40 Fed. Rep. 820.

1. A jury summoned under territorial laws from a county wherein a District Court is sitting is a jury of the vicinage, and may be used in a case arising under the federal laws, although the crime was committed in another county within the district. *U. S. v. Mays*, 1 Idaho 763.

Under the Act of Congress of June 30, 1879, it is competent for the territorial courts to order that jurors for the trial of cases arising under the Constitution and the laws of the United States shall be drawn from the box of names selected and provided by the county commissioners for the trial of territorial causes. *Territory v. Reed*, 5 Mont. 92.

Open Venire. — In a territorial court sitting for the trial of causes arising under the laws of the United States, and where no law of the territory exists as to the mode of procuring jurors, the court may cause jurors to be brought in under an open venire. *Beery v. U. S.*, 2 Colo. 186.

Crimes Committed within Indian Territory. — In *U. S. v. Dawson*, 15 How. (U. S.) 467, it was decided that a jury drawn from the district of Arkansas and state of Arkansas was a proper and competent jury to try a person for a crime committed in the adjoining Indian Territory.

In the United States court in the Indian Territory the accused is entitled

to have the jury drawn and impaneled in the mode prescribed by sections 4013-4015 of Mansfield's Arkansas Digest. *Gulf, etc., R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, following *Gulf, etc., R. Co. v. James*, 48 Fed. Rep. 148.

2. Applicability of Federal Laws to District Courts of Territory. — In *U. S. v. Beebe*, 2 Dakota 292, it was held that the Act of Congress of June 30, 1879, relative to the drawing of jurors, while applicable to federal courts sitting within the several states, did not apply to District Courts of the territory.

In *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434, which was a cause which arose exclusively under a law of the territory of Utah, the trial court proceeded on the theory that it was a court of the United States, and issued an open venire to the marshal, acting apparently on the hypothesis that it was to be governed in the selection of juries by the Act of Congress. But the Supreme Court of the United States held that the territorial court erred both in its theory and in its action, and that the making up of the lists and all matters connected with the designation of the juries were subject to the territorial laws. And see *U. S. v. Beebe*, 2 Dakota 292.

3. *State v. Conway*, 35 La. Ann. 350; *Friend v. Hammill*, 34 Md. 298.

Attorneys are improper persons to perform clerical work in the selection of jurors. *Bucks County Jurors*, 20 Pa. Co. Ct. Rep. 36.

4. Jury Commissioners Are Appointive and Not Elective Officers within a constitutional provision that "judicial

b. QUALIFICATION — (1) Generally. — The members of such boards or commissions must, of course, possess the requisite statutory qualifications to enable them to hold office.¹

officers of cities or villages shall be elected, and all other officers shall be elected or appointed," etc. *People v. Reilly*, 53 Mich. 260.

Appointment at Regular Term. — The *Montana* statute making it the duty of the judge of the District Court to appoint jury commissioners at each "regular term" is as well applicable to courts in continuous session as to those holding regular terms. *State v. McHatton*, 10 Mont. 370.

Appointment During Term. — Under a statute requiring an appointment of jury commissioners and selection by them at stated terms, and providing that if no commissioner shall have been appointed at the time prescribed, etc., the court may, when it deems necessary, appoint commissioners for the purpose of making a selection, where through oversight no jury commissioners have been appointed as required by law, commissioners may be appointed during a term for the purpose of selecting jurors for the transaction of business at that term, although other details respecting the filing of the lists within a prescribed time, etc., cannot be complied with. *Western Union Tel. Co. v. Everhart*, 10 Tex. Civ. App. 468.

Appointment Out of Term. — Jury commissioners may be appointed by the judge out of term, and the fact of the appointment and evidence of the same may be recorded by the clerk in the minute book at that time. *State v. Murray*, 47 La. Ann. 911.

Utilization of Existing Commission. — Where the court has a discretion "when it may deem necessary" to appoint commissioners where none have been appointed in time to make the selection, it may utilize the services of commissioners already appointed to make the selection for the next term. *Williams v. State*, 24 Tex. App. 32.

Prejudice of Sheriff. — Unless the right is conferred by statute, the accused cannot demand the appointment of a commission to select the jury by which he is to be tried because of the alleged prejudice of the sheriff and his deputies. *Johnson v. State*, 31 Tex. Crim. Rep. 456.

1. A County School Commissioner is not

a county officer within a statute disqualifying such officers from acting as jury commissioners. *McLain v. State*, 71 Ga. 279.

Where several members of a jury commission who were likewise school directors qualified as commissioners after their appointment as directors, they will be deemed competent and legal commissioners. *State v. Nockum*, 41 La. Ann. 689; *State v. Riley*, 41 La. Ann. 693.

Acceptance of Other Office. — A jury commissioner who has accepted another office and qualified in it is thenceforth constitutionally disqualified from serving as a jury commissioner. *State v. Newhouse*, 29 La. Ann. 824.

Superintendence of Drawing by One Disqualified. — Jurors selected from the regular panel drawn for the term are not incompetent because the judge who ordered and superintended the drawing was disqualified to sit in the cause. *People v. Ah Lee Doon*, 97 Cal. 171.

Objection to Want of Qualification When Made. — An objection to the mode or to the want of qualification of the jury commissioners must be made in the preliminary stages of the trial, and is unavailable on motion in arrest of judgment. *State v. Miles*, 31 La. Ann. 825; *State v. Alvarez*, 7 La. Ann. 284.

Proof of Disqualification. — The clerk of the court is a competent witness to prove that he was not duly qualified as jury commissioner prior to the drawing of a venire. *State v. Ashworth*, 41 La. Ann. 683.

The Failure of the Clerk to Make Entry of the Appointment and Qualification of a commissioner will not invalidate the acts of the latter. *State v. Hall*, 44 La. Ann. 976.

Race Distinctions. — A statutory provision that a circuit judge shall appoint annually three jury commissioners possessing certain prescribed qualifications as to intelligence, impartiality, etc., does not require the appointment as commissioner of a person of African descent, notwithstanding statutory provision as to discrimination between the white and colored races. *Smith v. Com.*, (Ky. 1896) 33 S. W. Rep. 825.

(2) *By Oath.*—Like other public officers, jury commissioners are required to qualify by oath duly to perform the respective duties with which they may be charged, though a commissioner who acts as such *ex officio*, and who has been duly sworn to execute the duties of his principal office, seemingly should not be required to take an additional oath with relation to his office as commissioner.¹ Yet in one jurisdiction, at least, a clerk who is *ex officio* a member of a jury commission is required, in addition to his regular oath of office, to take also a special oath as a member of the commission.²

One Oath.—This oath, however, need be taken but once during his term as commissioner, and it is unnecessary that he should be resworn upon every drawing of the jury.³

Failure to File or Record Oath.—But if an officer has qualified in fact, in the absence of express provisions of law to the contrary, the failure to file or to record the oath taken, or its absence from the files or record, will not invalidate a selection or drawing in which he participates;⁴ and a finding below as to whether or not the

1. *Additional Oath by Judge.*—In *Pennsylvania* the president judge is not required to take an additional oath before entering upon his duties respecting the drawing of jurors. *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. St. 521.

Time of Qualification.—In *Pennsylvania* the oath should be taken by the commissioners before proceeding to fill the wheel, and by the sheriff before drawing from the wheel. *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. St. 521. See also *Campbell v. Com.*, 84 Pa. St. 187.

Irregularity of Oath as to Form.—Where the oath taken by commissioners was not in the form prescribed by statute, the court refused to reverse where the irregularity was known to the appellant when, without objection, he made a successful application for a continuance, and did not file his motion to quash until nearly four months thereafter. *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. St. 521.

2. *Failure of Clerk to Take Additional Oath.*—Where, by statute each member of the jury commission is required to take the oath before entering upon the discharge of his duties, the failure of a clerk of the court who assisted in the drawing to take a special oath as member of the commission was held to invalidate the drawing, although as clerk he was a sworn officer. *State v. Thompson*, 32 La. Ann. 879; *State v. Williams*, 30 La. Ann. 1028; *State v.*

Vance, 31 La. Ann. 398; *State v. Bradley*, 32 La. Ann. 402; *State v. Ashworth*, 41 La. Ann. 683.

3. *State v. Revells*, 31 La. Ann. 387. A clerk of a District Court, elected in December, 1879, who took an oath of office as clerk on January 21, 1880, and who took an oath as *ex officio* jury commissioner on March 6, 1880, complied with the requirements of the Constitution, of the law, and of jurisprudence, and was thus legally qualified, as far as the prescribed oath was concerned, as a jury commissioner. No other oath was required of him on entering into his office on the first Monday of April, 1880. *State v. Fahey*, 35 La. Ann. 9.

Reformation of Commission.—Where a clerk who is *ex officio* a jury commissioner takes the oath as commissioner, it is not necessary for him again to take the oath when the judge removes members of the commission and appoints others. *State v. Nockum*, 41 La. Ann. 689; *State v. Riley*, 41 La. Ann. 693.

4. The fact of the qualification is the test of the jury commissioner to serve, and the failure of the clerk to reduce the oath to writing and to record the same cannot defeat public justice by interrupting judicial proceedings. *State v. Stewart*, 45 La. Ann. 1164.

The failure of jury commissioners to file the oaths taken by them with the officer designated by law will not invalidate their action in drawing jurors, notwithstanding a constitutional pro-

proper oath was duly administered to the members of the commission will be treated as conclusive.¹

c. **DISQUALIFICATION TO ACT.**—(1) *Bias or Partiality.*—In addition to the qualifications referred to, and respecting their right to act generally, the officers to whom the selection and drawing are intrusted may be rendered incompetent to act under particular circumstances, as when not impartial, or when, by reason of their attitude towards persons as to whose rights jurors of their choosing may be called upon to pass, they are or may be prejudiced.² The court will be justified in quashing the array where it appears that in making the selection or arraying the panel the commissioners, or any of their number, were guilty of any wilful default, or were moved by partiality or bias, or where there has been positive misconduct or a wilful violation of duty.³

vision that failure to file the oath with the officer prescribed shall work a forfeiture of the office. *Com. v. Valsalka*, 181 Pa. St. 17.

Parol Proof of Lost Record.—Parol evidence is admissible to show that a jury commissioner took the oath prescribed by the statute, when the record of the oath has been lost. *State v. Stewart*, 45 La. Ann. 1164.

1. **Conclusiveness of Finding Below as to Swearing of Jury.**—Where it was agreed by the parties that the presiding judge might hear evidence and pass on the question as to whether or not the jury commission was sworn according to law, the finding of the court in that respect was held binding on the parties. *Carter v. State*, 56 Ga. 463.

Where there is an issue as to whether or not commissioners were sworn at the time they made a selection, the finding of the court below will not be disturbed where the evidence upon which the finding was made discloses no manifest error. *Campbell v. Com.*, 84 Pa. St. 187.

The finding below on conflict of evidence that the sheriff took the oath required by law relative to the unlocking, locking, and sealing of the jury wheel preparatory to the filling, and after filling of the wheel, will not be disturbed on error. *Com. v. Manfredi*, 162 Pa. St. 144.

2. *Mitchell v. Likens*, 3 Blackf. (Ind.) 258; *Jones v. State*, 3 Blackf. (Ind.) 37; *Gardner v. Turner*, 9 Johns. (N. Y.) 260; *State v. Hensley*, 94 N. Car. 1021; *State v. Murph*, 1 Winst. L. (N. Car.) 129; *State v. Speaks*, 94 N. Car. 865; *Eaton v. Com.*, 6 Binn. (Pa.) 447; *Opinion of Ct.*, 1 Browne (Pa.) 121.

When Objection Will Lie.—In *People v. Harding*, 53 Mich. 48, it is said that a challenge to the array will lie to the action of a board of jury commissioners where it would lie at common law to the action of the sheriff or of his subordinate officers in selecting or summoning a jury. *People v. Harding*, 53 Mich. 48.

Ownership of Property Alleged to Have Been Stolen.—It is not a good ground of challenge to the array that the sheriff who assisted in selecting and drawing a venire was owner of some of the property the accused was charged with stealing. *Prince v. State*, 3 Stew. & P. (Ala.) 253.

Judge Formerly District Attorney.—A judge disqualified to act as such in a case in which he has officiated as district attorney may, nevertheless, preside at a drawing of jurors from which a panel is to be selected to try the accused. *People v. Ah Lee Doon*, 97 Cal. 171.

That the Information Against the Accused Was Made by the Sheriff, who had the custody of the key of the jury wheel, and that he participated in the drawing of the jurors for the term, are not grounds for quashing the array. *Clark v. Com.*, 123 Pa. St. 555.

Residence and Acquaintance with Suits.—A panel is not objectionable because drawn by commissioners one of whom was a merchant doing business in the vicinity of the land which is the subject-matter of the suit, or because some of the defendants trade with him. *Veramendi v. Hutchins*, 56 Tex. 414.

3. *Clark v. Saline County*, 9 Neb. 516.

Disregard of Mandate.—A panel should be quashed when it appears

(2) *Relationship*. — Where it appears that the officers were related by blood or affinity to litigants,¹ or to a person with whose killing a defendant who may be tried by the jury selected stands charged,² the court may quash the array.

(3) *Interest*. — Where the officers were interested, or might be affected by the result of an action or proceeding which the jurors selected might be called upon to try, the court will be justified in quashing the array.³

d. DURATION OF OFFICE. — *Fixed Term*. — Jury commissioners are usually appointed for a fixed time or for prescribed terms of the court.⁴

that through ignorance or obstinacy the board of supervisors disregarded the mandate of the statute in preparing the jury list. *Purvis v. State*, 71 Miss. 706.

Violation of Statutory Requirements. — Where the selection and drawing are in violation of statutory provisions, the court may discharge the commissioners and appoint others to carry out the requirements of the law. *Risner v. Com.*, 95 Ky. 539.

That a Jury Commissioner Selects Himself as a Talesman is not ground for challenge to the array, although it may be a valid objection as to him individually. *McCamant v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 610.

1. **Relationship to Party to Suit.** — A panel is not objectionable because one of the commissioners is the son of a defendant in a suit as to whom it has been dismissed. *Veramendi v. Hutchins*, 56 Tex. 414.

2. **Relationship to Person Feloniously Killed.** — Consanguinity of the commissioners who assisted in drawing the jury with the person whom it charged was killed by the accused may be a good objection, *State v. McQuaige*, 5 S. Car. 429; *State v. Sullivan*, 39 S. Car. 400; but where there is no relationship by blood the affinity must be such as of itself would reasonably lead to the presumption that the officer would thereby be affected in such a manner as to impair the proper discharge of his duties. *State v. McNinch*, 12 S. Car. 94.

3. **Residence within Interested Municipality.** — Jurors are not disqualified from acting in a prosecution for forging and uttering writings whereby a town and county were defrauded because town and county officers participated in the drawing and summoning. *Com. v. Brown*, 147 Mass. 585.

Interest in Pending Action Triable by Jury. — The panel selected will not be quashed on the ground that one of the commissioners who made the selection had an action pending to be determined by a jury, in the absence of any showing of partiality or unfairness, or that any of the persons selected were favorable to such commissioner. *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42.

In *Boyer v. Teague*, 106 N. Car. 576, it appeared that in drawing the jury for a special term, called principally to try an action in which the sheriff was the defendant and which involved his right to his office, the sheriff, in taking charge of the drawing and receiving the scrolls as they were drawn, called the names without submitting more than two or three of them to other inspection and passed them into a box. It further appeared that a name which should have appeared in one box was found in another. It was held that the challenge to the array was properly sustained, although the drawing took place in the presence of the board of county commissioners in regular session.

4. **At Pleasure of Judge.** — Under the *Louisiana Act* (No. 44) of 1877 the jury commissioners appointed by the district judge for the districts outside of New Orleans held office at his pleasure. *State v. Jean*, 42 La. Ann. 946.

Commencement of Term. — Under a statute providing that the term of jury commissioners shall commence on the first day of June next after their appointment, the term of a commissioner appointed on June first commences on that date. *State v. Mounts*, 36 W. Va. 179.

Appointment to Fill Vacancy. — Where an order appointing jury commissioners specifically stated that the terms of

Extended Term.— But where the term for which they were appointed extends beyond the term originally contemplated, it has been held that their authority will continue during such extended term.¹

De Facto Officers.— And likewise the acts of *de facto* commissioners, or commissioners whose successors have not qualified, will be treated as valid, and no attack on their title to the office will be entertained in collateral proceedings.²

c: POWER AND AUTHORITY — Generally.— The power and authority of boards of commissioners are defined by the statutes which establish or authorize their establishment, either in general terms or specifically, and beyond the power so prescribed they have no power to act.³

the appointees should correspond with unexpired terms commencing at a prior date, the appointment was considered as one to fill a vacancy and the commissioners so appointed were held to have been legitimately in office from that date. *State v. Scott*, 36 W. Va. 704.

1. Where, by existing practice, no challenge to the array of jurors selected by commissioners could be entertained, the appellate court declined to interfere where it appeared that the selection had been made at an extended term by commissioners who were appointed at an original term. *Williams v. State*, 24 Tex. App. 32. See also *Elkins v. State*, 1 Tex. App. 539; *Shackleford v. State*, 2 Tex. App. 385; *O'Bryan v. State*, 12 Tex. App. 118.

If the court lasts longer than was expected and it thereby becomes necessary to have other jurors, the better way is to reconvene the commissioners appointed at the first of the term and cause the necessary jurors to be selected by them; but the mere fact that a new commission was appointed and made the selection of jurors who tried the cause will be at most an irregularity, which, if any injury is occasioned, may be disregarded. *Roundtree v. Gilroy*, 57 Tex. 176.

Before Appointment of Successor.— That jury lists were prepared by a commissioner after the expiration of his term, but before the appointment of his successor, is not a ground of challenge to the array. *State v. McJenkin*, 7 S. Car. 21.

Before Qualification of Successor.— The acts of a commissioner whose term has expired and whose successor has been appointed and confirmed are valid until

qualification of the successor. *State v. Lee*, 35 S. Car. 192, *approving* *State v. McJenkin*, 7 S. Car. 21, *distinguishing* *State v. Bryce*, 11 S. Car. 342, wherein it was held that the chairman of a retiring board of commissioners whose successors, although chosen, have not yet organized has no authority to discharge any duties of the office.

2. See *Mapes v. People*, 69 Ill. 523.

Recognition of Officers by Court.— Jury commissioners in fact, acting as such, and recognized by an order of the court filling a vacancy in the board, though not naming its members, and also recognized by the adoption of the lists which they have prepared and filed, are commissioners *de facto*, if not *de jure*, and the fact that no order of their appointment appears on the minutes will not be good ground for quashing the array. *Cox v. State*, 64 Ga. 374.

Collateral Attack of Title.— Under an objection to the array, the title to the office of the commissioner who made the selection cannot be inquired into. *Palmer v. Charlotte, etc., R. Co.*, 3 S. Car. 580.

In *Carpenter v. People*, 64 N. Y. 483, it was held that a challenge to the array on the ground that the jurors were selected and drawn by a jury commissioner holding office under color of appointment was properly overruled, since the proceedings were had by a *de facto* officer, whose title could not thus be collaterally attacked.

3. **Restriction of Statutory Powers.**— A commission whose duty is by statute confined to the filling of vacancies on a panel cannot select jurors to try a particular case where, by another statute the sheriff is required to act in such a case by means of an open venire.

Delegation of Authority.—Where the duties imposed are ministerial in their character they cannot be delegated,¹ nor can the action of a third person be rendered valid by approval and ratification.²

6. Selection of Persons Eligible—*a*. EQUALIZATION OF JURY DUTY.—Various methods are devised for selecting jurors, having for their object the distribution and equalization of the burden of jury duty among citizens liable thereto, as by requiring the selection to be made in prescribed proportions between the number to be selected and the population or whole number of eligible persons within the political divisions of a state.³

Territory v. Carmody, (N. Mex. 1896) 45 Pac. Rep. 881.

Where the provisions for a drawing for an extra term when jurors could not be drawn therefor at a previous term are adapted to extra courts ordered by the Court of Appeals, and are inapplicable to an extra term ordered by a judge, juries for such a term cannot be procured in the mode prescribed for such extra courts, but must be drawn at the regular term preceding it. *State v. Pratt*, 15 Rich. L. (S. Car.) 47.

Restriction by Provisions Respecting Qualifications of Other Commissioners.—A statute prescribing that jury commissioners for a designated court shall possess the same qualifications as jury commissioners for other courts will not restrict the right of the former to act more than once within the year, although the statute regulating the actions of commissioners in such other courts does contain such restriction. *McCamant v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 610.

Implied Authority.—Where a statute expressly authorizes commissioners to provide a jury for two weeks, and thereafter the term of the court is extended two weeks, there is implied authority to provide a jury for the third week. *Leach v. Linde*, 108 N. Car. 547.

Supervisory Powers of Court.—The court has no supervisory powers over selections made by the jury commissioners. *Cavitt v. State*, 15 Tex. App. 190.

The Provision of the Florida Statute (Laws of 1879, § 3125) that the boards of county commissioners shall select from the registered voters of their respective counties a list of three hundred persons properly qualified to serve as jurors, who shall be such persons only as said commissioners know, or who have good character, sound judgment,

and intelligence, provided that if in any counties of this state said commissioners shall not be able to select the number required they shall be authorized to select a less number, said number to be the highest possible, invests such boards with authority to pass upon the integrity, character, judgment, and intelligence of the persons to be selected as jurors; and in the absence of an illegal purpose, fraud, or corruption in the selection of a less number than three hundred, the discretionary power of the commissioners in such matters will not be disturbed. *Reeves v. State*, 29 Fla. 527.

Necessity of Assigning Cause for Rejecting Juror.—Where jury commissioners have been invested with power to determine finally whether a given person is suitable to be a juror, unless so required by statute they are not obliged to give information as to those whom they have rejected as jurors. *State v. Merriman*, 34 S. Car. 16.

1. *State v. Gay*, 25 La. Ann. 478; *State v. Newhouse*, 29 La. Ann. 824; *People v. Labadie*, 66 Mich. 702; *Gov v. Brigham*, 45 Mich. 429.

Authority of Sheriff's Deputy.—A statute conferring power on a deputy to act in behalf of the sheriff in the performance of any of the duties of the latter prescribed by law will not authorize the deputy to act on behalf of the sheriff in drawing jurors under a provision requiring the duties in that respect to be performed by the clerk of the court, the sheriff, and the county auditor, and that in the absence of the sheriff the clerk shall call to his assistance such other county officer or officers as he may choose. *State v. Payne*, 6 Wash. 563.

2. *State v. Newhouse*, 29 La. Ann. 824.

3. See *Ex p. Crawford*, 12 Neb. 379; *State v. Page*, 12 Neb. 386.

b. TERRITORIAL AUTHORITY—(1) *Selection from Part of County*.—The law of *England* as it stood just prior to the American Revolution was satisfied if the jury was returned from any part of a county where the cause of action was laid or a crime was charged to have been committed.¹

(2) *From Whole County*.—This practice, though sanctioned more or less in a number of the states,² cannot be said to be

Object of Statutory Provisions.—Proceedings relative to drawing jurors are not for the benefit of litigants and form no part of the system to procure an impartial jury; they merely establish a mode of distributing jury duties among persons throughout the state who are subject to that kind of service, provided for rotation in jury service, and are directory rather than mandatory. *Rafe v. State*, 20 Ga. 60; *State v. Massey*, 2 Hill L. (S. Car.) 379.

Failure to Select in Proportion Prescribed by Statute.—Where a statute requires the selection of a number of persons corresponding to the population, in this case two hundred, and but sixty were selected, it was held that the selection was unlawful. *Risner v. Com.*, 95 Ky. 539.

A motion to quash the panel of jurors because not drawn in proportion to the number of electors of the several precincts of a county, verified by the attorney upon mere belief, was held insufficient to justify the court in quashing the panel. *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139.

1. Irrespective of the statute 6 Geo. IV., c. 50, referred to *supra*. *Shaffer v. State*, 1 How. (Miss.) 243.

"Formerly the Jury Was Required to Be Returned from the Vicinetum, or Visme—that is to say, from the neighborhood of the place where the cause of action was laid or the crime charged to have been committed—and therefore some of them (two, four, or six, at different periods) were required to come from the *hundred* in which such place lay, and it was a cause of challenge if they did not. To avoid such vexatious challenges this was changed, as respects civil actions, by 4 Anne, c. 16, and, as respects penal actions, by 24 Geo. II., c. 18, so that it was sufficient that the jurors came from the body of the county at large, though not from the particular hundred. But as respects criminal actions, no statutory change of the kind mentioned appears to have been made until 6 Geo. IV., c.

50, though by general acquiescence, and perhaps under the active sanction of the courts, challenges for want of hundredors appear to have fallen into disuse before that time as respects that class of actions. * * * See Black. Com. 360; Co. Litt. lib. 2, c. 11, § 193, note 2, (191); 2 Hale's P. C., c. 36. * * * The effect of the changes referred to was simply to remove the necessity of hundredors, and the words *de corpore comitatus*, 'from the body of the county,' 'of the county,' 'of the vicinage,' as they appear in English statutes and in American constitutions and laws, mean no more, as applied to jurors, than that they must come from some part of the given county. Sir Matthew Hale says that jurors are 'to be *de vicineto*, but this is not necessarily required, for they of one side of the county are by law *de vicineto* to try an offense of the other side of the county.' 2 P. C. 264." *State v. Kemp*, 34 Minn. 61.

2. *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 193.

Selection from Particular Parts of County or District.—In *State v. Kemp*, 34 Minn. 61, the court said: "We have not, after considerable research, found a single authority squarely adjudicating the unconstitutionality of a law or practice in accordance with which a jury for a court possessing county jurisdiction is selected from one or more parts of the county to the exclusion of the rest."

Jurors from Particular Part Where Court Has Larger Territorial Jurisdiction.—In *Colt v. Eves*, 12 Conn. 243, a law providing that jurors for certain city courts be taken from the freemen of the city, although such courts had jurisdiction over the counties, was sustained.

Section Eleven of the Nebraska Bill of Rights, which entitles persons accused of crime to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, is said to have been

general, for in other states the selection is required to be made from the whole county.¹

(3) *Jurisdictional Limits of Court.*—Likewise the selection may be required to be made from the territory over which the court in which the jurors are required to serve has jurisdiction,²

designed to secure to the accused a trial by jury in the vicinage where the crime is supposed to have been committed, so that he may have the benefit of his own good character and standing with his neighbors, and also of such knowledge as the jury may possess of the witnesses who give evidence before them. *Olive v. State*, 11 Neb. 1.

Where a statute provided for the selection, exclusively from the qualified electors of a city, of a list of persons to serve as jurors before a justice of the city, it was held that a jury impaneled from such list in a trial before a justice of an offense against the general laws of the state, committed within the county wherein the city was situated, was a jury of the county wherein the offense was committed within the meaning of a constitutional provision which conferred the right of trial by such a jury. *State v. Kemp*, 34 Minn. 61.

In the United States Courts jurors need not be returned from the whole district, but may be taken from some division thereof. Rev. Stat. U. S., § 802; U. S. v. Stowell, 2 Curt. (U. S.) 153; U. S. v. Chaires, 40 Fed. Rep. 820; U. S. v. Richardson, 28 Fed. Rep. 69. See *supra*, VI. 3. *United States Courts.*

A jury summoned under territorial laws from a county wherein a District Court is sitting is a jury of the vicinage, and may be used in a case arising under the federal laws, although the crime was committed in another county within the district. U. S. v. Mays, 1 Idaho 763.

Juries in Indian Territory.—In U. S. v. Dawson, 15 How. (U. S.) 467, it was decided that a jury drawn from the district of Arkansas and state of Arkansas was a proper and competent jury to try a person for a crime committed in the adjoining Indian Territory.

1. *Hartshorne v. Patton*, 2 Dall. (Pa.) 252; *Brown v. State*, 12 Ark. 623; *Wise v. Otter Creek Lumber Co.*, 86 Mich. 40.

What Constitutes Jury from Body of County.—The selection from as many townships as is reasonably practicable in the time limited for summoning the jurors is substantial compliance with

the statute which requires the jury to be summoned from the body of the county. *State v. Arthur*, 39 Iowa 631.

Requisites of Returns.—If the precept contains no direction to convene the jurors from the body of the county, the return on the panel must show that in fact they came from the body of the county. *White v. Com.*, 6 Binn. (Pa.) 179.

Unlawful Attempt to Add Territory to County.—Where, in violation of the Constitution, the legislature attempts to attach certain towns to a county, the fact that such towns were unrepresented on the jury list will not invalidate it. *Perry v. State*, 9 Wis. 19.

2. In *Opinion of Justices*, 41 N. H. 550, as respecting the place from which the jurors were required to be returned, they were described simply as men "having their homes within the jurisdictional limits of the court."

Territorial Differences in County and District.—Where, by a state Constitution, an accused is entitled to a trial by a jury of the county or district wherein the crime was committed, the right of a trial by a jury of the county where the crime was committed is had if the criminal jurisdiction of the court before which the accused is tried embraces and is confined to crimes committed anywhere in the county, and the right of a trial by a jury of the district where the crime is committed, whether such district be larger or smaller than the county, is had when the criminal jurisdiction of the court before which he is being tried embraces and is confined to crimes committed anywhere in such district. In other words, the jury must come from the jurisdictional territory of the court, whether it be a county or a district. *State v. Kemp*, 34 Minn. 61.

Selection from District Less than County.—The constitutional provision conferring on the accused the right to a jury of the county or district wherein the offense was committed, which county or district shall have been previously ascertained by law, is satisfied by the selection of a jury from a judicial district which is less than a county.

and it has been held that a jury drawn for a term of a court situated within territory out of which a new judicial district was created, and for which court a new term was fixed, might properly serve in the newly constituted court.¹ So where the selection is required to be made from the several townships, precincts, or other political divisions of a county, a disregard of the requirements, wilfully or otherwise, may be good ground for quashing the array.²

c. PROCUREMENT OF NAMES — (1) *Generally*. — The usual mode of procuring the names of persons eligible to jury duty is

Shaffel v. State, (Wis. 1897) 72 N. W. Rep. 888. And see *Ellis v. State*, 92 Tenn. 85.

From District Larger than County. — In *Olive v. State*, 11 Neb. 1, it was held that legislation creating trial districts larger than a single county should provide for the selection of jurors from the whole district and not from a portion thereof.

Territorial Changes. — Where, after a list had been made for a county, part of the town which comprised a portion of the county was incorporated with part of another town as a city, it was held that under a statute providing that persons whose names were returned as jurors for the town should be competent to serve for three years, and until other lists had been returned and filed, which time had not expired at the time of the trial, and no new list having been made for the city or town within the time fixed by statute, that a Court of Oyer and Terminer sitting within the city, which was unable to proceed for a lack of jurors, might cause names to be drawn from the list returned for the first-mentioned town, and that the fact that some of the jurors so drawn did not reside in either the city or the town in question at the time of the trial was not a ground of challenge to the array. *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155.

Attachment of Territory to Organized County. — In *Nebraska* it has been held that where, for certain political purposes, unorganized territory is attached to an organized county as a part thereof, and a court sitting in the county has jurisdiction of trials for crimes committed in such territory, in making up a list of jurors the commissioners should draw from both parts in suitable proportions. *Ex p. Crawford*,

12 Neb. 379; *State v. Page*, 12 Neb. 386.

1. In *State v. McKinney*, 31 Kan. 570, it appeared that a jury was drawn to attend a trial of a County Court which was then in a county which was a part of a certain numbered district, and had a regular fixed term; that thereafter an act took effect which created a new numbered district, assigned the county in question to that district, and fixed the commencement of the first term thereof. It further appeared that the act provided among other things that all proceedings, etc., pending in any of the courts of the counties named in the law should stand, etc., as if the change therein contemplated had not been made, and that without any new drawing or summoning the jury appeared at the term designated by the act, and it was held that objection would not lie to the array.

2. *People v. Coughlin*, 67 Mich. 466; *Clark v. Saline County*, 9 Neb. 516. See also *State v. Arthur*, 39 Iowa 631.

Omission of Township Where Lists Exhausted. — In *People v. Coffman*, 59 Mich. 1, it was held that the omission of the supervisor to return a list of names from one township would not invalidate a drawing from the body of the county and from the lists returned from the other townships according to law, where it may happen that the lists from one or more townships may have been exhausted by previous drawings.

Where complaint is made that there was no drawing from certain townships, in the absence of any showing that lists from such townships had not been exhausted under the provisions of the statute it will be presumed that they had been, and that for that reason no jurors were drawn and summoned therefrom. *People v. Coughlin*, 67 Mich. 466.

through various municipal officers and boards¹ whose duties, in that respect, are defined by statutes with which there should be at least a substantial compliance, though, as previously stated, slight irregularities or informalities in their conduct or proceedings,² as failure to make return of the list of names from a particular locality,³ or to comply strictly with the requirement respecting the preparation of the list, will not necessarily invalidate it.⁴

1. See *supra*, VI. 6. *b. Territorial Authority.*

In England the practice became the subject of statutory regulation, and the names, after selection by the churchwardens and certain officers in the parishes and townships, became finally incorporated in what was designated "The Juror's Book," from which jurors were chosen. Stat. 6 Geo. IV., c. 50.

Validity of Action of Particular Officers.

— Where, by statute, the supervisor and township clerk of each township, and the supervisor or assessors as the case may be, and aldermen of each ward or assessment district in any city shall * * * make a list of persons to serve as petit jurors," it was held that a list made and returned by the supervisors and aldermen of the several wards of a city was valid where, by the city charter, the supervisors were vested with the powers of supervisors of townships, and although the city comptroller was *ex officio* assessor of the city. *People v. Fuhrmann*, 103 Mich. 593, *distinguishing* *Hewitt v. Gage*, 71 Mich. 287, where it appeared that a provision of the city charter created the office of assessor and required such officer to make and return lists of persons to serve as jurors and wherein it was held that the general statute was not superseded.

United States Courts — Compliance with Rule. — A rule of court requiring the names of jurymen to be selected by a board of officers is substantially complied with by partially listing the names of persons furnished by a reputable citizen of a distant county within the district, on an application by one of the officers for a list of the names of proper persons residing in his vicinity. *U. S. v. Collins*, 1 Woods (U. S.) 499.

2. See *supra*, VI. 2. *f. Statutes Directory.*

Irregularities. — The manner in which lists are obtained is unimportant if they are procured from the proper source and through the proper chan-

nels. *People v. Fuhrmann*, 103 Mich. 593.

Action of Board at Adjourned Meeting.

— Where the statute does not require the selection by supervisors of names for jury service to be made at either a regular meeting of the board or a meeting specially called for the purpose, there is no good reason why the selection should not be made at an adjourned meeting at which all the members are present. *People v. Baldwin*, 117 Cal. 244.

In *Page v. Danvers*, 7 Met. (Mass.) 326, it appeared that a list of persons to serve as jurors was prepared and laid before a town by the selectmen thereof; that the town voted that the list be not accepted, but that a list be elected by nomination. Thereupon several persons, part of whom were on the list prepared by the selectmen and part not on that list, were nominated and declared elected, and the selection was held valid.

Selection from List by Last Board. —

Under an act requiring the selection "from the list made by the last board of supervisors in said county," etc., the selection should be made from the list prepared at the last meeting of the board before the time of selection. *Perry v. State*, 9 Wis. 19.

3. **Failure to Return Lists from Particular Locality.** — In *People v. Coffman*, 59 Mich. 1, an objection that one township had failed to return a list of jurors and that another had made return after the time fixed by law, and after one jury had been drawn from the list returned by the other township, was held unimportant.

It is not a good objection to the array that one officer of a city within the county failed to return a list of persons eligible to serve as jurors, and for that reason the panel included no persons from that particular city. *State v. Frazier*, 54 Kan. 719.

4. **Substantial Compliance with Statute.**

— The failure of town or other like officers to comply strictly with the law

(2) *Selection from Prescribed Class.* — Where a statute specifically prescribes the class or list of persons from which the jurors are to be selected, failure to draw the jurors from such class or list is a sufficient ground for quashing the panel.¹

(3) *Length of Residence.* — When residence for a prescribed period is an essential qualification, the qualification must exist at the time of the selection.²

(4) *From Taxpayers.* — Likewise the selection is sometimes required to be from a list of taxpayers or from the assessment roll.³

respecting the making up of lists will not vitiate the selection of jurors from the list so long as the choice is made from the list so filed. *People v. Tweed*, 50 How. Pr. (N. Y. Supreme Ct.) 262.

1. *State v. Jenkins*, 32 Kan. 477; *State v. Pratt*, 15 Rich. L. (S. Car.) 47; *State v. Jennings*, 15 Rich. L. (S. Car.) 42.

An act requiring jurors to be drawn from a box containing names selected from all the citizens between certain ages, etc., without regard to their qualifications as prescribed by the Constitution, is repugnant to the latter. *Moses v. State*, 60 Ga. 138.

Instruction Not to Return Ineligible Persons. — The mere fact that a clerk directed returning officers to make no return of persons over sixty years of age is not a sufficient reason for a challenge to the array where such persons are ineligible. *Smaltz v. Boyce*, (Mich. 1896) 69 N. W. Rep. 21.

Exclusion of Persons Having Pending Suits. — Wherever the statute directs the county commissioners not to include the names of a class of persons if drawn to serve on the jury in the panel, as in case of those having suits pending and at issue in the superior courts, it is a fundamental objection to the juror whenever it is made to appear, and is a cause of challenge although the county commissioners may have allowed his name to go upon the venire. *Hodges v. Lassiter*, 96 N. Car. 351.

Power of Court to Quash Panel. — Unless it appears that jury commissioners have acted in violation of statute in selecting an appreciable number of persons not having the statutory qualifications, or have in an illegal manner drawn from the list selected, no court has authority to set aside or disturb the panel. *Smith v. Com.*, (Ky. 1896) 33 S. W. Rep. 825.

Quashing Panel Including Disqualified

Persons. — Where it was discovered after the drawing and before service that names had been improperly included, the fact that the court, on its attention being called to the matter, quashed the venire and proceeded to draw again from the jury box until the names were exhausted was not erroneous. *Wilkins v. State*, 112 Ala. 55.

Where the Statute Is Directory an objection that the commissioners (judges) failed to comply with the law, in that some of the jurors selected did not possess the necessary qualifications, is not ground of challenge to the array. *People v. Durrant*, 116 Cal. 179.

Presumption as to Qualification of Persons Returned. — The defendant has the right to presume that the persons named on the list are qualified to act as jurors. *People v. Reece*, 3 Utah 72.

2. *People v. Shafer*, 1 Utah 260.

Laying Aside Names. — An irregularity consisting of the action of commissioners in laying aside the names of persons otherwise qualified, for the reason that they are ignorant as to whether such persons are residents of the county, will not invalidate the panel if the list is completed by the names of other duly qualified persons. *State v. Wilcox*, 104 N. Car. 847.

3. *Malone v. State*, 8 Ga. 408.

Failure to Use Last Assessment Roll. — In *Niles v. Steere*, 102 Mich. 328, the action of the court in overruling the challenge to the array on the ground that the board used the assessment rolls of one year instead of the rolls of the succeeding year in selecting the names from which the jurors were to be drawn was held proper where it appeared that the majority of the names were those of persons admittedly eligible.

The fact that the names of two persons not on the assessment roll for the preceding year appear upon the panel will not invalidate it. *People v. Young*, 108 Cal. 8.

(5) *Electors*. — The selection may be required to be made from qualified electors, in which case, should the mode of selection not be pointed out specifically, it seems that resort may be had to the last available list or registry of voters.¹

Extent of Officer's Duty. — Where the duty imposed on the officers is to select names from the assessment roll, they are not required to pass on the qualifications of the persons selected, beyond the fact of their names appearing upon the roll. *State v. Squaires*, 2 Nev. 226.

Selection of Juror Not Assessed. — Under a statute contemplating that the jurors must be selected from the persons whose names appear on the assessment roll of the township, a juror whose name is not on such a list may be successfully challenged. *People v. Thacker*, (Mich. 1896) 66 N. W. Rep. 562. As to the construction of the statute in question, see *Schlacker v. Ashland Iron Min. Co.*, 89 Mich. 253; *Wise v. Otter Creek Lumber Co.*, 86 Mich. 40.

Sufficiency of Showing that Names Were Taken from the Proper Roll. — That persons on the list were not on the proper assessment roll is not a ground of challenge to the array where it does not appear that they were not assessed on the roll. *Smaltz v. Boyce*, (Mich. 1896) 69 N. W. Rep. 21.

List Not in Court Records. — That there was no list returned by the assessor in the records of the court at the time of drawing the names from the box would not, of itself, be good ground of challenge when it is manifest that the names must have been taken from the list and deposited in the box as required by law. *Stevens v. Richer*, 1 How. (Miss.) 522.

In Kansas it is the duty of the assessors to enter upon the assessment roll all persons who have property to list for taxation, whether exceeding in value the constitutional exemption or not; and an assessor, by his failure to enter the name of a person who is duly assessed and is otherwise qualified to act as a juror, cannot thereby disqualify him from serving as such juror. *State v. Lowe*, 56 Kan. 594.

In Maryland the duty imposed upon the clerk of commissioners respecting a list of male taxables not known to him to be under twenty-five years of age, or over seventy, is directory. *Green v. State*, 59 Md. 123.

Objection After Verdict. — That a juror's

name was not upon the books of the tax receiver is no cause for new trial where the objection is not made until after verdict. *Pool v. Callahan*, 88 Ga. 468.

1. *State v. Newhouse*, 29 La. Ann. 824.

Where, by the charter of a city, a justice thereof was invested with exclusive jurisdiction to hear all complaints and conduct all examinations and trials in criminal cases within the city cognizable before a justice of the peace, etc., it was held that the authority thus conferred gave him exclusive jurisdiction, subject to certain exceptions, to act within the city in hearing complaints and conducting examinations and trials in criminal cases, and in doing so to procure a jury from qualified electors of the city in the manner provided by the city charter. *State v. Kemp*, 34 Minn. 61.

Resort to Registry. — Where a sheriff is required to draw a jury from a list of all the qualified voters in a designated parish, the list must be made from the last registry. *State v. Morgan*, 20 La. Ann. 442; *State v. DaRocha*, 20 La. Ann. 356.

Drawing from "All the Voters." — A statutory requirement that the jury be drawn from all the voters is not satisfied by drawing from a box containing a remnant of the names of the voters, after successive drawings therefrom. *Compton v. Legras*, 24 La. Ann. 259.

From Incomplete List. — Where it is required that jurors must be qualified voters, it is not necessary that a list of those liable to jury duty be furnished each year (presumably after the registration of voters), regardless of whether the box has been exhausted or not. *Gettwerth v. Teutonia Ins. Co.*, 29 La. Ann. 30. The contention in this case was that since the box had been filled many persons had become qualified voters by arriving at majority or by naturalization.

From "Registered" Voters, and Not "Qualified" Voters. — That jurors were selected from 'registered' voters and not from 'qualified' voters is not a valid objection in the absence of any testimony showing that the list of regis-

(6) *Race Distinction.* — The interpretation of the Fourteenth Amendment to the Constitution of the United States, and of legislation on the subject, has given rise to much discussion in cases where it has been claimed that persons of the negro race were discriminated against; but all the decisions are to the effect that in the absence of any wilful violation of statutory provisions on the subject, or of any discrimination against or intentional exclusion of persons of the negro race as jurors, a selection or drawing will not be invalid merely because the names of such persons do not appear, or because only an inconsiderable number appear.¹ It has been held that the venire cannot be modified so as to have them placed thereon in any proportion to the number of persons of the race in question;² but such action on the part of selecting officers as that by no possibility could persons of the race or color of the accused sit on the jury which was to try him will vitiate the proceedings in respect to the selection of which complaint is made.³

tered voters did not contain the names of the qualified voters. *State v. Thomas*, 35 La. Ann. 24.

Drawing of Disqualified Persons. — A *procès verbal* of the drawing which shows that the jurors were selected from qualified voters is sufficient, and the fact that some of the jurors drawn were not qualified is not a good ground for setting aside the panel. *State v. Green*, 43 La. Ann. 402.

Appeal — Insufficient Bill of Exceptions. — Certificates purporting to show the number of votes cast in certain districts and the number of names on the jury list, for the purpose of showing the proportions between the same, will not be considered on appeal if they are not contained in the bill of exceptions. *Neal v. State*, 32 Neb. 120.

1. *Georgia.* — *Wilson v. State*, 69 Ga. 225.

Kentucky. — *Smith v. Com.*, (Ky. 1896) 33 S. W. Rep. 825.

New Jersey. — *Johnson v. State*, 59 N. J. L. 535.

Texas. — *Williams v. State*, 44 Tex. 34.

Virginia. — *Lawrence v. Com.*, 81 Va. 484.

Presumptions of Discrimination. — Notwithstanding proof that the general venire from which jurors were drawn was exclusively composed of persons of the white race, or of Caucasian descent, and did not contain a single colored person, or one of African descent, there is no conclusive evidence of discrimination against the latter on

account of race or color within the intentment of the Fourteenth Amendment to the Constitution of the United States. *State v. Joseph*, 45 La. Ann. 903; *State v. Murray*, 47 La. Ann. 1424; *Cavitt v. State*, 15 Tex. App. 190.

Where the Proof Shows that Persons of African Descent Were Not Excluded from the general venire, but, on the contrary, that some colored people were included therein, the charge that the accused has been deprived of the due protection of the law is unfounded. *State v. Murray*, 47 La. Ann. 1424.

Integrity of Commissioners Unquestioned. — A challenge based on the fact that in the trial of a colored man but few colored men were selected is properly overruled where it appears that the commissioners who made the selection are of conceded integrity, and upright citizens, and acted honestly and according to law. *Thomas v. State*, 67 Ga. 460.

Jury of Peers. — In *Cavitt v. State*, 15 Tex. App. 190, wherein the accused, a negro, was charged with the murder of a white man, and in which the jury was composed of white persons, it was held that the court properly refused to quash the panel on the ground that the jurors were selected from persons who were the superiors of the defendant and not his equals, and because the commissioners, by refusing to select negroes, unjustly discriminated against persons of the negro race.

2. *Virginia v. Rives*, 100 U. S. 313.

3. In the selection of jurors no state

7. Wheel or Box — a. GENERALLY. — In the different states of the Union various provisions are made by statute for boxes, wheels, and other receptacles wherein lists of the persons eligible to jury duty are kept, and from which, from time to time, names are drawn, listed, and returned to the courts or designated officials, and wherefrom are selected the trial jurors.¹

Where There Is More than One Such Receptacle, the manner in which the names are required to be placed therein is usually regulated by statute, the requirements of which in their essential features must be conformed with in order that the panel returned be not objectionable because of informalities and irregularities invalidating the action of the selecting officers.²

has a right to exclude by law persons of the race or color of the person accused of crime so that by no possibility could such a person sit on the jury. *Strauder v. West Virginia*, 100 U. S. 303. See *Virginia v. Rives*, 100 U. S. 313.

1. Applicability of Statutes to Both Civil and Criminal Cases. — In *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155, the *New York* Act of 1861, c. 210, amendatory to the revised statutes which required that, in addition to the box provided by law and kept for the purpose of containing the names of jurors drawn to serve at any court, another box should be provided in which should be deposited the names of persons selected and returned as suitable persons to serve as jurors, residing in the city or town where courts are appointed by law to be held, was held applicable to criminal as well as to civil cases.

Statutory Changes. — The *Ohio* Act of March 29, 1881 (78 Ohio Laws 95), respecting juries in capital cases, did not repeal or affect existing legislation on the subject otherwise than by substituting the wheel for the box containing the names of the electors from which the original panel is to be drawn. *McHugh v. State*, 38 Ohio St. 153.

2. Substitution of Several Boxes for One. — Where an act requiring the venire to be drawn from a single box is amended as to a particular county by substituting therefor fifteen boxes, one for each precinct of the county in question, a defendant cannot complain that the drawing was from the greater number of boxes. *Hornsby v. State*, 94 Ala. 55.

Using Same Box After Division of District. — Where the law directs jurors to be drawn from each parish, the names from each being kept in a separate box,

and after the division of one parish into two the names from both are kept in the same box, the irregularity is fatal and a juror so summoned is entitled to his discharge. *Auzan's Case*, 2 Martin (La.) 127.

Drawing from Box Erroneously Made Up. — Although a list is erroneously placed in the wrong box and a drawing is had therefrom, there is no ground for reversal if otherwise the drawing was conducted according to law and there is no pretense of fraud or the like. *Lee v. State*, 45 Miss. 114.

Where the partitions of the jury box were marked "jurors drawn" and "jurors not drawn," with a lock on each partition, fitted by one key which was placed in the custody of the register and *ex officio* clerk of the board of county commissioners by the chairman of the board, and a special venire was drawn therefrom under the directions of the presiding judge, it was held legal though the statute required the scrolls to be placed in a box having two partitions marked Nos. 1 and 2, respectively, with separate locks and keys, one of which was to be kept by the sheriff and the other by the chairman of the board. *State v. Potts*, 100 N. Car. 457.

Mixing Names of Grand and Petit Jurors. — In *Atkinson v. Morse* 63 Mich. 276, the county clerk disobeyed the plain instructions of the statute by putting packages containing the lists of grand and petit jurors returned from three city wards all in one box, and drawing therefrom the names of both grand and petit jurors to attend court as petit jurors. There was held to be no error in discharging all the jurors drawn from the city in question, and directing a new drawing.

Placing Names in Wrong Box. — Where, by statute, a "general" box,

b. KEEPING BOX FILLED. — Since the object of statutes respecting the duties of jury commissioners is to have accessible a sufficient number of names of eligible persons to enable a requisition for veniremen to be complied with when their services are required in the courts, it is generally necessary that a full complement of names of qualified persons be kept up in order that the courts may suffer no inconvenience in the transaction of their business,¹ though it does not appear that the failure to keep up the prescribed number of names can be successfully complained of by a party who has had presented to him a full panel of qualified jurymen.²

and a box denominated a "neighborhood tales box" are required to be kept, and names within the neighborhood may be put into both boxes, except in a specified locality, the names of persons within such locality may be placed in one box, but not in both. *State v. Lee*, 35 S. Car. 192.

Special Legislation is necessary to legalize a jury box illegally made up and in the custody of county officers, or to authorize the preparation and filing of another box. *Steele v. State*, 111 Ala. 32.

Attacking Constitutionality of Act — What Must Be Shown. — Where it is claimed that a statute relative to the preparation of lists and ballots containing the names of persons who are to constitute the jury list is unconstitutional because it provides that the name of each alternate juror on the list from cities and towns where courts are held shall be deposited in a box to be known as the talesman box, and not in the first box, unless it is specifically shown to the court in what the unconstitutionality of the act consists the court will not be warranted in declaring against the validity of the law. *Cook v. Fogarty*, (Iowa 1897) 72 N. W. Rep. 677.

1. Failure to Put In Sufficient Names. — In *State v. Merriman*, 34 S. Car. 16, it appeared that the statute required the names of one hundred and fifty persons to be placed in the tales box, and that one hundred and fifty slips of paper were placed therein, but that by error or inadvertence the box contained the names of only one hundred and forty-eight persons, and it was held that in the absence of any provision in the statute to that effect, the failure to comply literally with the law would not necessarily invalidate the panel.

Putting in Excess of Names. — The mere fact that a jury wheel may have

contained four names more than the number prescribed by statute, which was one thousand five hundred and fifty, is an irregularity of an immaterial nature and furnishes no ground for quashing the array. *Rizzolo v. Com.* 24 W. N. C. (Pa.) 13.

Depletion of Box — Drawing from Reduced Number. — When many drawings have been made and the number of names left in the box has become relatively small, in trials had in these conditions the jury must be drawn from the reduced number left in the box. *Johnson v. State*, 102 Ala. 1.

Addition of Names by Successors in Office. — Jury commissioners may accept names found in the venire box, selected by their predecessors, and may add other names to make up the number prescribed by law. *State v. Mangrum*, 35 La. Ann. 619.

Taking Out Names Before Refilling Box. — Where, by statute, it is provided that the sheriff and commissioners shall select and deposit a sufficient number of names in each and every wheel that at the last drawing in each year a number requisite for one jury at least shall remain in each wheel, it is not a cause for quashing the array that the names which remained in the wheels at the end of the year were taken out and the names selected for the next year were put in, in view of the presumption that the law was complied with by placing in the wheel a sufficient number of new names to insure that the number requisite for one jury would remain in each wheel at the last drawing. *Com. v. Lippard*, 6 S. & R. (Pa.) 395.

In *Pennsylvania* retiring commissioners should fill the wheel for the ensuing year. *Bucks County Jurors*, 20 Pa. Co. Ct. Rep. 36.

2. The defendant has no right to inquire as to the number of names

c. **LOCKING.** — The contents of these receptacles must be kept intact, and, for the purpose of obviating the danger of tampering therewith by individual members of the board or by strangers, it is generally prescribed that the boxes be locked.¹

d. **SEALING.** — The boxes should, as a general rule, also be sealed by the different officers with their respective seals.²

e. **CUSTODY.** — And it is further generally provided that when so locked and sealed they shall be kept in safe custody by an officer or the officers specially charged with that duty,³ the key being

remaining in the box if he has a full panel drawn therefrom as required by law, from which he can select a jury for the trial. *Territory v. Reed*, 5 Mont. 92.

Drawing from Incomplete Box. — The provisions of the act "to more effectually secure competent and well qualified jurors" (Crim. Code, p. 132, note), relating to the drawing of petit juries by the jury commissioners of the several counties included in said act, are not merely directory, but mandatory; and when, in the discharge of their duties, the jury commissioners draw petit jurors before a list of all the qualified jurors of their county has been completed and the names of all such jurors placed in the jury box, the drawing is illegal, and the venire of such petit juries should, upon proper motion, be quashed. *Johnson v. State*, 102 Ala. 1. In this case the court said that, there being no provision of law for refilling the box until all the names were drawn out, where many drawings had been made, and the number of names left in the box had become relatively small, so that necessarily names must be drawn from a reduced number left in the box, if a panel was drawn under such circumstances the accused could not contend that he was denied any right because of the depletion of the box, adding: "We do not wish to be understood as saying that in no case should the array or venire be quashed because drawn from an incomplete list. If the process of filling the box had been carried to only a very limited extent, or if any circumstance attending the drawing gave evidence that it had not been fairly and impartially conducted, we will not say the presiding judge should not quash the venire."

1. *State v. Hensley*, 94 N. Car. 1021; *Rolland v. Com.*, 82 Pa. St. 306; *Com. v. Freeman*, 166 Pa. St. 332.

2. The failure properly to seal the wheel as required by statute is good

ground for quashing the array. *Kittanning Ins. Co. v. Adams*, 110 Pa. St. 553.

Sealing the Wheel with But One Seal is a violation of a statute requiring that the sheriff shall cause the wheel to be locked and secured with sealing wax, "and thereon the said sheriff and commissioners shall impress distinctly their respective seals." *Brown v. Com.*, 73 Pa. St. 321.

Use of Same Seal by Sheriff and Commissioners. — It is not proper for the sheriff and the jury commissioners to use one and the same seal, no matter how many impressions are made by it; each should use his own seal. *Curley v. Com.*, 84 Pa. St. 151.

Where the sheriff and the commissioners are required to "impress distinctly their respective seals," the array is properly quashed if the box is sealed with the individual seals of one of the commissioners only. *Kittanning Ins. Co. v. Adams*, 110 Pa. St. 553; *Brown v. Com.*, 73 Pa. St. 321.

Presumption of Compliance with Statute. — In the absence of negative proof the presumption is that the wheel was sealed as required by the statute. *Rolland v. Com.*, 82 Pa. St. 306.

Wheel as Evidence of Proper Sealing. — Complaint that a jury wheel was not sealed by the commissioners as prescribed by law is not supported by the production of the wheel showing its then condition without supplementary proof of its condition at the time the panel in question was drawn. *Com. v. Valsalka*, 181 Pa. St. 17.

3. Statutes relative to the locking and sealing of the wheel, its custody, and the custody of the key thereof should be strictly observed. *Com. v. Freeman*, 166 Pa. St. 332.

Propriety of Custody. — The fact that a jury box might have been kept in such a manner as to have afforded less opportunity for tampering therewith is not a good cause for quashing the array

required to be kept by an officer other than the one to whom the custody of the box or wheel is intrusted, thus affording an additional safeguard.¹

8. Procedure in Drawing—*a.* ORDER OR REQUISITION FOR JURORS—(1) *Service.*—Where an order, requisition, or notice to the officers charged with the duty of procuring jurors for service in the courts is required² it should be given within such

where it appears that the box was kept with sufficient care, and there was no evidence which would justify a suspicion that the names were changed. *Com. v. Lippard*, 6 S. & R. (Pa.) 395.

Place of Keeping.—In *Rolland v. Com.*, 82 Pa. St. 306, it appeared that after being placed in a chest and locked therein the wheel was deposited by the commissioner in a vault of the county commissioner's office and in custody of his clerk, who was likewise clerk of the jury commissioners and a sworn officer; that the wheel was properly sealed; that the sheriff kept the key in a desk in his office which was not always kept locked, and that his son, who was also his deputy, had access thereto; and it was held that the wheel was sufficiently in custody within a statute providing that the locked wheel remain in the custody of the jury commissioners, and the keys in the custody of the sheriff.

Where no office has been provided by law for jury commissioners, nor a place of safety for the custody of the wheel, it was held competent for the commissioners to arrange for the safekeeping of the wheel in the vault of the county treasurer upon condition that no one but one of the commissioners should enter the vault for the wheel. *Curley v. Com.*, 84 Pa. St. 151.

At Residence of Commissioner.—In *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. St. 521, it was held that the fact that after a wheel had been locked and sealed as directed by law one of the commissioners who lived some miles from the county seat took the wheel with him and kept it at his home, by express agreement, there being no intimation that it was tampered with, was no violation of the statute requiring that the jury wheel "shall remain in the custody of the jury commissioners," the keys to be kept by the sheriff. *Distinguishing Rolland v. Com.*, 82 Pa. St. 306.

Negligence of Officers—No Injury Shown.—Mere negligence of the commissioners, the clerk, and the sheriff in

respect to their several duties as to the locking, custody, and safekeeping of the jury box is not a good ground of challenge to the array where it does not appear that the box was tampered with, although such negligence is highly culpable. *State v. Hensley*, 94 N. Car. 1021.

1. Statutes relative to the custody of the key should be strictly observed. *Com. v. Freeman*, 166 Pa. St. 332.

Statutes respecting the locking of the jury wheel, its custody, and the custody of the keys of the box should be given a reasonable interpretation. *Rolland v. Com.*, 82 Pa. St. 306.

Necessity of Safekeeping of Key.—A prudent regard for the public interests requires that the key of the jury wheel should be kept where it is not accessible to any one but the person charged with its custody. *Rolland v. Com.*, 82 Pa. St. 306.

The Failure of the Sheriff to Have the Custody of the Keys to the jury boxes will render the array fatally defective. *Kittanning Ins. Co. v. Adams*, 110 Pa. St. 553.

2. See *infra*, VII. *Procuring Attendance of Jurors at Trial Court.*

The Venire, Although Technically Called a Writ, Is Rather an Order of the Court, issued to the several town clerks, directing and empowering them to select the requisite number of persons to serve as jurors. *State v. Bradford*, 57 N. H. 198.

Necessity for Writ.—In *Louisiana*, under the statutes in force in 1847, no writ for selecting and summoning a jury, nor any order therefor under the seal of court, was necessary. The clerk and sheriff, or deputy sheriff, drew, at stated periods, the requisite number of jurors who were to be summoned. *State v. Folke*, 2 La. Ann. 744; *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266.

Direction for New List in Place of Invalid List.—Under Act 201 of the *Michigan* Public Laws of 1893, which permits the circuit judge to direct the return of new lists when the current

time and in such manner as may be directed by law,¹ though the failure to make actual service, or the absence of proof of service, will not defeat the proceedings taken if the officer, or so many officers as may be necessary to perform the duties required of them by statute, did in fact act.²

(2) *Form and Sufficiency.*— Unless the form or sufficiency of the order is essential to the validity of the action of the commissioners or other like officers, mere informalities or irregularities which do not cause a positive violation of statute may be disregarded.³

lists are declared illegal for any purpose, it seems that the circuit judge, in a proper case, may declare a list invalid of his own volition and direct the return of a new list. *Smaltz v. Boyce*, (Mich. 1896) 69 N. W. Rep. 21.

In Florida, and under the Act of 1868, §§ 5, 32, where the whole number of any petit jury has not been summoned, it is the duty of the court to direct the clerk to draw a sufficient number to complete the jury from the list furnished by the county commissioners in the same manner as provided by law for the drawing in the first instance. *Gladden v. State*, 13 Fla. 624.

1. *The Length of Notice to the Officials* designated to conduct the drawing is of minor importance; the substantial fact is that the officers appeared and in their presence the drawing was had. *State v. Yordi*, 30 Kan. 221; *Jones v. State*, 1 Kan. 279.

2. *Performance of Duty by Officer Not Served.*— Where four of five commissioners were present and participated in the selection of a venire, it was held immaterial that some of them were not served with written summons. *State v. Magee*, 48 La. Ann. 901.

An objection that the clerk failed to notify the county judge of the drawing and that the latter did not attend cannot be considered where the transcript shows that he was present at the drawing. *People v. Ah Chung*, 54 Cal. 398.

It is immaterial that there is no entry of service of the writ where the record shows that the writ was duly issued, and that the commissioners acted in obedience thereto. *State v. Derrick*, 44 S. Car. 344.

Presumption of Service.— In the absence of anything in the record to the contrary, it will be presumed that the venire was properly served on the jury commissioners. *State v. McGraw*, 35 S. Car. 283.

3. *Signature by Judge.*— Unless so required by statute it is unnecessary that an order designating the number of jurors to be selected by the board of supervisors should be signed by the judge; it is sufficient if the order is made in open court and entered in the minutes. *People v. Baldwin*, 117 Cal. 244.

Specification of Causes to Be Tried.— An order for the drawing of tales jurors is not objectionable because specifying the cases for which the jurors are to be drawn. *State v. Chambers*, 45 La. Ann. 36.

Designation of Officers.— In *Smaltz v. Boyce*, (Mich. 1896) 69 N. W. Rep. 21, the order directed the supervisors and aldermen in cities to make the list, instead of charging the aldermen and assessing officers with that duty, and it appearing that the same officers were intended, the alleged error was held immaterial.

Specification of Locality to Be Drawn From.— An order that the jurors be drawn and summoned according to law is not objectionable because failing to specify the township from which the jurors were to be drawn and to include the vicinage of the alleged offense, where, by statute, the court is empowered to order the jury drawn from the county at large or from specified townships near the county seat. Consequently, under such an order jurors may be drawn and summoned from the county at large. *People v. Coughlin*, 67 Mich. 466, *distinguishing* *People v. Hall*, 48 Mich. 482, wherein an order directing a drawing from eleven out of about twenty-five townships, and excluding the entire vicinage of the alleged offense, was held invalid because it required neither a jury of the vicinage, a jury of the county at large, a jury near the county seat, nor one desired by the judge for the general purposes of the term.

b. NOTICE OF DRAWING.—Where notice of a drawing is required to be given, the statutes in that respect should be substantially complied with.¹

c. TIME.—That statutory provisions respecting the time when jurors shall be selected or drawn should be observed needs no discussion; whether or not the requirements in this respect have been complied with is dependent, of course, upon the particular circumstances of each case,² and while due diligence should be exercised, the mere fact that officials consumed unnecessary time in performing their duties is no reason for nullifying their

Specification of Term for Which Jury Required.—In *State v. Jennings*, 15 Rich L. (S. Car.) 42, it appeared that a military order authorized the governor to order a special term of court for the revision and preparation of jury lists and to provide for summoning and drawing jurors in accordance with the requirements of the order, and it was held that a drawing had under an order of the governor which failed to mention the special term was a nullity.

1. In *State v. Wheeler*, 64 Me. 532, a notice that a meeting for the drawing of jurors would be held on the eighteenth day of the month was posted on the fourteenth, and it was held to be a sufficient notice of four days, although Sunday was an intervening day.

2. Failure to Select Within Prescribed Time.—It is immaterial that the regular panel was not selected within the time prescribed by statute. *State v. Pitts*, 58 Mo. 558.

There is no necessity for discharging a panel of jurors drawn the twenty-eighth day before the first day of the term on the ground that the statute literally requires the drawing to be made thirty days before the term. *Babcock v. People*, 13 Colo. 515.

A statute (Laws Fla. 1879, § 1, c. 3125) providing a time for the boards of county commissioners to select from the list of registered voters in their respective counties a jury list of persons qualified to serve as jurors is directory, and should said commissioners fail to make the selection at the January meeting mentioned in the statute, it would be competent for them to do so at a subsequent meeting. *Reeves v. State*, 29 Fla. 527.

Validity of Drawing After Prescribed Time.—Where a statute directs that a jury be drawn within a prescribed time after its passage, it cannot be drawn

thereafter. *Buhol v. Boudousquie* 8 Martin N. S. (La.) 425.

Where the charter of a city required that a certain number of jurors should be chosen on the first Monday of July, but the choice was not made until the eighth day of the following August, it was held that the provision was directory, and that the persons chosen were proper members of a legal jury. *Colt v. Eves*, 12 Conn. 243.

Drawing More than Prescribed Time Before Term.—Where, by statute, a venire for the trial of a capital case is required to be drawn ten days before the commencement of the term at which the case is set for trial, the venire is not objectionable as being drawn more than ten days before the term. *Daughdrill v. State*, 113 Ala. 7.

In *Amherst v. Hadley*, 1 Pick. (Mass.) 38, it appeared on the face of the venire and on the officer's return that a juror was drawn more than twenty days before the sitting of the court, contrary to statute, but that the fact did not come to the knowledge of the party until after a verdict against him, and it was held that this furnished no cause for setting aside the verdict upon motion.

Sufficiency of Compliance with Statutory Provision as to Time.—A drawing on the second day of the month for a term commencing on the sixteenth day of the same month is a compliance with a statutory requirement that the drawing take place fourteen days before the term. *People v. Burgess*, 153 N. Y. 561.

A statute requiring that the jury be drawn at least fourteen days before the sitting of the court does not necessitate a drawing precisely fourteen days prior to that time, but only that that number of days shall intervene between the drawing and the sitting. *Crane v. Dygert*, 4 Wend. (N. Y.) 675.

action, especially where no limitation is imposed upon them.¹ Nor will their failure strictly to comply with statutory requisitions affect the validity of the array or of the list returned where there is no charge or suggestion of partiality, malpractice, fraud, or the like.²

d. PLACE OF DRAWING. — The legality of the proceedings as to the place where the drawing is had, the presence of designated officers, or the like, must depend of course on the particular circumstances of each case, but it may be said generally that there should be at least a substantial observance of statutory provisions respecting the subject in question.³

e. PERFORMANCE OF OFFICIAL DUTIES — (1) *Quorum.* — In the absence of an express requirement to that effect it is not necessary that, when performing the duties imposed and exercising the powers conferred by the legislature, a board or commission intrusted with the selection or drawing of jurors should act by all of its members, but ordinarily it will be sufficient if a majority of their number or a quorum was in attendance.⁴

1. *Com. v. Lippard*, 6 S. & R. (Pa.) 395. is a compliance with Act No. 44 of 1877. *State v. Green*, 43 La. Ann. 402.

Under Deliberation. — That the board of commissioners occupied two months in selecting jurors and putting the names in the wheel would seem to indicate unnecessary deliberation, but there is no ground of complaint by persons tried after the wheel was actually filled. *Com. v. Manfredi*, 162 Pa. St. 144.

2. *Childs v. State*, 97 Ala. 49; *State v. Rector*, 35 La. Ann. 1098.

3. *In Presence of Court.* — Where the statute contemplates that the jury be drawn in the presence of the court, a jury not so drawn will be deemed illegal. *Convers's Appeal*, 18 Mich. 459.

In *New Jersey* the general panel of jurors for the term is required to be drawn in the presence of the Court of Common Pleas. *Patterson v. State*, 48 N. J. L. 381.

In Open Court. — If the drawing takes place while the court is in session, and in the presence of its officers, as the clerk, sheriff, attorneys of the court, etc., it is a drawing in open court, whether it takes place in the room where the court ordinarily transacts its business or in any other room in the same building. *State v. Millain*, 3 Nev. 409.

In Clerk's Office. — Where the jury commissioners draw the jury in a room adjoining the clerk's office which opens into it and is a part of the office, this

is a compliance with Act No. 44 of 1877. *State v. Green*, 43 La. Ann. 402.

4. *State v. Arata*, 32 La. Ann. 193; *State v. Hornsby*, 33 La. Ann. 1110, *State v. Magee*, 48 La. Ann. 901.

Proceeding by Majority. — Where a statute declares that a jury commissioner and two county officers, or a majority of them, shall constitute a board of jury commissioners, any two of the officers may perform the duties of the board. *State v. Merriman*, 34 S. Car. 16.

Where the commissioners may act by a majority, the absence of one of them when the names were put in the wheel will not vitiate the proceeding. *Com. v. Manfredi*, 162 Pa. St. 144.

Presence of Sheriff. — The statute providing that the acts of selecting and writing the names and putting the slips in the box shall be performed jointly by the sheriff and the commissioners does not require the presence of the sheriff the whole time. The mere fact that he left the room from time to time will not vitiate the selection where it does not appear that anything material was done in his absence. *Com. v. Lippard*, 6 S. & R. (Pa.) 395.

Under a statute requiring the jury commissioner "to attend in open court, together with the clerk of the court and the sheriff," and under the direction of the court to draw such number of jurors as may be needed, etc., a drawing is sufficient if the sheriff was within the bar, but did not see the actual

(2) *Interchange of Duties.* — Where different duties, as to the performance of which different oaths were required and taken are imposed upon several members of a board or commission, the duties are not interchangeable so that though cast upon one they may be legally performed by another.¹

(3) *Participation by Unauthorized Persons.* — It will not be deemed enough to invalidate an array that others than those to whom a particular duty appertained performed that duty or participated in the proceedings.² Neither is it material that

drawing of one name. *State v. White* 15 S. Car. 381.

Constable's Presence. — In *Massachusetts* it is not necessary that the constable should be present when jurors are chosen or drawn, as was the custom before 1736, and there has never been any express provision showing how the constable should ascertain what persons were chosen as jurors, but the constable has always been required, in general terms, to summon the persons, etc. *Com. v. Besse*, 143 Mass. 80.

The *Louisiana* Act No. 89 of 1894 does not require the jury commission to meet at the court house or at the parish site. The act authorizes the clerk to designate the place of meeting, and for good and sufficient reasons he can call the commission together at any convenient point in the parish. If the deputy clerk participates in the drawing of the jury immediately under the control and supervision of the jury commission, and does acts by their direction, these acts are those of the commission, and, if irregular, must be imputed to the commission. *State v. Johnson*, 47 La. Ann. 1092.

Absence of Unqualified Commissioner. — A venire drawn by a jury commission in the absence of a member who has not qualified is legal and regular. *State v. Wells*, 33 La. Ann. 1407.

Impeachment by Officer of Record Showing His Presence. — The testimony of a clerk will not be received to show his absence from the drawing of the venue when the *proces verbal* of the drawing, signed by himself, recites his presence. *State v. Revells*, 31 La. Ann. 387.

Right to Appeal on Question of Quorum. — Whether or not the panel from which the jurors are drawn was selected by a quorum of the commissioners is a question of fact as to which the appellate court has no jurisdiction. *State v. Arata*, 32 La. Ann. 193.

1. When the oath of one officer ap-

plies to the duty of drawing names from the box, and the oaths of the other persons apply to other duties, their respective oaths do not accompany an exchange of duties. Hence, where the duty of the clerk is that of drawing names from the box, and the names are drawn by another officer upon whom that duty is not imposed, the drawing is irregular. *Gott v. Brigham*, 45 Mich. 429.

If, by statute, it is the duty of the clerk to draw the names from the box, it is a good ground of challenge to the array that the drawing was by the sheriff. *People v. Labadie*, 66 Mich. 702, citing *Atkinson v. Morse*, 63 Mich. 276.

Nonprejudicial Irregularities — Writing Names — Designating Residence. — A venire will not be set aside because one commissioner wrote the names on a portion of the ballots, or because there was merely a number on the ballot designating the ward wherein the juror resided, where it appears that the names were so written in the presence of the other commissioners and the clerk, although the statute required the clerk to write the names, and also that the ballots should show the residence of the juror, the matters in question being mere irregularities within the meaning of a curative act, especially where no prejudice is charged. *State v. White*, 46 La. Ann. 1273.

2. *State v. White*, 46 La. Ann. 1273.

Division of Duties of County Clerk. — In *Mapes v. People*, 69 Ill. 523, one clerk of a county wherein the duties of the office of county clerk were divided assisted in the drawing, instead of another clerk to whom the duty properly appertained, and it was held that as the clerk who acted was county clerk *de facto*, there was no ground for a challenge to the array.

Necessity of Participation or Presence of Commissioners Other than Clerk. — Under the Revised Statutes of *Indiana* (1881)

persons other than those properly constituting the board were present during the proceedings or took part therein.¹

f. CONDUCT OF DRAWING—(1) *Generally*.—Sometimes the commissioners have no discretion in making a drawing, but must list the names taken from the box,² and it has also been held that statutory requirements of exhaustion of the box or wheel before replacing names previously drawn³ or before refilling the

the jury commissioners are not required to draw the names to be inserted in venires for juries from the box prepared for that purpose, nor is their presence required when the drawing takes place. This is to be done by the clerk alone, and the presence or assistance of any one else is not essential. *Doolittle v. State*, 93 Ind. 272.

Officiation by Sheriff's Deputy.—The fact that a deputy sheriff officiated with others at the drawing of jurors where by statute the sheriff or under sheriff was designated as the officer to act will not invalidate the drawing. *State v. Bohan*, 19 Kan. 28.

Sheriff Acting for Clerk by His Direction.—The mere fact that a clerk, while writing down the list, requested the sheriff to draw the names of the jurors from the box will not vitiate the array. *Pratt v. Grappe*, 12 La. 451.

Mode of Objection to Action of Incompetent Person.—An objection to the drawing of the grand jury by an incompetent person for the reason that it might have affected the composition of the petit jury must be taken by challenge to the array, and comes too late on appeal. *State v. Underwood*, 6 Ired. L. (N. Car.) 96.

1. *Participation by Unauthorized Officer*.—Where all the officers designated by statute officiated at the drawing, the fact that another official, named through oversight of the judge who ordered the drawing, participated therein will not vitiate it. *Hunt v. Mayo*, 27 La. Ann. 197.

The fact that a clerk to a county officer who *ex officio* was a member of the jury commission was present at a meeting of the board will not affect the validity of the proceeding where it does not appear that the clerk participated in the preparation of the list or drawing further than to furnish names from the books of the officer, which were in his possession and under his control. *State v. Merriman*, 34 S. Car. 16.

Exclusion of General Public.—Where the statute simply provides that juries

shall be drawn "in the presence of the clerk of the court and the sheriff of the county," and those officers are present, the exclusion of the general public will not vitiate the panel. *State v. Merri-man*, 34 S. Car. 16.

Under the *Louisiana* Act No. 44 of 1877, the clerk is an essential and indispensable member of the jury commission, and no jury can be legally drawn in his absence and without his co-operation. *State v. Conway*, 35 La. Ann. 353.

2. The sheriff and county commissioners have no right to make any selection of jurors, or to exclude a single juror whose name is drawn out of the wheel. *Opinion of Ct.*, 1 *Browne* (Pa.) 121.

Laying Aside Names Drawn.—An irregularity consisting of the action of commissioners in laying aside the names of persons otherwise qualified, for the reason that they are ignorant as to whether such persons are residents of the county, will not invalidate the panel if the list is completed by the names of other duly qualified persons. *State v. Wilcox*, 104 N. Car. 847.

Statute Silent as to Mode.—If the statute is silent as to the manner in which jurors are to be drawn it is immaterial that the drawing is fortuitous. *Bena-way v. Conyne*, 3 Pin. (Wis.) 196.

Replacing Names Drawn.—Where a statute does not contemplate that the name of a juror once drawn from the box shall be restored, it is error on the part of the commissioners to replace in the box a name which has been legally and intentionally drawn. *Wilkins v. State*, 112 Ala. 55.

Rejecting Disqualified Persons.—Where the names of persons unqualified are drawn by the commissioners they may be rejected, the names already drawn replaced in the box, and the names of others substituted for those rejected. *Lindley v. Kimball*, 4 Blackf. (Ind.) 189.

3. *State v. Petrie*, 25 La. Ann. 386; *Wise v. Otter Creek Lumber Co.*, 86 Mich. 40.

box¹ must be complied with. But it has also been held that the failure to obey a statutory provision requiring the commissioners to replace the names of defaulting or excluded jurors will not be fatal.²

(2) *Number of Names.*—With respect to the number of jurors to be drawn statutory requirements should be followed,³ as likewise should the terms of an order describing the number to be drawn,⁴ and it has been held that where the list contains more

In *People v. Coffman*, 59 Mich. 1, a complaint that the clerk, on drawing one juror, failed to return the names drawn to each township package before proceeding to draw another jury was held immaterial where by statute it was provided that at the next succeeding drawing of jurors the drawing should commence from the package next in numerical order from the one from which the last name was drawn at the last preceding drawing, until the whole number of jurors should be drawn, and in the absence of any provision for the return of the names to the several packages until the list returned should have been exhausted.

1. *Quashal of Array for Irregularity.*—In *Kell v. Brillinger*, 84 Pa. St. 276, it was held that under the *Pennsylvania* Act of March 18, 1874, providing that when an array is quashed for irregularity the court shall order a new selection, and that the commissioners shall take all names from the wheel, make a new selection, and place the names unselected in the wheel, names which were in the wheel at first and which were taken therefrom cannot be deposited therein on the second selection.

Destruction of Slips in Box Before Refilling.—Where it is required by statute that the jury box must be exhausted before the commissioners have any power or authority to fill another box, it is error for them, on discovering that there are not sufficient names remaining in a box from which they are about to draw, to destroy the slips already in the box and to proceed to fill another box. *Steele v. State*, 111 Ala. 32.

2. The omission of commissioners to replace in the wheel the names of defaulting or excused jurors is not a ground of complaint when no injury has been sustained by such omission. *Com. v. Valsalka*, 181 Pa. St. 17; *Roland v. Com.*, 82 Pa. St. 321.

3. *Hewitt v. Gage*, 71 Mich. 287.

Selection of Less than Statutory Number.—Where, by statute, it was provided

that a list of one hundred names be selected, and that if from any cause the commissioners were unable to select that number they might select such less number as they might agree upon, it was held that the selection of ninety-seven names was not prejudicial. *State v. Straub*, 16 Wash. 111.

Effect of Excess of Names on List.—Where the number to be listed is specifically designated by statute the fact that jurors are drawn from a list containing more than the prescribed number of names is an irregularity which will require the array to be quashed. *Gladden v. State*, 13 Fla. 623.

Right to Vary Statutory Requirement.—Where the number of names to be drawn is regulated by statute, the court has no power nor has the accused any right to demand that a different number be drawn. *Burfey v. State*, 3 Tex. App. 519.

Discretion of Court.—Where, by statute, the court, when in its opinion more than twenty-four jurors may be necessary, is authorized to direct that an additional number not exceeding twenty-four be drawn, the fact that thirty-five were drawn will not render the drawing objectionable. *People v. Coughlin*, 67 Mich. 466.

Maximum and Minimum Number.—Under a statute providing that in a capital case there shall be drawn from the jury box not less than twenty-five nor more than fifty names to constitute a part of the venire from which the trial jury shall be selected, it was held that while the accused had the right to have the minimum but not the maximum number drawn at his election or on his demand, the number of names to be drawn between the prescribed numbers was discretionary with the court, having reference to the circumstances, and further that such discretion was not revisable. *Clarke v. State*, 87 Ala. 71.

4. *Drawing Fewer Names than Ordered.*—If by any error or inadvertence a less

than the statutory number it may be rectified.¹ Where, by statute, a prescribed number of names is required to be drawn from the box, and the persons whose names are so drawn are required to be summoned, the fact that some of the names are returned "not found," "dead," or the like is not a ground for quashing the array where the facts relative to the persons so returned were not known at the time of the drawing.²

Persons Exempt by Reason of Prior Service. — And though it may be provided by statute that persons who have served as jurors shall not be again liable to jury duty within a prescribed period, the panel will not be deemed objectionable because of inadvertence in drawing persons who are exempt by reason of such prior service.³

(3) *Order of Drawing*—(a) *Grand and Petit Jurors.* — Although probably the better practice would require that grand and petit jurors should be drawn separately, yet the fact that they are drawn together is not objectionable where the names, though drawn at one time, are kept apart, so that the service for which they are intended is apparent. However, this is a matter that is

number of names is drawn than was ordered, the order is not satisfied, and so long as the proceedings are *in fieri* the power of the court to correct the error is undoubted. *Wilkins v. State*, 112 Ala. 55. And see *Darby v. State*, 92 Ala. 9; *Roberts v. State*, 68 Ala. 515.

1. *Hewitt v. Gage*, 71 Mich. 287; *Wilkins v. State*, 112 Ala. 55.

Where a challenge to the array was based on the ground that an excessive number of jurors was returned from certain townships, there was held to be no error in ordering the clerk to reduce the lists by striking off all names below the number appearing thereon to which each township was entitled. *People v. Fuhrmann*, 103 Mich. 593.

2. *Rolland v. Com.*, 82 Pa. St. 306; *Foust v. Com.*, 33 Pa. St. 338; *Showers v. Com.*, 120 Pa. St. 573; *State v. Wittington*, 33 La. Ann. 1403.

In the Federal Courts it is no ground for challenge to the array that veniremen died between the time their names were placed in the wheel and the time they were drawn therefrom. *Pullman's Palace Car Co. v. Harkins*, 17 U. S. App. 22, 55 Fed. Rep. 932.

Failure to Destroy Slips. — The fact that the sheriff and the jury commissioners did not destroy the slips containing the names of absent or deceased persons and draw others in the place of them is not a sufficient reason for quashing the array where

the facts were unknown to them at the time of the drawing. *Rolland v. Com.*, 82 Pa. St. 306.

3. **Failure to Return Names to Box.** — The fact that the names of jurors exempt because of prior service were not returned to the wheel at the time of the drawing, as required by statute, is not a ground of challenge to the array where no injury has been sustained by the neglect or omission to comply with the statutory requirements. *Rolland v. Com.*, 82 Pa. St. 306.

Exemption by Prior Service. — Where the design of a statute is that no one person shall be required to serve as a juror a second time until all qualified persons shall have served respectively in rotation, the same persons should not be selected for successive terms. *Clark v. Saline County*, 9 Neb. 516.

Validity of Panel. — That the names of persons who are entitled to exemption from jury duty appear in the box will not invalidate the panel. *State v. Merriman*, 34 S. Car. 16.

Remedy for Improper Drawing. — Where, in drawing a jury, the names returned from a township are exhausted, the clerk should draw the jury for a second term during the same year from the remaining townships; but his failure to do so is not good ground for challenge to the array, as the rights of litigants can be fully protected by challenging the twice-drawn jurors on the ground that they have served as jurors

entirely regulated by statute, and mere irregularity in this respect will not usually vitiate the panel of petit jurors.¹

(b) *More than One Panel.*— But panels drawn for different courts should be kept separate and distinct.²

(4) *Recording Names.*— Likewise the commissioners, or such of their number as act in a clerical capacity, should obey statutory provisions respecting the writing down and recording of the names drawn.³

within the previous year. (How. Stat., § 7584.) *Wise v. Otter Creek Lumber Co.*, 86 Mich. 40.

1. In *Alabama* the commissioners are required first to draw a sufficient number of names of persons to serve as grand jurors, and then a sufficient number of petit jurors. *Peters v. State*, 100 Ala. 10.

The commissioners are required first to draw the regular number of names for grand jurors, and then the requisite number for petit jurors (Code, § 4299); and if they draw the entire number for both grand and petit jurors, then select the requisite number for grand jurors and leave the others to act as petit jurors, a special venire partly composed of such jurors may be quashed; and as the commissioners have no power to meet on a subsequent day and correct their irregular action, a special venire partly composed of jurors drawn by them on such subsequent day may likewise be quashed. *Wells v. State*, 94 Ala. 1.

If the commissioners draw the entire number for both grand and petit jurors, and then select from them the requisite number to act as grand jurors, the irregularity is not good ground of challenge to the array or motion to quash the venire. *Murphy v. State*, 86 Ala. 45.

Where the Order of Drawing Grand and Petit Jurors Is Not Specified by Statute, it is no ground of objection to a panel of petit jurors, no unfairness being imputed to the officers, that they drew grand and petit jurors at the same time, and as the names were taken from the boxes placed them alternately on the grand and petit juries according to their respective localities and standing in the county. *Dotson v. State*, 62 Ala. 141.

Under the California Code of Civil Procedure, § 204 *et seq.*, as amended in 1880, there was no distinction in the selection of grand and petit jurors, but the names of all were to be placed in

the same box, and the duty of designating in the order the number of grand and trial jurors to be drawn respectively was not imposed on the court. *People v. Crowey*, 56 Cal. 36.

In *Georgia*, at one time, after selection of grand jurors from the list made from the tax book by the clerk, those remaining constituted the petit jury. *Malone v. State*, 8 Ga. 408.

2. *Keeping Panels Distinct.*— It is immaterial that jurors for two different courts were drawn at the same time where it appears that they were kept entirely distinct, as much as though the panel of each was given to the sheriff. *Crane v. Dygert*, 4 Wend. (N. Y.) 675, *distinguishing* *Gardner v. Turner*, 9 Johns. (N. Y.) 260, wherein a clerk drew out seventy-two names and put them into a list, and then arbitrarily designated thirty-six names as a panel for one court, and directed that they be summoned accordingly.

Separate Lists for Separate Courts.— Under a statute providing for the selection of jury commissioners generally, and making no provision for jury lists for particular courts, a separate list is not required for each court. *State v. Lawrence*, 38 Iowa 51.

3. *The Names of the Persons Selected May Be Written by the Clerk in the presence and by the orders of the sheriff and commissioners.* *Com. v. Lippard*, 6 S. & R. (Pa.) 395.

Necessity of Recording Forthwith.— Where, by statute, the clerk is required to record the names of the jurors as soon as the several jurors' names are drawn and written on the panels to which they belong, they should be recorded without delay and before the issuance of a *venire facias* thereon, as required by the act. *Mitchell v. Likens*, 3 Blackf. (Ind.) 258; *Mitchell v. Denbo*, 3 Blackf. (Ind.) 259.

Designation of Place of Residence.— Where, by statute, commissioners, on entering the names of jurors selected on the roll, are required to add to the

g. **REVISION OF LIST.**—It becomes necessary from time to time to revise the jury list, and this is generally provided for by statute, but mere neglect in this respect will not usually invalidate a panel containing the names of disqualified, absent, or deceased jurors when it is apparent that no injury could have resulted.¹

names the word "city" where the juror is a resident of the city, and the word "county" where they reside outside the city, it is not a ground for quashing the panel that two of the slips failed to have the residence of the jurors designated, and that nine of them had simply the abbreviation "Co." and not the county in full. *Wilkinson v. State*, 106 Ala. 23.

Performance of Clerk's Duties by Commissioner.—The venire will not be set aside because one commissioner wrote the name of the jurors on a portion of the ballots, or because there is a number only on the ballots, manifestly intended to designate the ward of the residence of the juror, it appearing that the names were written by one of the commissioners in the presence of his cocommissioners and clerk, and although the clerk is required by the act to write the names, and although the act requires the ballots should express the residence as well as the name of the juror, the irregularities indicated being within the provisions of an act (Act No. 44 of 1877) maintaining the venire and indictment unless it is shown that the irregularities caused great wrong to the accused. *State v. White*, 46 La. Ann. 1273.

Presumption of Proper Preparation of Ballots.—It is presumable that ballots in the jury box bear the names of jurors written by clerks of the District Court who have passed out of office. Hence the testimony of the incumbent clerk, on a motion to quash the venire, that he does not recognize the handwriting on three of the ballots drawn from the box, does not authorize the conclusion that persons other than the clerk wrote the names on the ballots so drawn, but the inference is that the names were written by the predecessors, or some of them, of the incumbent clerk, and of whose handwriting he had no knowledge. (Act No. 44 of 1877.) *State v. White*, 46 La. Ann. 1273.

1. **The Failure to Revise the Jury List** according to law is not a ground for objection in the absence of any showing of prejudice, *State v. Stanton*, 118 N.

Car. 1182; *State v. Smarr*, 121 N. Car. 669; nor where it does not appear that there was more than mere negligence on the part of the commissioners, *State v. Hensley*, 94 N. Car. 1021.

Revision by Successor in Office.—Where the commissioner fails or neglects to take from the venire box for several years the names of disqualified, absent, or dead jurors, a succeeding commission may cast out the names for the purposes of putting qualified jurors therein. *State v. Nockum*, 41 La. Ann. 689; *State v. Riley*, 41 La. Ann. 693.

Proving Neglect by Testimony of Clerk.—The clerk may be introduced as a witness to show the neglect of a former jury commissioner in failing to take from the box the names of disqualified, absent, or dead jurors, and his testimony in that respect is not such parol evidence as will contradict a venire previously drawn. *State v. Nockum*, 41 La. Ann. 689; *State v. Riley*, 41 La. Ann. 693.

The Presumption is in favor of the regularity of the proceedings whereby the jury list was revised. *Com. v. Brown*, 147 Mass. 585.

Return of Persons Deceased or Absent.—The fact that one person drawn on a special panel is dead and that another had removed from the jurisdiction prior to the time when the jury lists should have been revised is not a ground of challenge to the array. *State v. Hensley*, 94 N. Car. 1021.

Revision for New Drawing within Same Term.—Where the names of three hundred jurors were put in the box from which the jury was drawn for the first weeks of the terms, it was held unnecessary to revise the list and to put in additional names for the purpose of drawing a jury for a later week of the same term. *State v. Sopher*, 35 La. Ann. 975.

Under the West Virginia Act of 1891 (c. 116), the lists and ballots prepared annually by the commissioners take the place of lists and ballots made prior thereto, with which they should not be mingled; therefore a jury should be made up from a box containing ex-

9. List and Returns — a. GENERALLY. — Statutory requirements as to the making of a list of persons to serve as jurors are in the nature of a privilege to the parties, who have the right to insist that there shall be substantial compliance with the law,¹ though a material departure from essential features of such provisions may invalidate the panel and necessitate its quashal.² As heretofore stated, fraud or improper conduct, or the like, in the preparation of a list, is a good ground for quashing the array, but mere unintentional impropriety which is in no wise prejudicial will not warrant interference.³ The list itself is *prima facie* evidence that it was legally made, or that the order under which it was made was fully complied with.⁴ Where the question of identity is not

clusively ballots belonging to the last annual list. *State v. Welch*, 36 W. Va. 690.

1. *State v. Jenkins*, 32 Kan. 477.

Irregularity Affecting Portion of Panel. — The whole array is not vitiated by an irregularity in the drawing or preparation of the list affecting jurors from a particular town or city. *Com. v. Walsh*, 124 Mass. 32.

Erroneous Statement in Unnecessary Indorsement of List. — Where commissioners selected to draw jurors for a specified term made a selection and delivered the lists in envelopes indorsed as lists of jurors for the term in question, the fact that the headings to the lists mistakenly stated the term for which the lists were made was held to be no ground for vacating a special venire drawn from one of the lists, when the statute respecting the duties of the commissioners contained no requirement as to the indorsement of the lists in a manner similar to the indorsement of the envelopes. *Giebel v. State*, 28 Tex. App. 151.

Absence of Town Clerk's Signature. — In *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155, it was held that a list was not invalid because it did not contain the signature of the town clerk.

Objection — When Made. — An objection that no list was made and certified as prescribed by statute is in the nature of a challenge to the array, and comes too late after verdict, unless injury is shown to have resulted from the irregularity. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401.

2. *People v. Davis*, 73 Cal. 355; *Burford v. McGetchie*, 60 Iowa 298.

Signature, Certificate, Authentication. — A material departure from the requirements of the statute in respect to

the signature, certification, or authentication of the list is sufficient to sustain a challenge to the panel. *State v. Schumm*, 47 Minn. 373, following *State v. Greenman*, 23 Minn. 209.

3. **Fraudulent Substitution for Names Returned by Commissioners.** — In *State v. Reilly*, 4 Mo. App. 392, it appeared that the name of a person on the list had not been placed there by the commissioner, but was surreptitiously substituted for one which had been erased. Such person was discharged and the panel completed from those remaining, and it was held, no prejudice appearing, that a new trial would not be granted.

Fraudulent Omission of Names from Which "Jurors' Book" Made Up. — In *O'Connell v. Reg.*, 11 Cl. & F. 155, a challenge to the array alleged that the jurors' book had not been completed in conformity with the requirements of an Act of Parliament, and that the names of fifty-nine persons, duly qualified to serve as jurors, had been fraudulently omitted from the general list from which the book was made, and from the book itself, for the purpose of prejudicing the defendant; but the challenge did not contain any specific accusation of the sheriff or other returning officer concerned in preparing the list. Lord Lyndhurst and other of the judges were of opinion that it was bad, and that the only ground upon which a challenge to the array could be allowed by the English law was the indifference or default of the sheriff or other officer by whom the panel was returned. See pp. 247, 249, 323, 325, 348.

4. A list of jurors regularly certified and filed by the proper officers is not only *prima facie* evidence that all the persons whose names appear on it were

involved, the mere fact that a person's name is wrongly stated is immaterial.¹

b. FILING AND RECORDING — TIME. — The list, when made up in accordance with existing provisions of law and duly signed and certified, is generally required to be filed or recorded, for the purpose, among other things, of affording an opportunity to correct any defects or informalities which may appear;² but the mere failure to file or record a return will not present a fatal objection to the array where the statute under which the list is made, and which provides for the filing or recording, is directory only.³

duly selected, but is also *prima facie* evidence of the selection of as many jurors as there are names on the list corresponding with the total number which the court has ordered to be selected. *Com. v. Valsalka*, 181 Pa. St. 17; *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155.

1. Variance in Initial of Middle Name.

— Where an issue has been tried by a person legally qualified to try such issues, neither party can object to a variance between the name by which he was known and called and that by which he caused himself to be registered. *Shaw v. Newman*, 14 Fla. 128. In this case it appeared that a person who caused himself to be registered on a list of voters as Robert D. was selected, summoned, and sworn under the name of Robert S., by which name he was known and called, and the court refused to set aside the verdict for this reason, there being no question of identity.

In *Pool v. Callahan*, 88 Ga. 468, it was held that a juror who is sometimes known as W. W. Bradley and sometimes as W. M. Bradley, and who wrote his name sometimes one way and sometimes the other, might be described in the jury list by either name, the evidence affirmatively tending to show that he was the identical person referred to in the jury list, and nothing appearing to the contrary.

2. In Louisiana the law prescribing the mode of drawing juries directs that a list of jurors drawn for each term shall be filed in the clerk's office as soon as completed, subject to the inspection of any person who may desire to examine it, in order that objections on account of any defects or informalities which may have occurred in the formation, drawing, or summoning of jurors, or any other defect whatsoever in the construction of the jury, shall be

made on the first day of the term. *State v. Vegas*, 19 La. Ann. 105.

Publication of List. — Where the panel of jurors drawn for the term is set aside for irregularities in the drawing the court has the power in term time to direct another venire for immediate service; and Laws 1896, No. 99, §§ 5-7, requiring thirty days' publication, before the beginning of the term, of the names of the jurors composing the regular panel, has no application to the second venire. *State v. Anderson*, 49 La. Ann. 1576.

In *Georgia* the county judge is not required by law to keep in his office a list of persons whose names are in the jury box. The list he is required to make is for use in furnishing the box. (Code, § 298.) *Smith v. State*, 63 Ga. 168.

3. Johnson v. State, 59 N. J. L. 535; *Gardner v. State*, 55 N. J. L. 17.

The Failure to Make Any Return is not a fatal defect where by statute it is provided that where no return is made the names previously returned may be retained and used. *Thomas v. People*, 39 Mich. 309.

Return by Successors in Office. — Where city officials choose jurors as required by law, but make no return, their successors in office may return the names so chosen. *McGann v. Hamilton*, 58 Conn. 69.

The Florida Statute (McClel. Dig. 621) requiring the county commissioners to select from the registered voters of the county a list of three hundred persons properly qualified to serve as jurors, which list, certified and signed by the chairman of the board, shall be forthwith delivered to the clerk, and by him recorded in the minutes of the county commissioners, does not require such list to be recorded in the minutes of the Circuit Court. *White v. State*, 26 Fla. 602.

Time of Returning or Filing the list will not be deemed important, except where the time is fixed by a mandatory statute, or prejudice has resulted or may result, it ordinarily being deemed sufficient that the return was made in fact.¹

c. COMPELLING RETURN. — When the duty of returning a proper list is obligatory the return may be enforced by the courts.²

d. CORRECTION. — An incomplete record may be corrected or amended to comport with the facts.³

10. Certificate—**a. NECESSITY.**— There is usually required to be indorsed on the list when returned, or to be attached thereto, a certificate or authentication which is evidence of compliance with the provisions of law respecting the selection, drawing, and preparation of the list,⁴ but under some circumstances noncom-

Presumption as to Record. — Where a statute requires a list to be recorded in the minutes of the county commissioners, but does not require it to be recorded in the minutes of the Circuit Court, it will be presumed that the list was properly recorded. *White v. State*, 26 Fla. 602.

Indorsement upon Venire. — Under the *Massachusetts Public Statutes* it is not necessary that the clerk or selectmen of a town should indorse upon a venire for jurors the names of the persons who are drawn. *Com. v. Besse*, 143 Mass. 80.

1. *Thomas v. People*, 39 Mich. 309; *People v. Fuhrmann*, 103 Mich. 593; *Gardiner v. People*, 6 Park Cr. Rep. (N. Y. Supreme Ct.) 155.

The Failure to File the List Forthwith is not a good ground of challenge. *State v. Gut*, 13 Minn. 341.

An irregularity consisting of failure to file the *proces verbal* of the drawing of the jury is not of such a character as to require quashal of the venire summoned after deposit of the *proces* in the clerk's office. *State v. Hall*, 44 La. Ann. 976.

In *Burlingame v. Burlingame*, 18 Wis. 285, a statute requiring the selection and return of names qualified to serve as jurors before the last day of May in each year was held to be directory, and it was further held that if the names properly selected were returned afterwards, it was no ground of challenge. *Citing Mills v. Johnson*, 17 Wis. 598.

Failure to File by First Day of Term. — Under a statute directing that the list of jurors drawn shall be filed in the clerk's office as soon as completed, sub-

ject to inspection of any person, etc. if the venire be not filed before the commencement of the term, or at the farthest at the day of the term, a new trial should be granted. *State v. Vegas*, 19 La. Ann. 105.

2. The duty of officers to return proper lists is a continuing one, and where they have failed to make proper return they may be compelled to do so by order of the court. *People v. Fuhrmann*, 103 Mich. 593.

3. An incomplete record made by the secretary of the judges who made the selection may be amended by their direction to conform to the facts, and the judge who presided at such selection may testify, in the cause wherein the panel is challenged, to the facts attending the selection and listing of the trial jurors. *People v. Durrant*, 116 Cal. 179.

4. Sufficiency of Certification. — Under the *Georgia Act of 1878*, p. 34, the clerk of the Superior Court and the ordinary were members of the board of jury commissioners, and therefore were required to certify the lists of grand and traverse jurors; but upon the passage of the Act of 1879, p. 29, they ceased to be so, and the clerk of the Superior Court was made the clerk of the board of jury commissioners, and was required to perform all the clerical duties required by law to be performed. Thus he becomes the ministerial officer of the board, and is not required to sign the certificate of the names in the respective jury boxes, but merely to transcribe them into the book required and deposit it in his office; and a list certified by the jury commissioners is sufficient. *Carr v. State*, 76 Ga. 592.

pliance with these requirements will not necessarily be fatal to the array.¹

b. FORM AND SUFFICIENCY. — This certificate should bear the signatures of the officers designated by law as the proper persons to affix their names.² Facts, and not conclusions, should be stated,³ and though a literal adherence to prescribed forms may not be absolutely necessary,⁴ good practice requires that there should be a substantial compliance with statutory provisions respecting the statements to be therein contained.⁵

The Provisions of the New Jersey Supplement (April 21, 1876) respecting the selection of juries are directory except as to the requirement of a certificate by the judges of the Court of Common Pleas, which is mandatory. *Poulson v. Union Nat. Bank*, 40 N. J. L. 563.

1. *Jackson v. State*, 76 Ga. 551; *Coker v. State*, 7 Tex. App. 83.

In *Massachusetts* it is said that there has never been any express requirement that the town clerk or selectmen shall certify in writing who were chosen as jurors by the freeholders, as was the custom before 1736, or drawn from the jury box by themselves, as has been the law since that date. *Com. v. Besse*, 143 Mass. 80.

Absence of Formal Certificate. — In *Carter v. State*, 56 Ga. 463, the jury list was headed, "A list of names of jurors in the jury box of W. county," and was followed by the words, "Given under our hands and seals," with the day and date, and was signed by the commissioners, ordinary, and the clerk of the Superior Court, but no formal certificate appeared. It was held that the law had been substantially complied with, notwithstanding that there was no formal certificate attached stating that the list was that of all the names in the jury box.

Supplying Certificate Not Attached in Time. — Where there was no doubt but that a jury list in possession of the county clerk, who was likewise clerk to the selecting board, was the same as that drawn by the board the clerk was allowed to attach the certificate though the practice was not commended. *People v. Young*, 108 Cal. 8, *distinguishing State v. Greenman*, 23 Minn. 209, in which case there appeared to be a doubt as to the identity of the list.

Objection on Motion for New Trial. — An objection that no list was made out and certified as prescribed by statute is in the nature of a challenge to the

array, and comes too late when made the ground of a motion for a new trial. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401.

2. Allowing Commissioners to Add Signatures. — The fact that the certificate was not signed by the jury commissioners is not good cause of challenge to the polls where the challenge to the array was made and withdrawn, and where, after the court had examined the lists as to their correctness, the certificate was completed by the signatures of the commissioners. *McLain v. State*, 71 Ga. 279.

Want of Signature as Ground of Challenge. — The fact that jury commissioners fail to sign a certificate of jury list drawn for the term, and which was tendered to the defendant from which to select the jury, is not a ground of challenge to the array where by statute the grounds of such challenge are confined to a single case *i. e.*, the disqualification of the summoning officer. *Coker v. State*, 7 Tex. App. 83.

3. The certificate should state the facts respecting the drawing, and not merely that it was conducted fairly and as provided by law. *State v. Payne*, 6 Wash. 563.

4. *Friend v. Hamill*, 34 Md. 298.

Necessity that Return Should Show Facts. — A *proces verbal* of the drawing showing that the acts of the jury commissioners were in accordance with statute is sufficient, and it is not necessary that the *proces verbal* should contain the evidence upon which their acts are based. *State v. Green*, 43 La. Ann. 402.

5. Compliance with Statutes. — In *Poulson v. Union Nat Bank*, 40 N. J. L. 563, it was held that a certificate under the N. J. Supplement of April 21, 1876, that the selection was "in all respects according to the provisions of the act entitled 'An act concerning jurors, approved April 21, 1876,'" was a substantial compliance with the terms

c. CORRECTION. — It has been held that omissions in a certificate may be supplied by parol evidence,¹ and it has also been held that the irregularity of a drawing may be proven by the testimony of the officers who took part therein, although the evidence contradicts the certificate itself.²

11. Irregularities — *a.* PRESUMPTIONS. — In the absence of anything in the record to the contrary³ it will be presumed that

of the provisions contained in the supplement.

Failure to State Reason for Noncompliance with Statute. — It is not material that the certificate fails to state the reason why a selection of a less number of names than prescribed by statute was made. *State v. Straub*, 16 Wash. 111.

Failure to Follow Statutory Language. — A certificate that "the foregoing list of names to serve as jurors were selected in conformity with acts of assembly in such cases made and provided," is a substantial compliance with a statutory requirement that the judge shall append to the list a certificate that "said list of names has been duly selected in conformity with and according to the spirit and intent of this act." *Friend v. Hamill* 34 Md. 298.

Incorrect Reference to Statute. — A list is not invalidated because of a certificate by the commissioners that it was prepared under a particular act when the proof shows that all the statutory provisions in force at the time of making the list were complied with. *State v. Lee*, 35 S. Car. 192.

One Certificate to Two Lists, one of the grand and the other of the petit jurors, following one head, is substantially in compliance with the statute requiring commissioners to make separate lists of the grand and petit jurors, which lists shall be certified, etc. *State v. Peterson*, 61 Minn. 73.

A Clerical Error in a certificate consisting of using the words "commissioners of said county," instead of "jury commissioners," is cured by a statute providing that no verdict shall be set aside, etc., for defects in or relative to the return of jurors etc. *Lynch v. Com.*, 77 Pa. St. 205.

Omission of Date of Order of Drawing. — Where the object of stating in the certificate, the date of the order directing the drawing is the identification of the order, the omission of the date is not fatal if the record sufficiently identifies the order and the date of the drawing, and the proceedings are regular in all

other respects. *People v. Iams*, 57 Cal. 115.

Failure to Record Certificate. — The omission of a clerk of a county board to record the certificate of the chairman to the list does not constitute an irregularity in the drawing, summoning, or impaneling of jurors. *Keech v. State*, 15 Fla. 591.

Certification through Medium of Clerk. — By the *Washington Code of Civ. Pro.*, § 58, the county commissioners are required to certify to the clerk of the Superior Court; and in *State v. Bokien*, 14 Wash. 403, a certificate that "pursuant to section 58 of Hill's Code, the commissioners of P. county have selected one hundred names from persons of their county competent to serve as petit jurors, and hereby instruct the clerk of the board to certify the same to the clerk of the Superior Court as the list of petit jurors drawn for the ensuing year, as follows," and containing the names of the persons selected and the signature of the chairman of the board, was held sufficient.

Presumption of Selection at Legal Meeting. — Where the certificate to the list states that the persons were selected at a regular meeting in January it will be presumed that the selection was made at the annual meeting in January as required by law. *State v. Gut*, 13 Minn. 341.

Objection After Verdict. — An objection that the jury list was not properly certified is too late when made after verdict. *Nikell v. State*, 62 Ga. 368.

1. Where the clerk's certificate to the list fails to show that the persons therein named were properly drawn, his testimony is admissible to show that the drawing was proper. *State v. Gut*, 13 Minn. 341. See also *People v. Young*, 108 Cal. 8.

2. *State v. Gut*, 13 Minn. 341; *State v. Brecht*, 41 Minn. 50.

3. The record must show affirmatively the alleged irregularity complained of, *People v. Madison County*, 125 Ill. 334; and it cannot be shown by affidavit, *Roberts v. Com.*, 94 Ky. 499.

the officers charged therewith performed their duty in accordance with existing provisions of law,¹ the burden of proof as to the illegality of proceedings being cast on the party who makes the charge.²

b. FRAUD OR PREJUDICE. — In the absence of fraud, collusion, or the commission of some wrong whereby a party has been prejudiced and has sustained material injury, or unless prejudice or injury can be inferred, the irregularity or informality which will constitute a good objection must be such as will deprive the complaining party of the opportunity to secure a competent and impartial jury.³

Impeachment by Seizing Officer. — An officer who has participated in the selection of persons eligible as jurors cannot impeach the list so made. *U. S. v. Collins*, 1 *Woods* (U. S.) 514.

1. *Smith v. State*, 88 Ala. 73; *English v. State*, 31 Fla. 356; *Woodward v. State*, 33 Fla. 508; *State v. Johnson*, 47 La. Ann. 1092; *People v. Coughlin*, 67 Mich. 466; *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155; *State v. Cardoza*, 11 S. Car. 246; *Osgood v. State*, 64 Wis. 472.

Recitals — Proceeding According to Law. — The testimony of a sheriff as to the time when he prepared the jury list which fails to designate the exact day, but which does state that he prepared the list in accordance with the existing provisions of law, will warrant a presumption that he did his duty. *Childs v. State*, 97 Ala. 49.

"In the Manner Required by Law." — A record that the jurors were "drawn, selected, tried, and sworn in the manner required by law" would furnish a presumption that qualified jurors acted. *Ohio River R. Co. v. Blake*, 38 W. Va. 718.

"Good and Lawful Men, Duly Appointed as the Statutes Require." — After verdict it will be presumed that the names of the jurors specified in the venire facias were drawn according to law, where the writ itself expressed that they were "good and lawful jurors of your county, duly appointed as the statutes require." *Collier v. State*, 2 Stew. (Ala.) 388; *State v. Williams*, 3 Stew. (Ala.) 454.

"Thereupon Came as a Jury." — A record stating that "the defendant having been brought into court, thereupon came as a jury," etc., is sufficient to show that the jury was drawn and called according to law. *O'Kelly v. Territory*, 1 *Oregon* 51.

Names of Persons to Be Summoned on Venire. — Where the writ of special venire requires the summoning of the persons whose names are on the list attached to the writ, it is sufficiently manifest that the persons named were selected before the writ issued, and in the absence of anything to the contrary it will be presumed that the selection was according to law. *Smith v. State*, 21 Tex. App. 277.

Failure to Identify Handwriting on Ballots. — Though a clerk in office testifies that he does not recognize the handwriting on ballots drawn from the box, it may be fairly inferred that the names were written by the predecessor of the incumbent rather than by strangers. *State v. White*, 46 La. Ann. 1273.

Presumption of Clerk's Obedience to Judge's Order. — Where the record shows that the panel was obtained upon the order of the judge directing the clerk to issue a special venire to the sheriff, it will be presumed that the clerk duly performed the duties required of him by law by repairing to the office of the county clerk and there drawing names from the jury box and inserting them in the venire. *People v. Madison County*, 125 Ill. 334.

2. *People v. Coughlin*, 67 Mich. 466; *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155.

3. *California*. — *People v. Davis*, 73 Cal. 355.

Colorado. — *Boykin v. People*, 22 Colo. 496.

Idaho. — *People v. Ah Hop*, 1 *Idaho* 698.

Illinois. — *Wilhelm v. People*, 72 Ill. 468.

Louisiana. — *State v. Daniel*, 31 La. Ann. 91; *State v. Newhouse*, 29 La. Ann. 824; *State v. Johnson*, 47 La. Ann. 1092; *State v. Simmons*, 43 La. Ann. 991; *State v. Gonsoulis*, 38 La.

12. Objections — Generally. — To be available, an objection based on alleged irregularities on the part of the commissioners or other like officers must clearly and explicitly point out the ground relied on,¹ for errors and irregularities in selecting and drawing jurors and returning the panel may be waived by the failure to make proper and timely objections.²

Time of Making. — When the time within which the objection must be made is limited by statute, the failure to comply therewith will preclude successful objection thereafter.³

Ann. 459; *State v. Sandoz*, 37 La. Ann. 376; *State v. Rector*, 35 La. Ann. 1098; *State v. Harris*, 34 La. Ann. 118; *State v. Dozier*, 33 La. Ann. 1362; *State v. Smith*, 33 La. Ann. 1414; *State v. Miller*, 26 La. Ann. 579; *State v. Curtis*, 44 La. Ann. 320; *State v. Taylor*, 43 La. Ann. 1131; *State v. McCarthy*, 44 La. Ann. 323.

Maine. — *State v. Neagle*, 65 Me. 468.

Missouri. — *State v. Reilly*, 4 Mo. App. 392.

Nebraska. — *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139.

Nevada. — *State v. Gray*, 19 Nev. 212.

New York. — *People v. Kiernan*, 101 N. Y. 618; *Cox v. People*, 80 N. Y. 500; *Friery v. People*, 2 Keyes (N. Y.) 424, 54 Barb. (N. Y.) 319; *People v. Ransom*, 7 Wend. (N. Y.) 417.

North Carolina. — *State v. Hensley*, 94 N. Car. 1021.

South Carolina. — *State v. Stephens*, 11 S. Car. 319.

Virginia. — *Suffolk v. Parker*, 79 Va. 660.

Washington. — *State v. Straub*, 16 Wash. 111.

England. — *Hill v. Yeates*, 12 East 229.

Drawing Disqualified Persons. — Where there is no pretense of corruption or improper motive, the fact that through carelessness of the commissioners there were in the wheel the names of a large number of persons who for various reasons were disqualified to act was held not to vitiate the whole selection and drawing. *State v. Foster*, 32 La. Ann. 34.

Mistake of Listing Board — Excusing Disqualified Jurors. — It cannot be said that harm resulted to one accused of crime from the fact that the names of two persons who were not qualified appeared on the jury list by mistake of the listing board, where it also appeared that the court, on becoming aware of the fact, excused them for cause. *People v. Young*, 108 Cal. 8.

Gross Neglect of Officials. — Irregularity in the drawing of an additional panel of jurors is not a ground for granting a new trial where no injury or prejudice has resulted to the prisoner, although the officers whose duty it was to attend to the drawing were guilty of gross neglect of their duty. *Ferris v. People*, 35 N. Y. 125, 31 How. Pr. (N. Y.) 140.

Jurors Conceded to Be Unobjectionable. — Where counsel for the accused admits not only the personal qualifications of the jurors but also that as jurors they are unobjectionable in all respects, the panel should not be quashed where no possible injury could result to the defendant from selecting a jury therefrom. *Boykin v. People*, 22 Colo. 496.

The Supervisory Power of the Court over a selection made by jury commissioners can only be exercised in a clear case of fraud or corruption, or where some great wrong has been committed in the selection. *Cavitt v. State*, 15 Tex. App. 190.

1. *State v. Green*, 49 La. Ann. 60.

Where a statute requires that the list returned shall be set down in a book kept for that purpose, and also on separate slips put in a numbered box, and a sufficient number be drawn therefrom, etc., a challenge which avers that at the time the persons summoned on the original venire to serve as jurors at the present term were drawn there was not among the records or papers of the court or in the books thereof any list or copy of the list is insufficient because failing to aver that no list was returned, or that the names were not deposited in the box from which the drawing was made. *Stevens v. Richer*, 1 How. (Miss.) 522.

2. *Brown v. State*, 9 Neb. 157.

3. *State v. Labauve*, 46 La. Ann. 548; *State v. Curtis*, 44 La. Ann. 320.

In Louisiana, by statute, objections to error and irregularity of the drawing

Before Entering on Trial. — The usual or ordinary mode of presenting objections of this character, and where no other mode is pointed out by statute, is by challenge to the array,¹ from which it necessarily follows that when the facts on which the objection is made were known or might have been ascertained in time to present the objection by challenge, it comes too late when made after entering upon the trial.²

After Verdict. — Neither can the objection be made after rendition of verdict.³

After Judgment. — Nor after judgment thereon.⁴

are required to be filed on the first day of the term, or exceptional circumstances to be shown which will excuse the failure to interpose the objection at that time, as fraud, wrong, or the like, of which the objecting party was ignorant and which rendered compliance with the terms of the statute impracticable. *State v. Vegas*, 19 La. Ann. 105; *State v. Hoffpauer*, 21 La. Ann. 609; *State v. Johnson*, 31 La. Ann. 368; *State v. Daniel*, 31 La. Ann. 91; *State v. Curtis*, 44 La. Ann. 320.

Change of Terms. — Defects, if any, in the drawing of a jury after the passage of an act relative to changes in the terms, and before the act becomes operative, are within the purview of a law requiring objections for any defects or irregularities to be made on the first day of the term. *State v. Desrosche*, 47 La. Ann. 651.

Disqualification of Commissioner. — In *State v. Ashworth*, 41 La. Ann. 683, a statute requiring all objections to the manner of drawing jurors or to any defect or irregularity that can be pleaded against any array or venire to be urged on the first day of the term, or otherwise to be considered waived, was held to apply to an objection based on the failure of a clerk of the court to qualify by oath before acting as jury commissioner. And see *State v. Vance*, 31 La. Ann. 399.

1. See *infra*, *Challenges and Objections*; *People v. Ah Lee Doon*, 97 Cal. 171; *Buford v. McGetchie*, 60 Iowa 298; *State v. Da Rocha*, 20 La. Ann. 356; *State v. Morgan*, 20 La. Ann. 442; *Robinson v. Mulder*, 31 Mich. 75; *Pierson v. People*, 18 Hun (N. Y.) 239; *State v. Underwood*, 6 Ired. L. (N. Car.) 96; *Ray v. State*, 4 Tex. App. 450.

2. *Suffolk v. Parker*, 79 Va. 660; *State v. Jenkins*, 32 Kan. 477. See also *Jennings v. Asten*, 5 Duer (N. Y.) 695.

Under the *Pennsylvania* Act of 1814, pleading the general issue and going to trial was a waiver of any defect in drawing, summoning, or returning jurors. *Com. v. Chauncey*, 2 Ashm. (Pa.) 90.

After Drawing Jurors. — Objection must be made at the time the name of the juror is drawn, and comes too late after a drawing of several jurors. *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155.

Objection Comes Too Late After Formation of the Jury without objection. *Brill v. State*, 1 Tex. App. 572.

3. *Alabama*. — *Collier v. State*, 2 Stew. (Ala.) 388; *State v. Williams*, 3 Stew. (Ala.) 454.

Arkansas. — *Brown v. State*, 12 Ark. 623.

California. — *People v. Ah Lee Doon*, 97 Cal. 171.

Georgia. — *Gormley v. Laramore*, 40 Ga. 253; *Stewart v. State*, 66 Ga. 90; *Mitchell v. Bradberry*, 76 Ga. 15.

Idaho. — *People v. Ah Hop*, 1 Idaho 698.

Massachusetts. — *Amherst v. Hadley*, 1 Pick. (Mass.) 38.

Pennsylvania. — *Com. v. Freeman*, 166 Pa. St. 332.

South Carolina. — *State v. Stephens*, 11 S. Car. 319.

Texas. — *Brill v. State*, 1 Tex. App. 572.

Knowledge of Irregularity Before Verdict. — Where a person is legally competent to act as a juror, but is irregularly selected, and the irregularity becomes known before verdict, a new trial should be granted on motion by either party, unless the party making the objection has expressly waived all objection to the juror arising from irregularity in the manner of his selection. *Mann v. Fairlee*, 44 Vt. 672.

4. *State v. Courtney*, 28 La. Ann. 794.

On Motion in Arrest. — Nor on motion in arrest of judgment.¹

On Motion for New Trial. — Nor can it be made on motion for a new trial, except, of course, in cases in which special circumstances are presented, and wherein it would be manifestly unjust to deny relief.²

On Appeal. — Nor can the objection be urged for the first time in the appellate court.³

VII. PROCURING ATTENDANCE OF JURORS AT TRIAL COURT — 1. The Process — a. COMMON-LAW PRACTICE. — The common-law venire, or writ of venire facias, was a command to the sheriff, coroner, or persons specially nominated, to cause to come a certain number of persons to serve as jurors. It included in the command the selection from the body of the county of duly qualified persons, the summoning of the persons thus selected, and a return of the writ with a statement of the proceedings thereunder.⁴ However, the jurors were not summoned under the venire, their names only being returned in the panel. Thus they were unavoidably put in default, and compulsory process was awarded, called in the Common Pleas a writ of *habeas corpora juratorum*, and in the King's Bench and the Exchequer a *distringas juratores*, whereby the officer to whom the writ was directed was commanded to

1. State v. Jackson, 36 La. Ann. 96; State v. White, 35 La. Ann. 96; State v. Swift, 14 La. Ann. 839.

2. Ray v. State, 4 Tex. App. 450; State v. Underwood, 6 Ired. L. (N. Car.) 96.

3. Howard v. State, 108 Ala. 571; Littell v. Wilcox, 11 Mont. 77; Mitchell v. Com., 33 Gratt. (Va.) 845.

4. State v. M'Elmurray, 3 Strobb. L. (S. Car.) 33; Perry v. Com., 3 Gratt. (Va.) 602; Brewer v. Jacobs, 22 Fed. Rep. 217; U. S. v. Antz, 4 Woods (U. S.) 174, 16 Fed. Rep. 119.

In Posey v. State, 73 Ala. 490, an order directed the sheriff to summon one hundred jurors, "including the regular venire," and it was held that by the term "venire" was meant the order which the clerk was required to issue for the summoning of petit jurors under section 4744 of the code.

A *Venire Facias de Novo* was a new writ to summon a new jury, where, by reason of some irregularity or defect in the proceedings on the first venire or on the trial the proper effect of that writ had been frustrated, or the verdict had become void in law, as where the jury had been improperly chosen or had given an uncertain or ambiguous or defective verdict, and was not discretionary. Among other grounds for the writ was irregularity or error in

the proceedings on the venire facias in the first trial. Witham v. Lewis, 1 Wils. 48; Brown v. Ralston, 4 Rand. (Va.) 518; 28 Am. and Eng. Encyc. of Law (1st ed.) 199; Stephen on Pl. 128.

Distinction between Venire Facias de Novo and New Trial. — A "venire facias de novo" and a "new trial" are very different things, though alike in some points. They agree in this: that a new trial takes place in both, and that the court may or may not grant either. They differ in this: that the venire facias is the ancient proceeding of the common law, the new trial a modern invention to mitigate the severity of the proceeding by attain. New trials are generally granted where a general verdict is found; a venire de novo upon a special verdict. The most material difference between them is that a venire must be granted upon matter appearing upon the record, but a new trial may be granted upon things out of it; as, if the verdict be contrary to the evidence, or the judge has given wrong instructions. But a venire can only be granted in one of two cases: 1. If it appear upon the face of the verdict that it is so imperfect that no judgment can be given upon it; 2. Where it appears that the jury ought to have found other facts differently. Witham v. Lewis, 1 Wils. 55.

have the bodies of the persons returned, or to distrain them by their lands and goods for their appearance on the appointed day. This mode of procuring the attendance of jurors has long since fallen into disuse, and at present they are obtained directly either through the medium of the venire itself in its various modified forms, by summons or the like, or through the statutory substitutes therefor, and without resort to the fiction of the common law.¹

b. NECESSITY FOR PROCESS — (1) Generally. — At common law a venire was indispensable to authorize the summoning of a jury, and where the common-law practice prevails, or has been substantially adopted by statute, except in the cases hereinafter referred to, the omission of the venire or corresponding process is a fatal defect.² But the fact that no venire issued in a par-

1. 3 Black. Com. 353; Bac. Abr., Juries, B. 2.

Origin of the Rule of the Distringas. — On the severance of the Court of Common Pleas from the *curia regis* at Westminster, it was provided by Stat. 13 Edw. I., c. 30, that the assize justices should try issues of "small examination;" hence the venire *nisi prius*, diverting the return to the justices of assize in the particular county. In order, however, to give opportunity to see the names of the jurors, provision was made, in consequence of the Stat. 42 Edw. III., c. 11, for a fictitious writ with a return of the names only, and a second writ of *distringas* *habeas corpora juratorum* in consequence of seeming neglect, with an actual return. The compulsory process of *distringas*, or *habeas corpora juratorum*, as the case might be, issued to bring in the jurors, and until the English statute of Geo. II., c. 25, these writs issued as of course in every separate cause; hence the old form of granting a new trial was the award of a venire *de novo*. This act of Geo. II. "appoints that the sheriff or officer shall not return a separate panel for every separate cause as formerly, but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight nor more than seventy-two jurors, and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused." 3 Black. Com. 357. And see *Brewer v. Jacobs*, 22 Fed. Rep. 217.

2. *Myers v. Com.*, 90 Va. 785; *Vawter v. Com.*, 87 Va. 245; *Hall v. Com.*, 80 Va. 555.

Capital Cases. — The failure to issue a venire required by statute is an error apparent on the record, and though the court may not be able to perceive much use in continuing the practice of using it, yet in a case affecting life the omission will be regarded as fatal. *People v. M'Kay*, 18 Johns. (N. Y.) 212.

Listing Veniremen at Their Own Request. — A challenge to the array will be sustained where it appears that certain of the veniremen had not been summoned by legal authority, but that their names had been placed upon the list by the clerk of the court at their own request, without any order requiring them to serve. *McCloskey v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 308.

Early Georgia Decisions. — The want of a venire is not such a defect as will vitiate the verdict and arrest the judgment if the trial in other respects was regular, but if, growing out of the want of a venire, or coupled with that defect, there is anything to show that the accused was not tried by an impartial jury of good and lawful men, it would be a ground for a new trial. *Bird v. State*, 14 Ga. 43, *criticising* *People v. M'Kay*, 18 Johns. (N. Y.) 212, and *State v. Dozier*, 2 Spears L. (S. Car.) 211.

Necessity of Express Order for Venire. — A venire issued with the sanction of the court has the same effect as though the express order of the court had been annexed. *U. S. v. Richardson*, 28 Fed. Rep. 69; *Trials of Fries, Whart. St. Tr.* 607.

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ticular case will be deemed immaterial if process issued generally for a day or a term wherein the case in which the complaint is made was set for trial.¹

(2) *Objections for Want of Process.*—Where the absence of process will be a good objection to the regularity of the proceedings, the objection must be made in due form and in apt time.²

Medietate Lingue are exceptions to the general rule and the common law requiring a venire. *People v. M'Kay*, 18 Johns. (N. Y.) 212.

Necessity for Special Venire.—Whenever there is an issue or issues of fact the venire should be general. *Roosevelt v. Fulton*, 6 Cow. (N. Y.) 48.

On a Plea of Rens per Descent the venire need not be special, but may be in the general form. *Roosevelt v. Fulton*, 6 Cow. (N. Y.) 48.

The venire *qui tam* applies only where there is a demurrer or default, as well as an issue of fact. *Roosevelt v. Fulton*, 6 Cow. (N. Y.) 48.

Passage of Curative Statute Pending Criminal Proceeding.—A statute providing that judgment shall not be reversed because of the failure of the record to show that there was a venire for the jury, unless exception on that ground was taken before the jury was sworn, was held inapplicable to a criminal proceeding pending at the time of the passage of the act. *Myers v. Com.* 90 Va. 785.

Record Must Show that Jury Was Procured through Process.—The record in the trial of an indictment for a felony must show that the venire was issued to the sheriff and was executed by him, or that by its order the court directed the summoning of the jury. *Burley v. State*, 1 Neb. 385.

Right to Require Jury to Attend After Expiration of Time for Which They were Drawn.—In *Howard Oil Co. v. Davis*, 76 Tex. 630, the court, in harmonizing two sections of a statute, one requiring jurors to be selected from names included in the list drawn for the week and the other authorizing the court to adjourn the whole number of jurors for the week or any part thereof to any subsequent day of the term, and for the purpose of giving effect to both, held that there was no error in requiring a jury to report two days after the expiration of the week for which they had been drawn, and in compelling the defendant to take one of their number after he had exhausted his peremptory challenges.

Recall of Discharged Jury.—In *Telford v. Wilson*, 71 Ind. 555, the court, after having discharged the jurors for the term, ascertained that another cause had been set down for trial and then directed the jury to return and ordered the clerk not to make any entry of the discharge. It was held that the recall of the jury without the issuance of a form of summons was not such an irregularity as would require the court to grant a new trial.

1. Necessity of More than One Venire—Several Cases.—Under the general statutes of Alabama (1884-85, p. 81), where more than one capital case is set for trial on the same day there need be but one special venire for all. *Chamblee v. State*, 78 Ala. 466.

Several Cases Tried at Same Term—Virginia Statute.—An objection that no venire was issued in one case is met by showing that there were two other cases to be tried at the same term; that a venire was issued for a jury in each of those cases, and that the jury which tried the objectant was composed of persons who had been thus summoned, where by statute (Code Va., § 4018), it is provided that if more than two cases are to be tried at one court only two juries need be summoned, unless the court or judge otherwise direct. *Prince v. Com.*, 89 Va. 330.

2. Objections to the Process, its form, sufficiency, execution, return, summoning officer, etc., will be found specifically treated under the subdivision *infra*, IX. *Formation of Jury.*

Objection for Want of Venire.—Where no venire was issued, the fact that no objection was interposed, as required by a statute respecting the time of objecting to irregularities in a venire, *i. e.*, before swearing the jury, is immaterial, and will not preclude an objection thereafter. *Myers v. Com.*, 90 Va. 785; *Lewis v. Com.*, (Va. 1891) 12 S. E. Rep. 1050; *Jones v. Com.*, 87 Va. 63.

On Appeal.—Objection for want of a venire or a summons cannot be made on appeal from a justice of the peace. *Bell v. Killcrease*, 11 Ala. 685. And

(3) *Talesmen*. — However, the same necessity for process does not exist where it becomes necessary to procure talesmen or additional jurors as aids in the completion of a trial jury from the regular panel, though sometimes such jurors are required by statute to be procured by process similar in many respects to process for the procurement of regular jurors.¹

c. APPLICATION FOR PROCESS. — When in any case an application for the issuance of process to procure the attendance of persons from whom the trial jury is to be chosen is required to be made, the application should be seasonably made within such time as will enable the court or its officers to take proper action thereon.²

d. ISSUANCE OF PROCESS — (1) *Authority to Issue* — (a) *Generally*. — Where the authority to issue a venire, order, precept, or other process having for its object the procurement of trial jurors, is limited, unless circumstances exist which authorize the exercise of the power, or unless all the jurisdictional facts exist, the action of the court will be nugatory.³

see to the same effect *Hudson v. State*, 1 Blackf. (Ind.) 317.

A Motion May Be Made in Arrest of judgment or the defect may be raised for the first time on error. *Jones v. Com.*, 87 Va. 63; *Vawter v. Com.*, 87 Va. 245.

Sufficiency of Challenge for Want of Precept. — A challenge to the array for want of the issuance or service of a precept must show the precept actually issued and served, or that there was no precept in fact. *Williams v. State* 69 Ga. 11.

1. For a specific treatment of the mode of procuring talesmen and additional jurors, see *infra*, IX. 4. *Talesmen and Additional Jurors*.

2. *Seasonableness of Application*. — Application for a special venire should be made so early that the jury can be summoned and be ready to be impaneled when the cause is called for trial. *Rose v. St. Charles*, 49 Mo. 509.

Discretion of Court. — Where an application for a special venire is not made within the time prescribed by statute it is within the discretion of the court to grant it or not. *State v. Leabo*, 89 Mo. 247.

3. *Noncompliance with Statutes*. — The failure to observe strictly statutory provisions respecting the issuance and return of a venire is not a good ground for arresting the judgment, since the principal object to be secured is a fair and impartial jury, and this purpose is not affected by the mode of sum-

moning the jurors. *State v. M'Elmurray*, 3 Strobb. L. (S. Car.) 33.

Order for Special Venire Ex Mero Motu. — A statute authorizing an order for a special jury on a motion by either party, if in the discretion of the judge such a jury is proper, will not empower the court to make such an order of its own motion. *McDaniel v. Nashville*, etc., R. Co., 88 Tenn. 542, *distinguishing* *Clingan v. East Tennessee*, etc., R. Co., 2 Lea (Tenn.) 726.

Section 4209 of the *Tennessee Code* does not empower the court to direct the summoning of a special jury to try a particular cause of its own motion, and to require a party against his objection, to resort to such a jury while recourse may be had to the regular jury in attendance. *McDaniel v. Nashville*, etc., R. Co., 88 Tenn. 542.

Necessity for Application. — It is ground for quashing a special venire that it was not issued on the application of the state or of the accused. *Gavigan v. State*, 55 Miss. 533.

Issuance of Venire by Clerk Who Is Party to Suit. — It is not a ground of challenge to the array that the clerk who issued the venire was a party to the suit. *Hart v. Tallmadge*, 2 Day (Conn.) 381.

Justices' Courts — Noncompliance with Statutes. — Where, by statute, jurors for a particular court are required to be procured by a requisition on the county clerk, a justice thereof has no authority to issue a venire for jurors

(b) *In Absence of Party.*—In certain special cases, and in some inferior courts, as justices' courts, no power exists to issue process to procure the attendance of jurors in a civil proceeding in the absence of a party thereto, or in a criminal proceeding in the absence of the accused.¹

(2) *The Issuance*—(a) *Generally.*—Where the manner in which the process shall issue in a given case is pointed out by statute, the prescribed mode should be substantially followed,²

from the territory over which the court has jurisdiction. *New York v. Mason*, 4 E. D. Smith (N. Y.) 143.

New Venire by Justice Ex Mero Motu.—A justice cannot challenge the panel and issue a new venire of his own motion. *Cross v. Moulton*, 15 Johns. (N. Y.) 469.

Failure to Apply to Particular Court in First Instance.—Where a warrant for a jury can be issued by a justice only when a superior court, to which application is required to be made in the first instance, is not in session, a warrant issued by a justice at a time the court in question is in session is a nullity. *Greene v. Milford*, 139 Mass. 69.

A Justice of the Peace May Issue a New Venire when the first venire has not been carried into effect, but has been mislaid, kept, or withheld by the defendant himself, to whom it was delivered. *Day v. Wilber*, 2 Cal. (N. Y.) 137.

Unauthorized Issue of Process—Motion in Arrest.—Where the record shows that the venire was issued without authority, the objection may be taken by motion in arrest. *State v. Stephens*, 11 S. Car. 319; *State v. Jennings*, 15 Rich. L. (S. Car.) 42; *State v. Pratt*, 15 Rich. L. (S. Car.) 47.

1. Error, if any, on the part of one judge in ordering a special panel in the absence of the accused or his attorneys is cured by the action of another judge who, in their presence, and after granting a continuance, ordered the same panel to return on the day fixed for the trial. *Hannum v. State*, 90 Tenn. 647.

In *Kelly v. State*, 3 Smed. & M. (Miss.) 518, before the trial and in the absence of the prisoner, motions made to quash the venire and for an alias venire were overruled, and on error it was held that the ruling was not prejudicial, because it did not preclude a renewal of the motions at the trial, and furthermore might have been overruled because of the absence of the accused.

Justice's Court—Issuance of Venire in Absence of Party.—It is error for one party to take a venire after an adjournment and before the day of the trial without giving notice to the other party thereby affording him an opportunity to object to the constable whom it is proposed to have select and summon the juror. *Mead v. Darragh*, 1 Hill. (N. Y.) 395.

Absence of Plaintiff.—In *Rice v. Buchanan*, 41 Barb. (N. Y.) 147, a venire was issued by a justice of the peace on the demand of the defendant out of court, and in the absence of the plaintiff, and without notice to him of the application and it was held that the justice acted properly in setting aside the venire and the panel returned, and issuing a new venire.

Nonappearance of Defendant.—Venire cannot be issued until after appearance of the defendant. *Sutton v. Coleman*, 2 N. J. L. 125. *Keen v. Scull*, 3 N. J. L. 133.

A venire may issue before the appearance of the defendant, but if the defendant fail to appear, the jury may be dismissed and the cause be tried by the justice. *Wills v. M'Dole*, 5 N. J. L. 577.

2. **Delivery of Process to Party Instead of Officer.**—Where the statute requires the venire to be delivered by the justice to the constable, it is error to deliver it to the defendant out of court at his request, and in the absence of and without notice to the plaintiff. *Becker v. Sitterly*, 38 How. Pr. (Montgomery County Ct.) 38. See also *Rice v. Buchanan*, 41 Barb. (N. Y.) 147.

Failure to Pursue Statutory Mode—Lack of Prejudice.—Where a statutory requirement as the drawing of a special venire of freeholders, is not mandatory, and the mode employed by the trial judge to procure freeholders is not objectionable and could not have prejudiced the prisoner, although the mode pointed out by the statute is preferable the fact that it was not

and as a rule the process should issue in accordance with the existing provisions of law, and not in accordance with the laws which were in force at the time of the alleged commission of an offense charged.¹

(b) **Time of Issuance.** — Statutory requirements as to the time of issuance of the process should be observed, of course, but mere nonobservance will not of itself be deemed fatal where the requirement is not mandatory and no prejudice has resulted.² For the same reason, or where the question of time is not controlled by statute, the premature issuance of a venire or a process having the same function will not invalidate the return thereto, irregularities in this respect being of such a character that they may be waived.³

(3) **Presumptions.** — Every reasonable intendment will be made

adopted will not constitute error. *State v. Whitson*, 111 N. Car. 695.

Discretion of Court. — Parties litigant cannot prescribe to the court which of several legal ways it shall resort to in order to compel the attendance of a jury. *State v. Buchanan*, Wright (Ohio) 238.

The duty of selecting jurors, which by the *Tennessee* Code is imposed on the court, may be discharged either by designating the persons and directing the sheriff to summon them, or by directing the sheriff to summon a panel and then adopting the panel as jurors. *Eason v. State*, 6 Baxt. (Tenn.) 431, citing *Cox v. Hunt*.

1. *Hawes v. State*, 88 Ala. 37; *Wilson v. Com.*, 86 Va. 666.

An act providing that "hereafter" in all prosecutions, etc., the venire shall command the sheriff or other officer to summon, etc., applies to all cases tried after the act, though the offense was committed, or even though the examining court had passed upon the case, before the passage of the act. *Perry v. Com.*, 3 Gratt. (Va.) 602.

2. See *infra*, VII. 7. **Mandatory and Directory Statutes.**

Noncompliance with Directory Statute. — Where a statute directing the issue of a venire facias is directory, the fact that it did not issue more than twenty days before the term, as prescribed by the statute, will not invalidate the array, since all that the accused can require is the issuance and execution of the writ, that the trial may be had at the proper term. *Wash v. Com.*, 16 Gratt. (Va.) 530.

A Venire Which Has Effected Its Purpose cannot be assailed because not

issued within the time prescribed by law. *State v. Clayton*, 11 Rich. L. (S. Car.) 587.

Presumption as to Time of Issuance. — Where a warrant for a jury to revise an order of a health board was changed as to the date of impaneling the jury, it was held that the warrant could not be considered as having issued on the day of the application for the change if at that time the conditions which would authorize the warrant did not exist. *Greene v. Milford*, 139 Mass. 69.

3. **Issuance of Venire Before Indictment.** — Where a jury is returned to serve in all causes which may be depending at the term, it is immaterial that the venire or order for summoning the jury was issued before the finding of the indictment which they were thereafter called upon to try. *U. S. v. Cornell*, 2 Mason (U. S.) 91.

New Venire Before Return of First Venire. — Where a venire has not been returned and a new venire is issued at the request of a party, he cannot object to its issuance as illegal. *Day v. Wilber*, 2 Cai. (N. Y.) 134.

Order to Summon Jurors Before Their Selection by Commissioners. — The proviso to section 8 of the *Louisiana* Act (No. 89) of 1894, which authorizes the district judge to cause a jury to be drawn to try a civil case in which there is a prayer for jury during a term of court at which the prayer is filed and the jury ordered, requires that the order to the sheriff to summon the jury shall only be given after the jurors have been selected by the jury commissioners. *Soniat v. Supple*, 48 La. Ann. 296.

May Be Waived. — The premature issuance of a venire may be waived by

in favor of the legality and regularity of the issuance of process,¹ and, in the absence of anything which will authorize a contrary conclusion, a presumption is warranted that the trial jury was procured through the medium of process duly issued.²

(4) *Record of Issuance.*—Where a venire has issued, or an order, precept, or the like has been made, the fact should appear by the files, minutes, or records of the court by which the process was authorized.³

failure to object after trial and a verdict on the merits. *Brown v. State*, 12 Ark. 623.

Issuance of Venire by Justice Before Service of Summons.—When either party demands a jury it is error for a justice, without consent of parties, to issue a venire facias before the summons to commence the suit has been served and returned and the time fixed for the appearance of the defendant has arrived; but where the defendant appears and has the case continued, and the jury thus summoned is adjourned to the time set for trial, he will be held to have waived such irregularity in the writ of the venire facias if it appear that he was not injured thereby. *Greer v. Wilson*, 38 W. Va. 100.

1. *Pauska v. Daus*, 31 Tex. 67.

Immaterial Irregularities.—A mere irregularity in the issuance of a venire will not invalidate it where the effect of the statute is to make jury process almost a matter of mere form. *Haight v. Holley*, 3 Wend. (N. Y.) 258.

2. *Roberts v. Com.*, 94 Ky. 499; *Pennsylvania Mut. Aid Soc. v. Corley*, 2 Penny. (Pa.) 398.

Presumption as to the Time of Making Precept.—It will be presumed that the precept for the summoning of attendance of jurors was made when the clerk gave the list to the sheriff. *Williams v. State*, 69 Ga. 11.

Presumption of Issuance of Order for Venire.—In *Peri v. People*, 65 Ill. 17, it was objected that the court had no power to try the prisoner because of the absence of an order to the clerk to issue a venire, but the record on appeal showed that the venire had issued, and it appearing that no motion was made to quash the writ and challenge the array, it was presumed that the writ was authorized and that a proper order was made.

Presumption that Order for Special Venire Was Made or Waived.—Where the record is silent as to the making of an order for a special venire and no ob-

jection was taken *in limine* that such an order was not made, if the record shows that a jury was impaneled under a special venire it will be presumed that such order as the law prescribes was made and entered, or that it was waived by the defendant. *Williams v. State*, 29 Tex. App. 89, *overruling Steagald v. State*, 22 Tex. App. 464.

Necessity of Showing Issuance of Writ by Clerk.—If it appears that the jurors attended in obedience to a special venire for which an order had been made, the record need not show affirmatively that the writ was issued by the clerk of the court. *State v. Perry*, Busb. L. (N. Car.) 330.

Necessity of Affirmative Showing.—The failure to show that a venire issued cannot be aided by presumption. *Myers v. Com.*, 90 Va. 785; *Spurgeon v. Com.*, 86 Va. 652; *Dougherty v. Com.*, 69 Pa. St. 286.

3. The files and records must always show how the jury came to be called. *People v. Treadway*, 17 Mich. 480.

It is not necessary that the venire facias should be spread upon the minutes of the court which issued it, but it will be enough if the record show the return and the selection of a proper jury. *Conner v. State*, 4 Verg. (Tenn.) 137. And see *Cornwell v. State*, Mart. & Y. (Tenn.) 147; *M'Clure v. State*, 1 Verg. (Tenn.) 206.

An Order for a Venire Made by One Court and Directed to Another Court need not be made a part of the record of the court which issues the venire, since it forms no part of the writ, and it will be presumed that the clerk would not issue the writ without the order. *State v. Cole*, 9 Humph. (Tenn.) 626; *Conner v. State*, 4 Verg. (Tenn.) 137.

Showing Case in Which Order Was Made.—The record need not show that an order for a special venire was made in any particular case, but it will be sufficient if it appear that it was made at the term at which the trial was had. *State v. Murph*, 1 Winst. L. (N. Car.) 129,

e. FORM AND SUFFICIENCY — (1) *Generally*. — The form and sufficiency of the process are matters of importance. Where the common-law practice, not modified by statute, is still followed, the sufficiency of the writ or process will be judged by the rules of the common law, and where the form is prescribed by statute, the provisions thereof should be substantially followed, and the various recitals required thereby and by the prevailing practice should be incorporated therein.¹

An Order for Talemenn need not be entered of record. *Morrison v. State*, 84 Ala. 405.

Neglect to Record — Lack of Prejudice. — Where no prejudice has resulted, the mere fact that the clerk neglected to write up the minutes of the court so as to show the order for the special venire is unimportant where it appears by the record that the order was made, and a copy of it regularly served on the defendant as well as a list of the jurors summoned under it. *Hawes v. State*, 88 Ala. 37.

Correction of Record. — The clerk's minutes may be made to conform to the order for a venire after it has been executed and returned. *English v. State*, 34 Tex. Crim. Rep. 190.

1. Failure of Writ to Show Authority Therefor. — A second writ of venire issued after the commencement of the term which fails to show that it was directed by the court is an invalid writ. *Spurgeon v. Com.*, 86 Va. 652.

Process Running in Name of State. — A writ of venire facias commencing in the name of the state and county, as "state of," etc., "county of," etc., and addressed to the sheriff of the county specified, is a sufficient compliance with a constitutional requirement that all writs and process shall run in the name of the state. *State v. Hill*, 19 S. Car. 435; *State v. Gilreath*, 19 S. Car. 603.

Statement of Reason for Issuance by Justice Instead of Court. — Where a warrant for a jury can be granted by a justice only when a Superior Court, to which application must be made in the first instance, is in session, a recital in a warrant issued by a justice that the court in question was not in session at the time of granting the warrant will not give it any validity, if in fact the Superior Court was in session at the time the warrant was issued by the justice. *Greene v. Milford*, 139 Mass. 69.

Assignment of Reasons for Special Venire. — Where, in its order for a

special venire, the court declared as a reason therefor that there was no legal jury box in the county, it was presumed, in the absence of the facts on which the order was based, that they justified the action of the court. *Russell v. State*, 53 Miss. 367.

Summoning Jurors for a Special Term — Nebraska. — In Nebraska, when a judge of the District Court calls a special term of the court and desires a petit jury, it is his duty in the order to direct the summoning of such jury, and the jury must then be selected in the same manner as for regular terms of court. *Brown v. State*, 9 Neb. 157.

Inclusion of Grand Jurors in Venire for Petit Jurors. — Unless so required by statute, grand jurors need not be included in a venire for petit jurors, but should be summoned separately. *Forsythe v. State*, 6 Ohio 19.

Unnecessary Statements in Venire. — The introduction into a venire of an unnecessary statement that the persons designated be summoned from those who reside "remote from the place where the felony was committed" will not invalidate it, for although the statement is not required by statute, it is in accordance with the policy of the law. *Poindexter v. Com.*, 33 Gratt. (Va.) 766.

It is immaterial that the requirement in question is contained in a venire sent to a distant locality. *Poindexter v. Com.*, 33 Gratt. (Va.) 766.

Necessity of Designating Manner of Drawing or Selection. — A direction to the sheriff to summon a designated number of good and lawful men need not prescribe in what manner they shall be drawn or selected. *White v. Com.*, 6 Binn. (Pa.) 179.

Time of Objection to Direction of Court — Waiver. — If the direction of a justice to the sheriff to make a list of jurors is irregular, the defendant should then object, otherwise the objection will be deemed to have been waived. *State v. Nerbovig*, 33 Minn. 480.

(2) *Direction to Officer.*—The language of the direction to execute the process, or the designation of the officer to whom it is directed, is not material if there is no such ambiguity or uncertainty as will prevent its due execution.¹

(3) *Entitling—Characterizing Cause.*—Where the process, as a special venire or the like, is issued to procure jurors for a particular cause, the failure to entitle the process, or accurately to designate the character of the proceeding, will not be deemed material if the identification is otherwise sufficient.²

(4) *Date of Issuance and Receipt.*—A venire facias is not invalid because the date of its issuance or its receipt by the summoning officer is not indorsed thereon.³

(5) *Signature.*—Where the signature of a clerk or other officer is not requisite to the validity of the process, the omission of the signature is not necessarily fatal.⁴

1. Jackson v. State, 33 Tex. App. 664; Suit v. State, 30 Tex. App. 319.

It is immaterial that the venire reads "I command you to summon," etc., instead of "you are hereby commanded to summon," etc. State v. Cole, 9 Humph. (Tenn.) 626.

Command in the Alternative.—A command to the sheriff or any other officer in the alternative will not vacate the process. Thus a writ of special venire directed to the "sheriff or any constable of the county" is not invalid because by statute such a writ must command the sheriff to execute it. Jackson v. State, 30 Tex. App. 664; Suit v. State, 30 Tex. App. 319.

2. It is not requisite that a venire for a special jury in a capital case should be either entitled as of the case or state the name of the person with whose murder the accused stands charged. Leffner v. State, 10 Ohio St. 598.

A special venire for additional jurors may be entitled as of the cause in which it issues. Wood v. State, 92 Ind. 269.

Omission of Name of One Defendant.—A venire is not objectionable because it omits the name of one of two defendants (joint debtors) who was not served with process. Hutchins v. Fitch, 4 Johns. (N. Y.) 222.

Sufficiency of Designation of Cause and Court.—A writ of special venire sufficiently shows in what case it is issued and in what court the proceedings are pending if it sets out the style and number of the case, and, though omitting in the preliminary recitals the name of the court or county in which

the case is pending, requires, in the mandatory part, that the persons to be summoned appear before the court, etc., properly designating it as well as the place where it is to be holden. Murray v. State, 21 Tex. App. 466.

Improper Characterization of Cause.—A venire, in other respects regular, which describes the proceeding as a civil cause instead of a criminal proceeding is not invalid for that reason. State v. Nerbovig, 33 Minn. 480.

Separate Trial—Venire for Joint Trial.—In M'Whirt's Case, 3 Gratt. (Va.) 566, a writ was quashed without the consent of the prisoner because the prisoner, who had been indicted jointly with others, had elected to be tried separately and the writ had directed a venire to be summoned for the trial of all jointly indicted.

Stating Nature of Indictment.—The order directing the summoning of persons to serve as jurors in a certain cause, giving the title thereof, need not state after the title the nature of the indictment to be tried. White v. State, 16 Tex. 206.

3. **Date of Issuance.**—A venire is not objectionable because the day on which it issued is not indorsed upon it if it appears that it was issued and received a proper time before the sitting of the court. State v. Stedman, 7 Port. (Ala.) 495.

Date of Entry in Sheriff's Office.—A venire is not invalidated by the fact that the sheriff did not indorse on it the fact of entry in his office. State v. Clayton, 11 Rich. L. (S. Car.) 587.

4. Where the law does not so require, it is unnecessary that the name of the

(6) *Teste*.—Where a teste is necessary, it has been held that irregularities in testing the writ may be amended.¹

(7) *Seal*.—At common law the writ of venire facias, in common with other writs, was required to be issued under the seal of the court, and in the earlier cases in this country, and where the common-law practice has been preserved in effect, this requirement has been held necessary to the validity of the writ;² but as sealing has gradually fallen into disuse, and the common-law venire has, in great measure, been superseded by statutory substitutes therefor, unless the common-law practice in this respect still prevails, or a seal to the process is required by statute, the necessity therefor no longer exists.³

(8) *Designation of Persons to Be Served*—(a) *By Name*.—Unless so required by statute it is not necessary that the persons to be served should be named, though the power to designate generally will authorize a designation by name.⁴

(b) *The Number — Law Governing*.—The number of jurors which a party is entitled to have summoned may depend upon the law in force at the time of the issuance of the process for their require-

attorney-general or that of the solicitor of the circuit should be signed to a writ of venire. *State v. Hill*, 19 S. Car. 435.

Sufficiency of Clerk's Signature.—A venire signed by a person who is clerk in fact is valid though the clerk fails to add his official title to his signature. *State v. Cole*, 9 Humph. (Tenn.) 626.

Omission of Clerk's Signature.—It is proper to overrule a motion to quash a venire facias because of the omission of the clerk to fix his signature, where by statute the omission does not render the writ void, but merely irregular and amendable. *Hale v. State*, 72 Miss. 140.

Necessity for Signature to List for Bystanders.—Where, by statute (Code Va. 1887, § 4019), the court may direct a new venire, and cause to be summoned from the bystanders, or from a list to be furnished by it, so many persons as may be necessary to complete the panel, etc., if the jurors are summoned from the bystanders it is not necessary that the list should be signed. *Williams v. Com.*, 85 Va. 607.

1. Necessity of Teste.—A writ of venire need not bear teste of the chief, first, or senior justice. *State v. Bradford*, 57 N. H. 188.

Amendment — A Venire Tested out of Term is not for that reason void, but the mistake being merely clerical, the venire may be amended by altering the teste to the last day of the previous

court, and the irregularity cannot be taken advantage of in arrest of judgment. *People v. Justices*, 20 Johns. (N. Y.) 310.

2. People v. M'Kay, 18 Johns. (N. Y.) 212; *State v. Dozier*, 2 Spears L. (S. Car.) 211.

Sufficiency of Sealing.—A venire should be sealed, but it is not necessary that the impression of the device on the seal should be manifest. *State v. M'Elmurray*, 3 Strobb. L. (S. Car.) 33. See also *State v. Clayton*, 11 Rich. L. (S. Car.) 587.

A venire having above the clerk's name a slip of paper attached by a wafer is sufficiently sealed. *State v. Thayer*, 4 Strobb. L. (S. Car.) 286.

A venire should not be quashed because of an immaterial omission in the name of the court appearing on the seal. *Cordova v. State*, 6 Tex. App. 207.

3. State v. Marshall, 36 Mo. 400; *Samuels v. State*, 3 Mo. 68; *State v. Bradford*, 57 N. H. 188; *Bennett v. State*, Mart. & Y. (Tenn.) 133.

4. A special venire which specifies the number of jurors to be summoned need not name them. *State v. Stokely*, 16 Minn. 282.

In Tennessee a judge empowered to designate jurors may designate by name the special jurors to be summoned. *Hannum v. State*, 90 Tenn. 647; *Clingan v. East Tennessee, etc.*, R. Co., 2 Lea (Tenn.) 726.

ment,¹ though the possible advantage to a litigant of having a larger panel may be claimed by him when a change in the law, increasing the number to be returned, has taken place between the time of the selection of the jury and the time of the trial.²

Designation of Number by Court. — Where the number of jurors to be summoned is not definitely prescribed by statute, the number to be brought in is within the determination of the court, which may designate any number sufficient for the purpose for which the process is issued.³

Failure of Process to Direct Statutory Number. — Although there are exceptions thereto, it may be stated as a general rule that the failure of the process to direct the summoning of the number of jurors prescribed by statute will invalidate the proceeding.⁴

1. Passage of Statute Subsequent to Order. — In *Fifield v. Chick*, 39 Iowa 651, it was held that an order for the summoning of the number of jurors prescribed by statute was unaffected by a subsequent statute prescribing a different number.

Repeal of Statute After Indictment but Before Trial. — Where, after indictment but before trial, existing statutes which prescribe, among other things, the number of jurors persons defending jointly may have from which to select a trial jury, are repealed, except as to prosecutions pending, the provisions as to the former law will control. *State v. Phillips*, 24 Mo. 475.

2. If, between the time of selecting the panel and that of beginning the trial, the law be changed so as to require a larger panel — as here, twenty-four instead of eighteen jurors — a litigant has the right to demand the larger panel. *Kennon v. Gilmer*, 4 Mont. 433.

3. By the *North Carolina Code* (§ 1738) it rests in the discretion of the trial judge to order a special venire in capital cases, and likewise to determine the number of jurors which shall comprise it. *State v. Brogden*, 111 N. Car. 656.

Changing Number. — Section 1738 of the N. Car. Code vests the trial judge with the discretion to amend an order made by him for a special venire, so as to increase or decrease the number of jurors to be summoned. *State v. Brogden*, 111 N. Car. 656.

Directing Statutory Number. — Under a statute making it the duty of the presiding judge to direct by order, a specified time before holding the court, what number of jurors shall be drawn for the court, but that if no such order is

made, then that a prescribed number of jurors shall be drawn, it was held, where no order was made prior to the court, that there was no error in drawing the prescribed number. *Kenny v. People*, 31 N. Y. 330.

Failure to Keep Panel Full by Special Venire. — Where, by statute, the court is vested with a discretion as to the number of persons to be summoned as jurors, an objection that the panel was not kept full by special venire is untenable. *Rounds v. State*, 57 Wis. 49.

Right to Require Particular Number. — It is not the right of the defendant to require that any particular number shall be ordered. *Blevins v. State*, 68 Ala. 94.

4. If the venire issues for a less number of jurors than the law directs, it is a good ground of challenge to the array. *Showers v. Com.*, 120 Pa. St. 573.

Capital Case. — Where, by a statute respecting the venire in a capital case, it is necessary that the writ require the summoning of a specified number of jurors, the failure to direct the summoning of the prescribed number is error which may be taken advantage of in the appellate court. *Spurgeon v. Com.*, 86 Va. 652.

Provision for Less Number by Rule of Court. — A special order is a "rule" within a statute requiring a specified number of jurors in certain districts except when by appropriate rule the judges provide that a less number may be drawn. *Barney v. State*, 49 Neb. 515.

Failure of Clerk to Comply with Writ for Special Venire. — Where a writ for a special venire is required to be issued in accordance with the order authoriz-

Discretion of Court as to Number. — Where the power of the court is limited in directing not less than a certain number nor more than a certain number to be summoned, the court is vested with a discretion to designate any number in excess of the minimum, but not exceeding the maximum, which will answer the purpose of the administration of justice.¹

Directing Return of Excessive Number. — While it does not seem seriously objectionable that an excessive number of jurors should be directed to be returned, especially where no prejudice has resulted from the failure to observe the requirements of the statute,² yet it has been held that where the number of jurors

ing it, it has no validity when issued by the clerk for a number of persons considerably less than designated by the order. *Hunter v. State*, 34 Tex. Crim. Rep. 599.

Sufficiency of Record to Show Summoning of Statutory Number. — Where it appeared by the record that "a panel of sixteen jurors summoned by the sheriff were * * * found free from all legal exceptions and qualified to serve," etc., "whereupon the prisoner erased from the panel four of the jurors, and the remaining twelve constituted the jury," etc., "to whom there was no objection," it was inferred that a statute providing that a panel of twenty-four jurors should be summoned, and that the directions of the statute should be pursued "until a panel of sixteen jurors, free from exception, be completed," and that "the accused shall have a peremptory challenge as to four of the panel, and the remaining twelve shall constitute the jury for the trial of the case," was duly complied with. *Lawrence v. Com.*, 30 Gratt. (Va.) 845.

Waiver of Statutory Number by Failure to Object. — While it is error to order the summoning of a less number of persons than is prescribed by statute, yet if the defendant fails to object on that ground he will be regarded as having waived the right to the statutory number. *State v. Robertson*, 71 Mo. 446, *distinguishing* *State v. McCarron*, 51 Mo. 28, and *citing* *State v. Waters*, 62 Mo. 196.

Lack of Prejudice. — An irregularity in ordering a less number of persons to be summoned as jurors than the number prescribed by statute may be disregarded when it does not appear that the accused was prejudiced. *Evans v. State*, 109 Ala. 11.

1. *Wilkins v. State*, 112 Ala. 55;

Hubbard v. State, 72 Ala. 164; *Blevins v. State*, 68 Ala. 92.

Venire for Maximum — Omission of One Name. — Where a special venire may be issued for not less than a certain number or not more than another certain number, the fact that on motion for a venire for the greater number a writ for one less than that number is issued will invalidate neither the writ nor the panel summoned under it. *Hall v. State*, 28 Tex. App. 146.

Excess of Maximum. — Where, by statute, it is required that a special venire shall consist of not less than a certain number nor more than a certain other number, it is error to direct that jurors in excess of the maximum number be drawn and summoned. *Harrison v. State*, 3 Tex. App. 558.

Sufficiency of Compliance with Statute. — An order to summon one hundred persons, including the regular jurors for the week, etc., is a sufficient compliance with a statute providing that the order shall command the sheriff to summon not less than fifty nor more than one hundred persons, including those summoned on the regular juries for the week, or term, when the time does not exceed one week. *Lewis v. State*, 51 Ala. 1.

2. The objection that the court ordered too many additional jurors to be drawn and summoned to supply a deficiency in the panel of a petit jury is unavailable where the record shows affirmatively that it was done at the express request of the defendant, if he did not except to the action of the court in this regard. *Allen v. State*, 74 Ala. 557.

Lack of Prejudice — Timely Objection. — An objection to the summoning of a number of jurors which, if an irregularity, was not to the prejudice of the defendant, comes too late after ver-

who may serve is specifically designated by statute, there is no power in the court to order a greater number.¹

(c) *Designation of Particular Class — Qualifications.* — It is sometimes necessary to designate the particular class of persons to be summoned,² but unless so required by statute it is not necessary that the qualifications of the persons to be summoned should be specified in the writ of venire or other process issued to procure their attendance,³ nor should any particular class of persons be

dict. *Lyles v. Com.*, 88 Va. 396; *Vawter v. Com.*, 87 Va. 245.

Virginia Practice. — Where the statute provides for the summoning of a prescribed number of persons from a list to be furnished by the judge, the number of names which may be placed on the list is not limited to the prescribed number, but may exceed it. *Drier v. Com.*, 89 Va. 529 [*distinguishing Vawter v. Com.*, 87 Va. 245]; *Sands v. Com.*, 21 Gratt. (Va.) 878; *Mitchell v. Com.*, 33 Gratt. (Va.) 850; *Snodgrass v. Com.*, 89 Va. 679.

1. *People v. Lane*, 55 Barb. (N. Y.) 168.

A statute providing that the number of petit jurors actually in attendance at the court, at any one time, shall not exceed a certain number was held, in *State v. Clyburn*, 16 S. Car. 375, to fix the number as a maximum and not as a minimum.

Special or General Objection. — That the names of more persons were drawn than required by the statute should be made the ground of a special objection to the organization of the jury; a general objection of that nature is unavailable. *Jones v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 975.

2. *"Regular Juries for the Week"* — *Alabama Practice.* — Where a statute requires that the court make an order commanding a sheriff to summon not less than a certain number of jurors, including those summoned on the regular juries for the week, or the term, when the term does not exceed one week, "those summoned on the regular juries for the week" means those persons summoned on the regular juries for the week in which the trial is ordered to take place. *Posey v. State*, 73 Ala. 490.

Under this statute it was held the proper practice to put on the list ordered to be summoned only the names of such of the drawn and summoned jurors for the week as were in attendance on the court when the order

was made, thus leaving off such as were summoned and failed to attend, or were talesmen summoned to supply their places. *Posey v. State*, 73 Ala. 490; *Jackson v. State*, 77 Ala. 18. And see *Morrison v. State*, 84 Ala. 405.

Under a statutory provision that on trial of indictments for capital offenses the court shall make an order for a certain number of persons, "including those summoned on the regular juries for the week," it was held that where the order setting a day for the trial and the trial occurred in the same week, only those jurors summoned for the week who were in attendance should be placed on the venire. *Dick v. State*, 87 Ala. 61 [*following Floyd v. State*, 55 Ala. 61, which was followed in *Shelton v. State*, 73 Ala. 5]; *Cotton v. State*, 87 Ala. 75.

Traverse Jurors for the Regular Term. — In *Turner v. State*, 70 Ga. 765, an order that the traverse jurors of the regular term attend a special term to be held at a designated time was considered to apply to the jurors in attendance when the order was made, and not to regular jurors for the first week who had been discharged.

Direction to Procure Entire Jury of Colored Men. — A jury composed of intelligent, qualified men is not objectionable because all the persons summoned were colored, and it is immaterial that in denying a motion to quash the venire on this ground the court assigned as a reason for its action that the prosecutrix and the prisoner were both colored people. *Coleman v. Com.*, 84 Va. 1.

3. *Sharp v. Hendrickson*, 3 N. J. L. 259; *Cox v. Haines*, 3 N. J. L. 261; *Cornwell v. State*, Mart. & Y. (Tenn.) 149; *State v. Alderson*, 10 Yerg. (Tenn.) 523.

Completion of Special Venire by Talesmen. — Unless so required by statute, the judge, in drawing talesmen to be summoned to complete a special venire, is not obliged to direct the

designated or pointed out to the exclusion of others competent to serve.¹

(d) **Furnishing List to Officer.**—The persons to be summoned are sometimes required to be indicated to the summoning officer by furnishing him a list of names.²

sheriff to summon qualified persons only, or to inform him as to the qualifications, though such a direction is necessary when ordering a special venire. In capital cases, however, it is advisable that such a direction should be given. *Dill v. State*, 1 Tex. App. 279.

Requirement to Summon Qualified Jurors.—An order for a special venire directing the sheriff to summon qualified jurors as far as possible is not objectionable. *State v. Cody*, 119 N. Car. 908.

Duty of Court to Ascertain Qualifications.—In naming the jurors the court is not bound to send for or examine the assessment roll. *Tremblay v. State*, 20 Kan. 117.

1. Requirement to Select Freeholders.—In *Wash v. Com.*, 16 Gratt. (Va.) 530, it was held that a writ which directed the officer to summon freeholders who owned "property * * * of the value of one hundred dollars at least" ought to have been quashed on motion, because containing a qualification which the law did not require.

Instruction Not to Select from Prescribed Locality.—In *Gibbons v. Van Alstyne*, (Supreme Ct.) 9 N. Y. Supp. 156, the justice, when delivering the venire to the constable, told the latter that the parties were farmers and wanted a farmers' jury, thus in substance instructing him not to summon any jurors from the village, and it was held that although the action of the justice was improper, yet as it did not appear that the constable had been influenced by the instruction in selecting the jury, and that he would be presumed to have done his duty, there was no reversible error. *Gibbons v. Van Alstyne*, (Supreme Ct.) 9 N. Y. Supp. 156, citing *People v. Kelly*, 31 Hun (N. Y.) 225, and *Mandeville v. Reynolds*, 68 N. Y. 528.

A Command to Summon "Good and Lawful Men" is a requisition to summon citizens of the county, and is sufficient without specifying the particular qualifications necessary to constitute them "good and lawful" jurors. *State v. Alderson*, 10 Yerg. (Tenn.) 523.

Error of form in a venire consisting of substituting the words "good and lawful men" for "citizens of this state, and freeholders," etc., which could not have injuriously affected any right or interest, will not furnish any reason for reversing the judgment below. *Sharp v. Hendrickson*, 3 N. J. L. 259.

An objection that the order for a special venire directed that a specified number of "persons" be summoned, instead of requiring the summoning of a designated number of "good and lawful men of the county," is immaterial when the writ commands the summoning of "good and lawful men," etc. *White v. State*, 16 Tex. 206.

Resort to Grand Jury on New Trial in Civil Case.—In *Georgia*, and under the Acts of 1884-85, p. 93, whether, on a new trial in a civil case, the jury shall be taken from the grand jury or the traverse juries, or partly from each, is a matter of discretion with the presiding judge. *Powell v. Augusta*, etc., R. Co., 77 Ga. 192.

2. Necessity that Court Furnish List.—A second writ of venire issued after the commencement of the term which fails to show that the list of names appended thereto was furnished by the court, as provided by statute, is an invalid writ. *Spurgeon v. Com.*, 86 Va. 652.

Compliance with Statutory Requirement of Lists.—A statutory direction that the judge deliver to the proper officer a list of jurors to complete the panel is complied with by a written order directing the marshal to summon a designated number of jurors. *State v. Sansone*, 116 Mo. 1.

Embodying Lists in Venire.—It is not necessary that the names of the jurors be embodied in the writ of venire facias; it is sufficient if they be arranged in lists below the signature of the clerk. *State v. M'Elmurray*, 3 Strobb. L. (S. Car.) 33.

Record to Show Summoning from Proper List.—The record of a writ commanding the sheriff to summon from a list attached, and to have "there this writ

(9) *Residence of Proposed Jurors.* — Where the residence of the persons summoned is required to be set out in the venire, it should be stated with as much particularity as the circumstances of the case will permit and at least sufficiently to identify the persons intended.¹

(10) *Occupation.* — For the purpose, among others, of distinguishing veniremen from others of the same name, it is sometimes necessary that the business or occupation of the persons summoned should be indicated on the return, and when this is required there should be such a designation as will sufficiently identify the persons intended.²

(11) *Designation of Locality Whence Persons Are to Be Taken* —
(a) *Generally.* — Formerly the venire facias did not direct the jurors to be summoned from the body of the county, but from the immediate neighborhood where the occurrences took place out of which the controversy arose, or where the offense charged was

and the judge's list of said jurors," followed by the list referred to, signed W. S. G., and indorsed "Executed by summoning the within-named parties," the indorsement being signed by the sheriff, sufficiently shows that the jurors were summoned from a list furnished and signed by W. S. G. as judge. *Coleman v. Com.*, 84 Va. 1.

Using Names in Quashed Venire in Making New Lists. — In *Waller v. Com.*, 84 Va. 492, a judge who deemed it improper that he should preside at the trial, because of his connection with the case, issued an order to summon a jury from a list furnished by him, and the judge who tried the cause quashed the venire, ordered the issuance of another, and furnished another list consisting of the same persons as those named in the first list. There was held to be no impropriety in using the same names for the second list.

When Venire Is Directed to Another County. — When a venire is directed to another jurisdiction because of inability to procure a jury within the corporation wherein the cause is pending, in the absence of any statutory requirement to that effect it is unnecessary to furnish a list of the persons to be summoned. *Clark v. Com.*, 90 Va. 360.

1. When the statement of the residence of the veniremen is such that no reasonable person can be misled, the venire will not be quashed. *Jones v. State*, 104 Ala. 30.

If a statute requires the residence of the jurors to be set out in the venire, the better practice is to write out the

name of the city or town, and in the case of a precinct or beat, to write out the word "beat" and indicate it by a numeral, but where figures appear after the juror's names, running consecutively, and the court, after inspection, decides that the numbers of the precincts in which the jurors live are sufficiently indicated, if the interpretation seems a fair one the appellate court will decline to interfere. *Jones v. State*, 104 Ala. 30.

2. Immaterial Misstatement. — Where a juror is accurately identified in the panel by a statement of his name and residence, a mere misstatement as to his occupation which is not misleading is immaterial. *Quigley v. Com.*, 84 Pa. St. 18.

Sufficiency of Identification. — In *Com. v. Valsalka*, 181 Pa. St. 17, the occupation of a juror present, up to within two months of the time of filling the jury wheel, was the same as that of a juror selected, and it was held that the fact that the juror thereafter continued in connection with the same line of business sufficiently indicated that he was the person intended, rather than another of the same name who, although formerly in the same business, for two or three years prior to the time in question had been engaged in an entirely dissimilar business.

The Addition of Such a Term as "Mill Boss" to a juror's name will be presumed to designate his occupation as known and understood in the locality in which he resides. *Clark v. Com.*, 29 Pa. St. 129.

alleged to have been committed, and from among those who best knew the truth of the matter.¹ The reasons, however, for procuring a jury from the vicinity having ceased to apply, thereafter, and by what has now become the general practice, the venire was executed by summoning jurors from the county at large, or, as it is termed, the body of the county.² Consequently, unless provision

1. See *supra*, VI. *Selection and Drawing*; Stephen on Pleading 153.

In order to know into what county the venire facias for summoning a jury should issue, and to enable the sheriff to execute the writ, it was necessary that the issue and therefore the pleadings out of which it arose should show particularly what that place or neighborhood was. Stephen on Pleading 268. See article VENUE.

"Vicinage" as Synonymous with "County."—The vicinage from which the jurors are to be summoned means the county. *Conver's Appeal*, 18 Mich. 459.

What Constitutes Residence within Vicinity.—Persons residing without the limits of a town, but within the vicinity, may be summoned in a proceeding before a town council which has like powers to try and punish the violation of town ordinances with trial justices who may try cases before them by juries organized from the vicinity. *McCormick v. Calhoun*, 32 S. Car. 291.

In Rhode Island trials are not confined to the vicinage except in actions relating to real estate or in criminal prosecutions. *Taylor v. Gardiner*, 11 R. I. 182.

2. When the Jury Began to Be Summoned No Longer as Witnesses, but as judges, and instead of being cognizant of the fact on their own knowledge received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighborhood ceased to apply, and it was considered as sufficient if, by way of partial conformity with the original principle, a certain number of the jury came from the same hundred in which the place laid for venue was situated, though their companions should be of the county only, and neither of the venue nor even of the hundred. This change in the manner of executing the venire did not, however, occasion any alteration in its form, which still directed the sheriff, as in former times, to summon the whole jury from the particular venue. Stephen on Pleading 271.

"The Common Law Was Particularly Careful in securing to individuals a trial by the jury of the neighborhood, or *visne*, and hence it required that the jury, or at least a part of them, should be of the hundred in which the cause of action or offense occurred, and if they were not it was a cause of challenge. The rule proceeded from the reason that the inhabitants of the neighborhood were more intimately acquainted with the merits of the cause of controversy, and therefore better prepared to decide. This was found in some cases to be productive of mischief and delay, because at times a sufficient number of hundreders could not be obtained, and because jurors permitted their prejudices to have an influence in the formation of their verdict. The courts, therefore, relaxed the rule, and it was ultimately changed in civil cases by the 4 and 5 Anne, chapter 16, which authorized the taking the jury from the county. * * * The statute mentioned did not extend to criminal cases, and afterwards another was passed, in the reign of George II., which included prosecutions on penal statutes, leaving prosecutions for crimes still unaltered. But the practice in criminal prosecutions also changed, and the direction in the venire was looked upon as mere form, and the jury were selected from the body of the county, without the least regard to the *visne* of the indictment." *Shaffer v. State*, 1 How. (Miss.) 238.

Sufficiency of Direction to Summon "from the County."—A venire is not objectionable because it directs the sheriff to summon a jury "from the county" instead of a jury "of the county," since the phrase "from the county" is not susceptible of a construction which would authorize a summoning from persons outside the county. *Woodsides v. State*, 2 How. (Miss.) 655.

Summoning Jurors Previously Drawn from Particular Locality.—In *Smith v. State*, 4 Neb. 277, the sheriff, in pursuance of a proper direction to summon the jurors from the "body of the

is made by statute for summoning from some particular part of the county or territory over which the court exercises its jurisdiction, there is no power to direct that jurors be so procured.¹

(b) **Locality Other than Vicinity.**—Where, because of the influence of a party to a cause, or the existence of bias or prejudice, or for any other reason, the court is unable to procure a sufficient number of qualified jurors from the county or locality of its jurisdiction, in some states statutory authority exists to procure jurors from another county or locality, as a substitute for a change of venue,² and where the jury is required to be procured from persons residing remote from the place where the offense is charged to have been committed, the venire should contain that specific requirement.³

county," summoned almost one-half from members of a special panel which had previously been taken from a particular part of the county and for that reason had been quashed, and it was held that the last panel having been properly summoned, it was immaterial that the twelve trial jurors selected had been of the quashed panel.

Justices' Courts.—In *Michigan* a justice, by his constables, may summon juries from the county at large. *Faulks v. People*, 39 Mich. 200.

Sufficiency of Venire for Jurors from County at Large.—An order directing the summoning of additional jurors from the county at large is a substantial compliance with a statute providing for the ordering of such jurors from the bystanders or from the county at large, though the venire fails to specify whence such jurors are to be taken. *People v. Mallon*, 3 Lans. (N. Y.) 224.

Sufficiency of Direction for Jury from County at Large.—An informality consisting in directing that jurors to be summoned "be drawn by the clerk in the usual way," instead of directing that they be summoned from the county at large, is not such an irregularity as should be allowed, after a trial on the merits, an objection not being made until after verdict, to affect the validity of the proceedings. *People v. Cummings*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 343.

Objection to Improper Direction.—Objection that a venire was not directed generally to the whole body of the county comes too late after verdict. *Brown v. State*, 12 Ark. 623.

1. In *Grissom v. State*, 4 Tex. App. 374, after the exhaustion of the original venire, the defendant moved to quash a special venire drawn from the city

wherein the alleged crime was committed because of the existence therein of great prejudice against the accused, and requested that the sheriff be directed to summon without the city limits, which the court refused to require. There was held to be no error in overruling the motion.

A challenge to the array should be sustained when it appears that the jury was not summoned from the body of the county, as required by statute, but from a particular locality where the subject-matter of the proceeding had been discussed freely and with some apparent bias. *Houghton v. Huron Copper Min. Co.*, 57 Mich. 547.

Discrimination Against Particular Locality.—There is an abuse of authority in ordering a special jury under the *Tennessee Code*, § 4805, when the court directs the selection by discriminating against a particular municipality in which there are persons equally competent with those within the locality in which the selection is ordered. *Jackson v. Pool*, 91 Tenn. 451.

Locality of Alleged Murder.—It is reversible error to command the sheriff in a special venire to summon a jury "residing as near as may be to the place where the murder was committed." *Shaffer v. State*, 1 How. (Miss.) 238.

2. *Bell v. Van Riper*, 3 N. J. L. 103; *Roberts v. Com.*, 94 Ky. 499; *Brafford v. Com.*, (Ky. 1891) 16 S. W. Rep. 710; *Massie v. Com.*, (Ky. 1896) 36 S. W. Rep. 550; *Purylar v. Com.*, 83 Va. 51; *Cahoon v. Com.*, 21 Gratt. (Va.) 822; *Sands v. Com.*, 21 Gratt. (Va.) 871; *Wormeley v. Com.*, 10 Gratt. (Va.) 658; *Craft v. Com.*, 24 Gratt. (Va.) 602; *Waller v. Com.*, 84 Va. 492; *Lawrence v. Com.*, 81 Va. 486.

3. **Sufficiency of Venire.**—A venire

(12) *When Returnable.*—At common law the venire might be made returnable the same day on which it issued, or any day during the term, and it may be generally stated that the time when process may be made returnable will not usually be deemed important, with certain exceptions hereinafter referred to, if the time designated for the return is sufficient for the transaction of the business of the court.¹

2. *The Officer*—*a. GENERALLY.*—At common law the sheriff, in executing the venire, not only selected the jury but likewise summoned them, and though his authority to make the selection

directing jurors in a capital case to be summoned remote from the place "where the felony was committed" is not such a variance from a statutory requirement that they shall be summoned "remote from the place where the offense is charged to have been committed" as will necessitate a reversal for that reason. *Poindexter v. Com.*, 33 Gratt. (Va.) 766.

"Remote" Defined.—"Remote," in such a statute, is a relative term, and should be considered in connection with the density or sparsity of population in the particular locality where the cause is to be tried. *Lawrence v. Com.*, 81 Va. 484; and, in the sense of the law, all parts of the adjoining county, outside of the limits of a corporation, are remote from the place where the offense is alleged to be committed if it is alleged to be committed within the limits of the corporation. *Craft v. Com.*, 24 Gratt. (Va.) 602.

The Failure to Comply with a Statutory Requirement that the venire shall command the summoning of persons "residing remote from the place where the offense is charged to have been committed" is fatal. *Whitehead v. Com.*, 19 Gratt. (Va.) 640.

1. See *infra*, VIII. *Service of Jury List or Panel.*

In England the judges of assize sitting as a court of oyer and terminer, or as a court of general jail delivery, could issue a venire and make it returnable the same day or any day during the term. 1 Chit. Crim. Law, 508, 513; 4 Hawk. Pl. Cr. 376; 3 Bac. Abr. 736; Cro. Car. 315. And see *Shaffer v. State*, 1 How. (Miss.) 238.

At Term Venire Bears Teste.—A venire may be made returnable at the term which it bears teste. *Woodsides v. State*, 2 How. (Miss.) 655.

On Adjourned Day.—Under the Comp. Laws of Michigan, § 4374, providing for

summoning jurors when for any cause they shall not have been drawn or when a sufficient number shall have failed to appear, if the court has adjourned the attendance of the jurors may be required on the adjourned day. *People v. Jones*, 24 Mich. 215.

Summoning Jury for Probate Term.—A district judge has no power to summon a jury at the time fixed by law to hold the regular probate term of the court. *State v. Doyall*, 13 La. Ann. 418.

Special Venire Returnable at Succeeding Term.—In *Roberts v. State*, 30 Tex. App. 291, it appeared that, by statute, at any time after the finding of an indictment, the prosecuting officer was empowered to obtain an order for a special venire, that after the finding of an indictment the cause was continued to the next term, the court adjourned, and the succeeding term of the court convened on April 4; that on the preceding March 31 an order for the writ issued returnable on April 9, and the cause was set for trial on April 13. There was held to be no reversible error, either because the court made the special venire returnable to a succeeding term of the court or because the court was without jurisdiction to make such an order.

Clerical Misprision.—An objection that the order commanded the appearance of jurors at the next term, etc., and that the jurors appeared and were impaneled at the same term within which the order was issued, is frivolous where it appears that the part of the order directing the appearance "at the next term" was a mere clerical misprision, and that the exact date when the jurors were to appear was set out in the order, and was also definitely fixed in the order of summons issued by the clerk to the sheriff. *Peters v. State*, 100 Ala. 10.

has been curtailed in great measure, yet the duty of summoning and procuring the attendance of jurors now generally devolves on him as an officer of the court, through whom it executes its writs and process, and who may himself act by his deputies,¹ or through persons specially deputed to perform the duties so imposed.² In some jurisdictions, however, this duty is performed by various other officers designated by statute,³ as in justices' courts and courts of inferior jurisdiction when the process is executed by constables and like officers,⁴ and it has been held

1. *State v. Arthur*, 39 Iowa 631; *State v. Gay*, 25 La. Ann. 472; *People v. McGeery*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 653.

Temporary Disability of Sheriff. — A statutory provision authorizing a direction to the sheriff or other attending officer, in case of his absence or inability to serve, to impanel a jury, etc., does not confer authority on the court to direct the coroner to impanel a jury when the sheriff is temporarily disabled from sickness, where the latter has deputies or constables summoned by him to attend the court as bailiffs and who are competent to act. *State v. Monk*, 3 Ala. 415.

Service by Deputy When Sheriff Is Disqualified. — A statute providing that in an action in which the sheriff is disqualified to act officially in the service of process the coroner shall act will not authorize a deputy sheriff to impanel a jury in an action in which the sheriff is a party. *Gollobitsch v. Rainbow*, 84 Iowa 567.

Service by Deputy — Improper Setting Aside of Sheriff. — When the record shows that a jury was summoned by a deputy sheriff, it is immaterial that the court, without authority, dismissed the sheriff from the duty of summoning tales jurors, the act of the deputy being deemed that of his principal. *Kelly v. State*, 3 Smed. & M. (Miss.) 518.

De Facto Deputy. — It is sufficient that the jurors were summoned by a deputy sheriff *de facto*, whose appointment had not been formally approved and from whom an oath had not been exacted. *State v. McGraw*, 35 S. Car. 283.

2. **Summoning by Bailiffs.** — In view of a statute that jurors shall be summoned by the sheriff or his deputy, if the panel is summoned in part by bailiffs under the authority of the sheriff, they will be deemed his deputies. *Conner v. State*, 25 Ga. 515. See also *Westmoreland v. State*, 45 Ga. 225, *McGuffie v. State*, 17 Ga. 497.

Special Constables. — The duty of summoning jurors which devolves by law upon the sheriff may be performed by special constables appointed by him to assist him during the term of the court. *State v. Arthur*, 39 Iowa 631.

The Sheriff May Depute a Minor to Execute the Venire. — *State v. Toland*, 36 S. Car. 515.

Evidence of Deputation. — Deputation of persons to serve the venire need not be indorsed on the venire nor attached thereto. *State v. Toland*, 36 S. Car. 515.

Failure to Have Possession of Writ or Appointment as Deputy. — The fact that a person presuming to act for the sheriff did not have the writ in his possession nor any written appointment as a deputy is not a ground for quashing the return. *Gillum v. State*, 62 Miss. 547.

Sufficiency of Consent to Execution of Writ by Deputy. — Where, during recess of the court, the sergant appointed a deputy without the judge's consent, and the deputy took oath of office before the judge, in writing, signed by the deputy and certified in writing by the judge, there was held to be such a sufficient consent in writing by the judge as authorized the deputy to execute a writ of venire facias directed to the sergant. *Craft v. Com.*, 24 Gratt. (Va.) 602.

3. Under the *New York* Act of 1858, relative to jurors in Kings County, the jurors were required to be summoned by a commissioner and not by the sheriff. *Kenny v. People*, 31 N. Y. 330.

In *Smith v. Com.*, 6 Gratt. (Va.) 696, the prisoner was examined in the Hustings Court of a city, and sent on by that court to the Circuit Superior Court for the county and the city, and it was held that the venire was properly executed by the sergant of the city.

4. *Louw v. Davis*, 13 Johns. (N. Y.)

that the fact that jurors were summoned by the wrong officer would not necessarily vitiate a judgment rendered where no prejudice resulted.¹

b. QUALIFICATIONS. — The sheriff or other summoning officer may be disqualified by interest, bias, partiality, or prejudice which may or in fact does unfit him for the proper performance of his duties, especially when he is likewise intrusted with a discretion in selecting the persons to be brought in under the venire,² or he

227; *Rice v. Buchanan*, 41 Barb. (N. Y.) 147. Ct.) 262; *Vanauken v. Beemer*, 4 N. J. L. 416.

In *Louw v. Davis*, 13 Johns. (N. Y.) 227, it is intimated that though the venire from a justice's court is directed to any constable of the county, yet if it is executed by the proper constable the defect is merely in form, and would not require the reversal of the judgment.

1. That Jurors Were Summoned by the Wrong Officer, i. e., by the sheriff instead of by an officer of the metropolitan police, is not a ground of reversal. *People v. Williams*, 24 Mich. 156.

For the court to order a United States marshal to summon a talesman from the bystanders when the sheriff is present in the court room, and is not disqualified, is an unwarranted departure from the practice, but if no objection is interposed, and the talesman thus summoned is not unfitted, it is error without prejudice. *Meeker v. Gardella*, 1 Wash. 139.

Summoning by Sheriff After Designation of Coroner. — It is not a ground of challenge to the array that a jury was summoned by the sheriff after an order directing the coroner to act when at the time of hearing the challenge the objecting party expressly stated that the jurors included in the panel were not prejudiced or illegally drawn or summoned, except in the one respect stated, and there was no suggestion at all as to prejudice or bias on the part of any of the jury. *Boykin v. People*, 22 Colo. 496.

Erroneous Designation of Coroner. — Error of the court in improperly directing service of a special venire by a coroner because of the bias of the sheriff cannot be urged as a challenge to the panel or ground of objection to the venire when no contention is made that the coroner was partial or biased. *People v. Welch*, 49 Cal. 174.

2. See *State v. Cameron*, 2 Pin. (Wis.) 490, 2 Chand. (Wis.) 172; *People v. Tweed*, 50 How. Pr. (N. Y. Supreme

Sheriff as Witness. — A sheriff who is likewise the prosecuting witness is disqualified to summon the jurors. *State v. Powers*, 136 Mo. 194.

The mere circumstance that a sheriff was liable to be called as a witness, and had knowledge of facts which would make against the accused if he should be so called and should testify to such facts, will not disqualify him from serving a special venire. *Sullivan v. State*, 75 Wis. 630.

Prosecuting Witness Father of Sheriff. — In *Hanna v. People*, 86 Ill. 243, the father of the acting sheriff was the prosecuting witness, and it was held to be error to refuse to appoint a special bailiff to serve the special venire, on a motion made for that action, when by statute it was provided that on objection being made by either party to the sheriff acting the court shall appoint a special bailiff to summon such persons.

Sheriff Part Owner of Stolen Property. — It is not a good ground of challenge to the array that the sheriff who assisted in selecting and drawing a venire was owner of some of the property the accused was charged with stealing. *Prince v. State*, 3 Stew. & P. (Ala.) 253.

Affiant in Affidavit Before Committing Magistrate. — A sheriff is not disqualified from summoning talesmen because he made the affidavit on which the prisoner was held by the committing magistrate and changed the charge of assault with intent to murder to the charge of murder, the person assaulted having subsequently died of the wound. *Mabry v. State*, 50 Ark. 492.

Ascertainment of Bias by Court. — On the challenge to a panel summoned on a special venire upon the ground that the officer who summoned the jurors was disqualified for bias under the statute, he may be asked by the court: "If you were impaneled and sworn as

may be disqualified by relationship to one of the parties,¹ or to a person with whose death a defendant who is to be tried by the jury to be obtained stands charged.²

c. **SUBSTITUTE FOR DISQUALIFIED OFFICER** — (1) *Coroner*. — At the common law, the substantial features of which as to the subject under present consideration have been generally adopted, if the sheriff was unindifferent or if he was related by blood or affinity as heretofore indicated, the venire

a juror to try this cause, could you and would you give the defendant a fair and impartial trial?" *People v. Ryan*, 108 Cal. 581.

Suggestion of Partiality — Who May Make — Under Section 193 of the Kentucky Code, which authorizes the court to designate some officer or person other than the sheriff to summon jurors, where partiality of the sheriff or the like is shown, there may be such a designation from information furnished by either the state or the defendant. *Johns v. Com.*, (Ky. 1887) 3 S. W. Rep. 369.

Possible Interest in Conviction. — A new trial will not be granted for possible partiality of the sheriff because of supposed interest in a reward where the evidence fails to establish that fact and where it appears that a deputy summoned nearly all the jurors, who, as to those chosen, were free from objection. *Armstrong v. Com.*, (Ky. 1893) 22 S. W. Rep. 750.

Filing Evidence of Sheriff's Disqualifications — Harmless Error. — On a challenge to a panel secured under a special venire, sustained on testimony taken in the absence of jurors accepted from the regular panel and those summoned under the special venire, the defendant objected to the filing of an affidavit of the sheriff embodying the substance of his testimony as to alleged bias, an elisor having been appointed, and it was held that, conceding the filing of the affidavit to have been an irregularity, it was harmless to the defendant and therefore constituted no ground of reversal. *People v. Ebanks*, 117 Cal. 652.

An Affidavit Introduced on a Motion for an Elisor Is Not Conclusive as to allegations therein of prejudice on the part of the sheriff or the coroner, and unless there has been an abuse of discretion in disposing of the application there is no available error. *State v. Mathews*, 98 Mo. 119; *State v. Leabo*, 89 Mo. 247.

Change of Opinion as to Guilt of Accused.

— An officer who admits having had an opinion as to the guilt or innocence of the accused, but states that it has since been dispelled, is not disqualified for bias within a statute providing for challenges to a special venire for reason of bias of the summoning officer. *People v. Ryan*, 108 Cal. 581.

Right to Test Impartiality of Constable.

— Where a statute provides that the justice issuing a venire shall deliver the same to a constable disinterested between the parties, and against whom no reasonable objection shall have been made by either party, the justice should not deliver a venire to the constable until the parties have been afforded an opportunity to interpose objections to the officer if they shall see fit. *Rice v. Buchanan*, 41 Barb. (N. Y.) 147.

Representation of One Party by Constable. — It is a good cause of challenge that the constable who summoned a jury appeared on behalf of the plaintiff before the justice. *Watkins v. Weaver*, 10 Johns. (N. Y.) 107.

1. *Munshower v. Patton*, 10 S. & R. (Pa.) 334; *Vanauken v. Beemer*, 4 N. J. L. 416.

Relationship to Accused. — When it is ascertained by the court during the making up of a jury that the sheriff is related to the accused, it is proper to appoint an elisor to summon other jurors, although no improper conduct on the part of the sheriff is shown. *Allen v. Com.*, (Ky. 1889) 12 S. W. Rep. 582.

2. *State v. Sullivan*, 39 S. Car. 400.

Uncertainty as to Relationship.

Where a sheriff's deputy who summoned a jury is uncertain as to his relationship to the person for whose death the accused is on trial, the array should not be quashed in the face of clear affirmative proof of the correct and due performance of his duty by the deputy. *Com. v. Manfredi*, 162 Pa. St. 144.

might be directed to the coroner.¹

(2) *Elisors*. — If exception lay to the coroner, two clerks of the court, or two persons of the county, who were called elisors, were required to be named by the court and were nominated to execute the venire.² In some jurisdictions, when the sheriff is disqualified but not the coroner, elisors may be appointed to execute the process.³

1. *State v. Hardin*, 46 Iowa 623; *Harriman v. State*, 2 Greene (Iowa) 270; *Com. v. Carson*, 3 Phila. (Pa.) 219; *People v. Tweed*, 50 How. Pr. (N. Y. Supreme Ct.) 262.

An objection to a venire because of irregularity in appointing a coroner to act in lieu of the sheriff is, in effect, a challenge to the array, and is unavailable where by statute the only ground for such a challenge is for bias of the summoning officer. *People v. Welch*, 49 Cal. 174.

The inability of the sheriff to act, through illness, will not empower the court to direct a coroner to summon the jury and to serve the list where there are others in the sheriff's office who can perform the duty. *State v. Monk*, 3 Ala. 415.

Persons Previously Summoned by Sheriff. — Where a coroner appointed because of the disqualification of the sheriff summoned persons who had already been summoned by the sheriff and presumably were on the regular panel, there was held to be no available error, since, if necessary, recourse might have been had to the right of challenge. *State v. Wiley*, 109 Mo. 439.

2. *State v. Hardin*, 46 Iowa 623; *Harriman v. State*, 2 Greene (Iowa) 270; *Williams v. Com.*, 91 Pa. St. 493.

Appointment of Elisors through Extreme Caution. — Where, from extreme caution, the prosecuting officer presented a state of facts which in the opinion of the court disqualified the sheriff and the coroner, the fact that the jurors were summoned by an elisor appointed by the court was held not to be a sufficient ground of challenge to the special venire. *People v. Young*, 108 Cal. 8.

Necessity of Elisor to Summon Advisory Jury. — Where the action is of an equitable character and the function of the jury is merely advisory to the court, there is no error in denying an application for the designation of some person other than the sheriff to serve a special venire. *Peck v. Farnham*, (Colo. 1897) 49 Pac. Rep. 364.

The Pennsylvania Act of April 14, 1834, which provides that if a sufficient number of jurors shall not appear when a cause is called for trial the sheriff or coroner, or, if the case requires it, two citizens to be appointed by the court, upon its order shall immediately summon from the bystanders or from the county at large a sufficient number of qualified persons to complete the jury, was construed in *Com. v. Carson*, 15 Leg. Int. (Pa.) 325, to mean that if from any cause, bias or partiality, sickness, absence, death, removal or resignation from office, or refusal to obey the order to summon special jurors, or if for any other sufficient cause the court determine that the circumstances of the case so require, it may appoint two citizens to perform the duty mentioned in the act.

Qualification of Elisor. — It is no objection to the appointment of an elisor that he acted under the sheriff as bailiff to juries in other causes. *State v. Bodly*, 7 Blackf. (Ind.) 355.

Service on Coroner's Jury. — In a capital case where it is admitted that the sheriff is disqualified, and that the present coroner has been a member of the coroner's jury, whereby he is disqualified by force of statutory provisions, an elisor may properly be appointed. *People v. Schorn*, 116 Cal. 523.

3. Where, by statute, an affidavit is filed charging partiality, prejudice, or the like, on the part of the sheriff, and requiring that process be directed to the coroner or some other person, upon the filing of such affidavit it is the duty of the court to direct the coroner or an elisor to act. *State v. Hardin*, 46 Iowa 623; *Harriman v. State*, 2 Greene (Iowa) 270.

Appointment of Elisor instead of Coroner. — Where it is provided by statute that when the sheriff or his deputy is disqualified jurors may be summoned by the coroner or by any disinterested person whom the court may appoint, if such a disqualification exists it is im-

d. OATH.—While it is necessary that jurors should be summoned by a duly sworn officer, it is not ordinarily necessary that a sheriff or his deputy who has duly qualified by oath, generally, or who has been duly sworn at the beginning of the term, should be resworn when called upon to perform his duty in this respect.¹

e. OBJECTIONS.—As hereinbefore stated with respect to other objections, the objection to the summoning officer should be in due form and should be made in apt time.²

material that the court appoint a disinterested person, and not the coroner. *Phillips v. State*, 29 Ga. 105.

When the Sheriff Is a Party and There Is No Coroner, it is proper that on the application of the adverse party there should be an elisor appointed. *Pacheco v. Hunsacker*, 14 Cal. 120; *State v. Bodly*, 7 Blackf. (Ind.) 355.

In Kentucky, and by force of section 193 of the Criminal Code, after the regular panel is exhausted, the court may designate two persons other than the sheriff, duly sworn, to summon petit jurors. *Roberts v. Com.*, 94 Ky. 499.

Right of Elisor to Appoint Assistant.—Where, at the defendant's request, a person other than the sheriff is appointed to summon a jury, there is no error in the fact that such person appointed an assistant where it is not apparent that any prejudice has resulted. *Forman v. Com.*, 86 Ky. 605.

Ex Parte Ascertainment of Disqualification.—Under the *Missouri Revised Statutes of 1889*, § 3244, providing that where the sheriff is interested or prejudiced elisors may be appointed, the alleged interest or prejudice may be ascertained by the court *ex parte*, and the court may act on an affidavit made by the prosecuting officer of the state. *State v. Hultz*, 106 Mo. 41.

Retrospective Statute.—In *North Carolina* an act (1889, c. 441) providing for the appointment of some suitable person to summon a jury from the bystanders in a case in which the sheriff is a party or is interested was held applicable to actions commenced before its passage. *Boyer v. Teague*, 106 N. Car. 576.

Action by Sheriff After Appointment of Elisor.—An objection to jurors that they were summoned by the sheriff, and not by an elisor appointed on the sheriff's disqualification, is in effect a challenge to the array. *State v. Weeden*, 133 Mo. 70.

1. If a sheriff and his deputy were

sworn at the beginning at the term, it is not necessary to swear them again prior to ordering them to summon talesmen to fill out the special venire. *Deon v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 266.

Summoning Talesmen.—Where the oath prescribed by a statute to summon proper persons as talesmen, etc., has been taken by the sheriff once during the term, it is not necessary that it should be readministered at each particular time thereafter that it becomes necessary for him to summon talesmen during that term. *Blankton v. Mayes*, 72 Tex. 414; *Shaw v. State*, 32 Tex. Crim. Rep. 155; *Habel v. State*, 28 Tex. App. 588.

No Oath at Commencement of Term.—A conviction will be reversed for failure to administer to the sheriff and his deputies, at the commencement of the term, the oath prescribed by statute respecting his conduct in summoning juries. *Hicks v. State*, 5 Tex. App. 488.

Objecting to Service by Unsworn Officer.—Objection that a venireman was not summoned by a sworn officer comes too late after verdict. *Newman v. Dodson*, 61 Tex. 91.

3. Before Trial.—Objection to the summoning officer must be made before the trial, and comes too late on motion for a new trial. *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125.

An objection to the qualification of the sheriff who summoned the talesmen should be interposed before the beginning of the trial, and comes too late after verdict. *Daniel v. Frost*, 62 Ga. 697.

Court Acting of Its Own Motion.—The *California Penal Code* does not authorize the court, of its own motion and against objections, on issuing a special venire to aid a depleted panel, to examine the sheriff as to matters concerning his alleged disqualification, and to authorize service by the coroner be-

3. Execution of Process — a. DUTY OF OFFICER. — It is the duty of the officer to whom process is directed to obey the direction made, and his failure to perform the duties so charged upon him may furnish a good ground for quashing the array.¹

b. MISCONDUCT, BIAS, ETC. — Independent of statutory provisions prescribing causes for which a venire may be quashed, it is a good objection that in executing the process the summoning officer was interested, biased, prejudiced, actuated by improper motives, or guilty of misconduct,² which objection may properly

cause of bias on the part of the sheriff. *People v. Welch*, 49 Cal. 174.

Waiver by Consent. — A defendant who consents that the constable who represents the plaintiff may summon the jury waives the irregularity. *Watkins v. Weaver*, 10 Johns. (N. Y.) 107.

1. A Sheriff Has No Power to Excuse Jurors and summon others to attend, that power belonging to the judge alone. *Ayers v. Metcalf*, 39 Ill. 307.

Substitution of Names. — That the sheriff, before executing a special venire, took therefrom the names of two persons and substituted the names of two others therefor is no reason for quashing the venire if no objectionable juror was chosen, and the accused did not exhaust his peremptory challenges. *Williams v. State*, 29 Tex. App. 89.

Although the law gives the summoning officer the power of selecting jurors, when that selection has once been made and the jurors have been regularly summoned to attend, he has no authority to change them and to substitute others in their places. The power to discharge jurors lies in the court. *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47.

Before the constable returns the venire to the justice, he may strike out the name of a juror and insert another. *Boyles v. M'Eowen*, 3 N. J. L. 253.

Where a Juror Was Summoned as a Substitute for Another Person of a Similar Name who was regularly on the panel, the verdict was held not necessarily invalid, although the sheriff violated his duty, it not appearing that there was any injury or prejudice to the rights of the parties. *Bennett v. Matthews*, 40 How. Pr. (N. Y. Supreme Ct.) 428.

Failure of Officer to Comply with Order. — The failure of the sheriff to comply with a judicial order for the organization of a legal jury is a ground for reversal. *Roberts v. State*, 68 Ala. 515.

Disobedience to Direction of Court. — In *People v. Colt*, 3 Hill (N. Y.) 438, the

order to the sheriff directed him to summon three hundred persons from the county at large, but he selected the persons so to be summoned by copying names from the jury list in the clerk's office, and this was held not to be such an irregularity as would vitiate the proceedings.

Waiver of Objection. — Even if the fact that an order directing a special venire was not obeyed would be a good objection to proceeding with the trial, yet if the accused selects his jury without objection it is a waiver. *State v. Perry*, Busb. L. (N. Car.) 330.

Special Jury Law. — Persons summoned on a special jury in a criminal case need not be selected by the sheriff of St. Louis from names furnished him by the jury commissioner. *State v. Hayes*, 16 Mo. App. 560.

Duty of Party. — It is not the duty of the defendant in a justice's court to see that the venire is served. *Moslander v. Hays*, 2 N. J. L. 148.

Who May Be Included in Panel. — The sheriff, when directed to summon a panel of a specified number, may include therein the regular panel, and from the whole number the traverse jury may be elected. *Galvin v. State*, 6 Coldw. (Tenn.) 283.

2. Connecticut. — *Quinebaug Bank v. Tarbox*, 20 Conn. 510.

Massachusetts. — *Com. v. Walsh*, 124 Mass. 32.

Mississippi. — *Durrah v. State*, 44 Miss. 789.

New York. — *Gardner v. Turner*, 5 Johns. (N. Y.) 260; *Pringle v. Huse*, 1 Cow. (N. Y.) 432.

North Carolina. — *Boyer v. Teague* 106 N. Car. 576; *State v. Murph* 1 Winst. L. (N. Car.) 129.

Pennsylvania. — Opinion of Ct., 1 Browne (Pa.) 121; *Showers v. Com.* 120 Pa. St. 573.

Texas. — *Anderson v. State*, 34 Tex. Crim. Rep. 96.

Willfully Summoning Prejudiced Per

be taken by challenge to the array.¹

c. PRESUMPTIONS.—In the absence of any showing to the contrary, it may be presumed that officers charged with the duty of summoning jurors properly discharged that duty.²

sons.—The array may be challenged because the summoning officer acted corruptly, and wilfully summoned upon the jury persons known to him to be prejudiced against the defendant, with a view to securing a conviction. *Tuttle v. State*, 6 Tex. App. 556.

Corruption of Summoning Officer.—The *Mississippi* Act of 1836 had the effect of confining the right to quash the array to corruption of the summoning officer only. *Thomas v. State*, 5 How. (Miss.) 20.

Constable Interested in Conviction.—Judgment reversed because the constable who summoned the jury was interested in the conviction. *People v. Felker*, 61 Mich. 114.

Unindifference of Officer.—In *Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, it was held that while a challenge to the array might be taken for unindifference of the sheriff or coroners, who were general officers of the court, and were bound by their duty to attend at the assizes, and in fact usually did so, yet, when jurors were summoned by another officer under rule of court, no challenge to the array could be allowed for his unindifference; and this not only because he was specially appointed by the court for the purpose, but, as Lord Tenterden observed, because of the great inconvenience that would ensue and the almost utter incapacity of inquiring into the matter satisfactorily at nisi prius, in the absence of the person by whom the panel had been formed, and accordingly without any opportunity of answer or explanation.

Endeavoring to Ascertain Opinions.—It is not a ground of challenge that while serving a special venire the sheriff endeavored to ascertain the opinions of the proposed jurors, and to summon them accordingly. *State v. McCarty*, 17 Minn. 76.

Directing Minor to Serve.—In *Watts v. Ruth*, 30 Ohio St. 32, wherein a minor sat as a jurymen, which fact was not discovered until after verdict, there was held to be no such misconduct as to entitle the parties to a new trial on the part of an officer who directed the juror in question to take his

seat as a talesman. Upon the latter remarking that he was a minor the deputy sheriff directed him to take his seat, saying "You are of age," but there was no intimation that the officer acted corruptly, but rather that he thought the juror was making a frivolous excuse.

Excusing Jurors Regularly Selected.—The fact that a sheriff excused jurors regularly selected will not, of itself, warrant a conclusion that he was actuated by corrupt motives, or that prejudice resulted. *Ayers v. Metcalf*, 39 Ill. 307.

1. *Connecticut.*—*Quinebaug Bank v. Tarbox*, 20 Conn. 510.

New York.—*Gardner v. Turner*, 9 Johns. (N. Y.) 260; *Pringle v. Huse*, 1 Cow. (N. Y.) 432.

North Carolina.—*Boyer v. Teague*, 106 N. Car. 576; *State v. Murph*, 1 Winst. L. (N. Car.) 129.

Pennsylvania.—Opinion of Ct., 1 Browne (Pa.) 121; *Showers v. Com.*, 120 Pa. St. 573.

Texas.—*Anderson v. State*, 34 Tex. Crim. Rep. 96.

See also *infra*, IX., 6, *Challenges to the Array*.

At Common Law, if a sheriff returned a juror on the nomination of one of the parties, or knowingly returned a person more favorable to one party than to the other, it showed partiality, or, as it was called, unindifference on the part of the sheriff, which was a ground for challenging the array, and consequently could not be used as a ground of challenge to the polls. See *Com. v. Walsh*, 124 Mass. 32.

Under a Statute Authorizing a Challenge to the array, where the summoning officer has acted corruptly and has wilfully summoned persons known to be prejudiced, etc. (*Pasch. Dig. Texas*, art. 3034), a challenge on the ground that a jury composed exclusively of white men was selected is without merit. *Williams v. State*, 44 Tex. 34.

2. *Smith v. State*, 88 Ala. 73; *Gibson v. State*, 16 Fla. 291; *Roberts v. Com.*, 94 Ky. 499; *Lawrence v. Com.*, 30 Gratt. (Va.) 845.

Where a motion is made to set aside a supplementary venire because not

d. MODE OF EXECUTION — (1) *Generally*. — The mode of serving prospective jurymen with process is usually prescribed by statute, but when not so prescribed the better practice is that the service should be personal, so that all questions as to the fact of actual notice may be obviated.¹

(2) *Talesmen*. — See *infra*, IX. 4. *Talesmen and Additional Jurors*.

(3) *Objections*. — Irregularities in the manner of executing process should be objected to in apt time and in due form. They may be waived, and when not prejudicial may be disregarded.²

summoned according to law, if the bill of exceptions fails to show in what respect the law was disregarded, it will be presumed that the statutory provisions were conformed to. *Swofford v. State*, 3 Tex. App. 76.

Failure of Return to Show Mode of Execution of Venire. — Although the return fails to show that the venire was executed by reading it to the persons summoned, as required by law, it will be presumed that the law was duly complied with. *State v. Toland*, 36 S. Car. 515.

Drawing Names to Fill Panel. — When it is provided that if, at the opening of a term of court, the panel shall not be full, the clerk shall repair to the office of the county clerk and draw more jurors until the panel be filled, and that if before that time a jury is needed the court shall direct the sheriff to summon persons, etc., the fact that a special venire issued to the sheriff will warrant a presumption that the clerk has performed the duties imposed on him by the law. *People v. Madison County*, 125 Ill. 334.

1. *Cordova v. State*, 6 Tex. App. 207.

Sufficiency of Service. — A statute requiring notice to attend the term to be served upon each person named in the list, personally or by leaving the notice at his residence with a person of suitable age, etc., is not complied with by mailing a notice to such persons, inclosing a card admitting service of the notice, to be signed and returned. *People v. Burgess*, 153 N. Y. 561.

Leaving at Place of Abode. — A summons left at the "house or usual place of residence" of the person named in the venire is a sufficient service by leaving it "at his place of abode," as required by statute. *State v. Toland*, 36 S. Car. 515.

Reading Venire. — The *Massachusetts* Public Statutes do not require a certifi-

cation of the venire by the town clerk and selectmen, and jurors may be summoned by reading the venire to them with the indorsement thereon of their being drawn, which indorsement may be made by the constable. *Com. v. Besse*, 143 Mass. 80. See also *Com. v. Moran*, 130 Mass. 284.

Resort to General Statutes under Special Act. — In summoning a special jury the officer need not proceed according to the common law relative to summoning of special or struck juries, but may follow the general provisions of the statute relative to the summoning of jurors. *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125.

2. See *infra*, IX. *Formation of the Jury*.

Waiver by Acquiescence. — Supposed irregularities will be deemed waived by the acquiescence of the accused in the completion of the panel without objection. *Jackson v. State*, 4 Tex. App. 292, *distinguishing* *Bates v. State*, 19 Tex. 122.

A Trial on the Merits Is a Waiver of all irregularities and defects in the mode of summoning and returning the jurors. *Fife v. Com.*, 29 Pa. St. 429; *Bergman v. Wolff*, (Buffalo Super. Ct.) 11 N. Y. Supp. 591; *Kennedy v. Com.*, 14 Bush (Ky.) 340.

Irregularities Without Prejudice. — The refusal of the trial court to sustain a challenge to a panel obtained irregularly will not require a reversal of the judgment where it is not also shown that positive injury resulted from the refusal. *People v. Madison County*, 125 Ill. 334; *Wilhelm v. People*, 72 Ill. 468.

Failure to Exhaust Peremptory Challenges. — Alleged irregularities in summoning jurors are not good grounds for interference where the defendant did not exhaust his peremptory challenges, and was not forced to take any

(4) *Irregular Summoning—Attendance of Venireman.*—Where a venireman appears though irregularly summoned, or in fact not summoned at all, the irregularity or omission will be deemed immaterial, since his attendance, which is all that due service of the process would effect, and which is its object, has been attained.¹

e. TIME OF EXECUTION.—The time of summoning jurors, except so far as their own convenience is concerned, is immaterial where no prejudice results, unless the statute in that behalf is mandatory.²

objectionable juror. *Franklin v. State*, 34 Tex. Crim. Rep. 625; *Williams v. State*, 29 Tex. App. 89.

1. *Judge v. State*, 8 Ga. 173; *State v. Matthews*, 88 Mo. 121; *State v. Pitts*, 58 Mo. 556; *State v. Breen*, 59 Mo. 415; *State v. Knight*, 61 Mo. 373; *State v. Ward*, 74 Mo. 256; *Martin v. Steele*, 3 N. J. L. 290; *Hill v. Hill*, 1 N. J. L. 302; *Com. v. Salter*, 2 Pearson (Pa.) 461; *State v. Anderson*, 26 S. Car. 599.

That the Jury Was Summoned Without a Venire is neither ground to arrest the judgment nor for a new trial. *Bird v. State*, 14 Ga. 43.

Placing Names on Jury List Without Authority.—It is a good ground of challenge to the array that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of jurors by the clerk of the court at their request, without any order having been entered requiring such jurors to serve. *McCloskey v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 308.

Procuring Absent Juror by Telephone.—In *Goodland v. Le Clair*, 78 Wis. 176, there was held to be no error on the part of the court where one of the jurors who failed to answer the call was afterwards telephoned to be present and was placed on the jury.

Specification of Mode of Service.—Where the object of a statute is to require the return to specify the manner of service upon the jurors, if the jurors actually attend the manner of service then becomes immaterial, and no defect in the mode of notifying them will render the jury objectionable. *People v. Jones*, 24 Mich. 215. And see *People v. Williams*, 24 Mich. 156.

Disregard of Statute by Summoning Officer.—Where the sheriff, instead of following the statute, adopted a mode which left the court without power to compel the attendance of a single

juror, it was held that no harm had resulted because all the jurors drawn who were qualified to sit personally appeared in court at the time appointed. *People v. Burgess*, 153 N. Y. 561.

Timely Objection.—An objection that a person served on the jury without being selected by the court or summoned by the sheriff comes too late after judgment. *Short v. Com.*, 90 Va. 96.

Waiver by Failure to Object.—When a person is called as a juror whose name is not in the venire, the party who suffers him to remain on the jury without objection, and takes his chance of a verdict, waives his objection. *Burton v. Ehrlich*, 15 Pa. St. 236.

Effect of Plea as a Waiver of Defects.—Defects in the methods whereby jurors are brought into court are waived by a plea of not guilty. *Com. v. Seybert*, 4 Pa. Co. Ct. Rep. 152.

Resummoning Persons Summoned by Unauthorized Officer.—That a panel was discharged because brought into court by persons who were neither sheriffs' deputies nor sworn officers will not prevent the sheriff from executing a new venire by summoning the same persons who were ordered discharged. *State v. Degonia*, 69 Mo. 485.

2. *State v. Smith*, 67 Me. 328; *Hurley v. State*, 6 Ohio 399; *Roberts v. State*, 30 Tex. App. 291.

Under the *New York* Act of 1858, relative to Kings county, upon exhaustion of a panel a new panel might be summoned on one day's notice. *Kenny v. People*, 31 N. Y. 330.

Resort to Common-law Practice.—In *Rockford Ins. Co. v. Nelson*, 75 Ill. 548, the term of the regular jury having expired, a jury was drawn in accordance with the statute, except that the jurors were not drawn and summoned twenty days before court, and

f. SERVING DISQUALIFIED PERSONS. — The fact that disqualified persons were served with process is immaterial.¹ Nor is it material that the disqualification was known at the time the persons were summoned, unless without them there was not a sufficient number of good and lawful men from whom an impartial jury could be selected.²

g. INTERFERENCE BY STRANGERS. — The fact that suggestions were made to the summoning officer as to the persons to be selected, that efforts were made to influence his action, or that he was improperly interfered with in the discharge of his duties, may furnish a good reason for quashing the array.³

the court said: "It is apparent in many cases this would be impossible, and courts must resort to their inherent powers as recognized at common law."

1. See *infra*, VII. 5. *Return of Process*.

Withholding Service on Disqualified Person. — That a person directed to be summoned is supposed or even known to be exempt or disqualified is not sufficient to excuse the failure of the sheriff to summon him. *Ezell v. State*, 102 Ala. 101.

Coroner or Elisor Summoning Jurors Previously Summoned by Sheriff. — The fact that a regular jury was summoned by the sheriff is not a barrier to any or all of them being summoned for a particular case by a coroner or an elisor. *State v. Wiley*, 109 Mo. 439. And see *State v. Weedon*, 133 Mo. 70.

2. *Roberts v. State*, 68 Ala. 515; *Commander v. State*, 60 Ala. 1.

3. *Com. v. Walsh*, 124 Mass. 32.

Where a Selection Is Ordered on an Open Venire it is a ground for reversal that any other officer of the court or other person requested the sheriff to discriminate against any class of citizens eligible to jury duty, but it is not error for the district attorney or other counsel to request before the court, nor for the judge himself to direct, that the officer shall summon good and lawful men where the writ itself so commands. *Babcock v. People*, 13 Colo. 515.

Delegation of Talesman by Party. — In *Park v. Harrison*, 8 Humph. (Tenn.) 412, it appeared that while a deputy sheriff, by order of the court, was looking for a juror in place of one rejected, one of the successful parties attracted his attention and pointed out a person whom the officer summoned. It was held that this would not necessitate a new trial, as it did not appear that the

officer was influenced in making the selection or that there was any intention to influence him.

Suggestion by Counsel. — Where, in response to the request of the summoning officer, counsel informed him who were stockholders of the plaintiff company, and, after disclaiming any intention of influencing him in the discharge of his duty, named several persons who were not stockholders and expressed the opinion that they were independent and judicious men, there being no evidence of bias on the part of the officer, the court refused to sustain a challenge to the array, although some of the persons named were included in those summoned. *Quinebaug Bank v. Tarbox*, 20 Conn. 510.

Directions by Court. — In *Caperton v. Nickel*, 4 W. Va. 173, there was held no error in directing the sheriff, in summoning a jury, after quashing the panel, not to exclude any juror who had been on the panel quashed if he were otherwise unobjectionable, nor in summoning such persons.

Correcting Venire at Suggestion of Party. — Although a constable, on finding that he has not summoned proper men, may correct the venire, he should not do so on the suggestions or representations of either party. *Boyles v. M'Eowen*, 3 N. J. L. 253.

Interference by State's Attorney — Timely Objection. — In *State v. Dusenberry*, 112 Mo. 277, it was held that there was no error on the part of the court below in refusing leave to the defendant to file an amended motion for a new trial, setting up improper interference of one of the state's attorneys in summoning talesmen, after the expiration of the four days allowed by law for filing such motions.

Disqualified Deputy. — In *Clapp v. State*, 94 Tenn. 186, the judgment was

4. Defective Process — a. GENERALLY. — While the process may be so defective as to require reversal of a judgment rendered by a jury procured thereunder,¹ if the defects or irregularities are immaterial, or not of such a nature that prejudice may be fairly inferred, their existence will be deemed unimportant.²

b. AMENDMENTS. — It has been held that a writ which has served its purpose by bringing the persons to be summoned before the court may be amended in so far as respects mere clerical errors.³

5. Return of Process — a. GENERALLY. — Having executed the process directed to him, it is the duty of the summoning officer to make his return, showing his proceedings thereunder,⁴ which

reversed and a new trial ordered on it appearing that a sheriff adjudged disqualified and incompetent to summon the jury, after the appointment of a special sheriff for that purpose, gave to the latter officer the names of three of his regular deputies to assist in summoning the jury, which fact was not known to the defendant until after the trial.

1. Defects in the venire may require reversal. *Veal v. Brown*, 2 N. J. L. 68; *Sayres v. Scudder*, 2 N. J. L. 50.

If a venire is invalid it is ineffectual for any purpose, and as soon as the invalidity becomes apparent to the court, it is the duty of the court to quash the writ and to discharge the jurors brought in under it. *Muscoc v. Com.*, 87 Va. 463.

The right to a proper venire is not waived by the interposition of peremptory challenges. *People v. M'Kay*, 18 Johns. (N. Y.) 212.

Where the error assigned is that no precept was issued or ordered as the law directs for the summoning or attendance of jurors, the precept issued in fact should be set out, that the court may judge of its legality. *Williams v. State*, 69 Ga. 11.

2. *Haight v. Holley*, 3 Wend. (N. Y.) 258.

Defects in Unnecessary Venire. — Where there is no authority or necessity for a venire, defects in the writ are immaterial. *State v. Hill*, 19 S. Car. 435.

3. **Showing True Date.** — A writ of venire may be amended by showing the true date of the order for its return, i. e., by adding a figure so as to make the year read 1891 instead of 189-. *Suit v. State*, 30 Tex. App. 319.

Necessity of Actual Amendment. — In *Spratley v. Kitchens*, 55 Miss. 578, it

was held that a motion to quash a venire for an amendable defect dispensed with the necessity for actual amendment, for the reason that the writ had served its purpose by bringing the persons required to be summoned before the court, and the defect being clerical only, and amendable, the writ would not be declared void, though an amendment was not actually made. To the same effect see *Hale v. State*, 72 Miss. 140.

4. 3 Black. Com. 353; *Bac. Abr.*, tit. Juries, (B) 2.

At common law the sheriff returned the names of the jurors in a panel (a little pane or oblong piece of parchment annexed to the writ). 3 Black. Com. 353; *Co. Litt.* 158b. And see *Brewer v. Jacobs*, 22 Fed. Rep. 217.

In *Beasley v. People*, 89 Ill. 575, the panel is defined to be "a schedule containing the names of persons whom the sheriff returns to serve on trials."

In *Porter v. People*, 7 How. Pr. (N. Y. Supreme Ct.) 441, the court, in construing a statute (2 Rev. Stat. N. Y. 509, § 9) providing that "jurors shall be summoned, returned, and impaneled in the same manner as provided by law in civil actions before justices of the peace, and shall be sworn by such judge," etc., after stating the dictionary definitions of "impanel" and "panel" (*Bouvier and Webster*) said: "Thus it will be seen that the act of impaneling has nothing to do with that of drawing, selecting, or swearing those who are to serve as jurors, but simply making the list of those who have been selected."

Necessity of Returning and Filing Process. — It is good cause for reversing a capital judgment that no precept summoning a petit jury was returned

return is authentic evidence as to the persons who have been summoned to appear,¹ and in the absence of any suggestion to the contrary will be taken *prima facie* as true.²

b. TIME OF RETURN. — If the sheriff or other officer returns the process in time for the business of the court, and his action has not had the effect of depriving a party of any right to which he might be entitled, or of working any prejudice or injury, the fact that statutory requirements or the requirements of the process were not strictly complied with in respect to the time of the return will not be deemed an irregularity of sufficient importance to invalidate his action in the premises.³

and filed. *McGuire v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 148. See also *Eaton v. Com.*, 6 Binn. (Pa.) 447.

Annexation of Panel to Distringas. — In *French v. Wiltshire*, Andr. 67, it was held that there was a good return, the panel being annexed to the distringas. See also *Phillips v. Phillips*, Andr. 248; *Hill v. Hill*, 1 N. J. L. 302.

Order by Statute. — In *Cowper v. Franklin*, 3 Bulst. 186, it was said that the failure to return the distringas was aided by the statute of 30 Henry VIII.

Failure to Return Venire and Panel. — In *Welsh v. Upton*, Cro. Eliz. 259, it was moved in arrest of judgment that the venire and panel were wanting, but it was held that the venire being the ground of the distringas, which evidently alone was returned, it was helped by the statute.

Presumption from Failure to Object. — Where the defendant fails to object and voluntarily proceeds to trial before a jury in the selection of which he participated, there is a just presumption that the sheriff returned the venire, or that the return was waived. *Brown v. State*, 74 Ala. 478.

1. *Collins v. State*, 31 Fla. 574.

2. *Logan v. State*, 53 Miss. 431.

3. *State v. Clayton*, 11 Rich. L. (S. Car.) 587; *Ryan v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 288; *State v. Squaires*, 2 Nev. 226.

Filing on First Day of Term. — A requirement that a venire be filed with the clerk on the first day of the term is sufficiently complied with by depositing the venire with the clerk and posting it in his office on that day. *State v. Caulfield*, 23 La. Ann. 148.

Before Opening of Court. — A return made before the opening of the court is a sufficient compliance with a statute requiring the return before the opening or time of holding the court

from which it issued. *State v. Toland*, 36 S. Car. 515.

After Commencement of Trial. — It is immaterial that a return to the venire was not made until after the commencement of the trial. *State v. Payne*, 6 Wash. 563.

Delay of Proceedings Until Return. — It is a matter within the discretion of the justice of the peace whether he will delay proceedings until the return of the sheriff, who has been directed to summon talesmen, or will proceed as fast as the jurors present themselves. *State v. Henry*, 15 La. Ann. 297.

Until Return of Special Venire. — It is error to proceed against objection with the impaneling of the jury from a special venire as the persons summoned arrive in advance of the sheriff's return of the writ, since by so doing the accused is deprived of his right to demand a list of those summoned, and consequently is shut off from an intelligent and judicious exercise of the right of peremptory challenge. *Collins v. State*, 31 Fla. 574.

Presumption. — If the return shows that it was made on the day whereon the court convened, it is a fair presumption that it was made before the opening of the court. *State v. Toland*, 36 S. Car. 515.

Waiver of Timely Return. — Statutory provisions prescribing the time for the return of a second venire after the discharge of the first are for the convenience of the parties, and a compliance therewith may be waived by them. *Fiero v. Reynolds*, 20 Barb. (N. Y.) 275.

Return Prior to Prescribed Time. — The fact that the venire was returned to the clerk the day prior to the meeting of the court, instead of at the opening of the court, is immaterial. *State v. Gut*, 13 Minn. 341.

Premature Return by Direction of

c. CONTENTS — (1) Time of Execution. — Where the process contains directions as to the time of its execution, the return should show compliance therewith, or at least enough should appear to warrant an inference of obedience thereto,¹ but if the person summoned appear, the fact of the omission to state the time of service will not generally be deemed material.²

(2) Statement of Qualifications. — In view of the presumption of the performance of an official duty, there is no necessity that the return should show that the jurors summoned were selected or drawn according to law.³

(3) Subscription and Signature. — Though it is undoubtedly proper that the return should be subscribed or signed by the summoning officer, an omission in that respect is not incurably vicious.⁴

d. RETURN AS TO NUMBER — (1) Insufficient Number. — Unless under exceptional circumstances, and in the absence of any allegation that the summoning officer acted corruptly or with partiality in summoning the panel, or any showing that anything was done to affect the integrity and fairness of the entire panel, if reasonable diligence has been used it is not a ground of objec-

Judge. — In *Murphy v. People*, 37 Ill. 447, it was objected that although a venire had been issued for jurors for the third week of the term, by request of the court the sheriff executed the venire for the second week, and that the defendant was thus compelled to select a jury from a panel chosen for a different week from that in which he was to be tried, but the irregularity not properly appearing of record, the court stated that it was not prepared to say that such a change would be a ground of reversal.

Failure to Return Justice's Venire. — Where a venire has been issued by a justice of the peace and it is not returned, he should not proceed but should issue a new venire, *Sebring v. Wheedon*, 8 Johns. (N. Y.) 460; *Day v. Wilber*, 2 Cai. (N. Y.) 137; though the failure to make the return will not give the defendant any right to a nonsuit. *Blanchard v. Richly*, 7 Johns. (N. Y.) 198.

1. Reference to Date in Venire. — Where a venire facias directed the constable to cause a jury to be drawn not more than twenty nor less than six days before the sitting of the court, and he made return that the jury was drawn "as above directed," but without date, the return was held sufficient. *Fellows's Case*, 5 Me. 333.

2. In Anonymous, 1 Pick. (Mass.)

196, a constable omitted, in his return, to state the day on which he summoned the jurors, but they attended on the first day of the term, and in answer to questions by the court admitted that they had received due notice, whereupon they were sworn.

3. In Com. v. Green, 1 Ashm. (Pa.) 289, it was held that it was not necessary that it should appear upon the return of the precept that the jury had been drawn according to law, but that it would be presumed that the sheriff proceeded legally, until the contrary was shown.

In *Eaton v. Com.*, 6 Binn. (Pa.) 447, in which the judgment was reversed, the sheriff was commanded to summon particular persons, and he returned that he did summon them, but to another precept commanding him to draw the names of the jurors he made no return, so that it did not appear on the record either expressly or by necessary implication that the persons who served as jurors were summoned according to law.

4. Com. v. Chauncey, 2 Ashm. (Pa.) 90.

Subscription by Deputy. — Where, by statute, it is provided that where the service of process is by deputy the deputy shall subscribe to the return his own name as well as that of his principal, a venire facias should be quashed

tion that there was an omission to serve and a consequent failure to return the prescribed statutory number of persons, or the number required by statute to be brought in under the process,¹ because of the decease of persons to whom the process is directed,² or because of the absence of the proposed jurors from the jurisdiction or inability to find them or make service upon them therein.³ But where the number of jurors prescribed by statute

when the return thereto is subscribed by the deputy alone. *Mitchell v. Com.*, 89 Va. 826.

1. *State v. Dozier*, 33 La. Ann. 1362; *State v. Stanton*, 118 N. Car. 1182; *State v. Whitt*, 113 N. Car. 716; *Charles v. State*, 13 Tex. App. 658; *Rodriguez v. State*, 23 Tex. App. 503; *Murray v. State*, 21 Tex. App. 466; *Washington v. State*, 8 Tex. App. 377; *McCarty v. State*, 26 Miss. 299; *Rex v. Hunt*, 4 B. & Ald. 430, 6 E. C. L. 547.

Failure to Summon Whole Panel.—In *Roberts v. State*, 68 Ala. 515, the order in a capital case directed the sheriff to summon one hundred persons as special jurors, but by the erroneous repetition of one name one hundred names appeared, though in truth only ninety-nine persons were summoned. This was held good ground for quashing the venire, the case not being within a statute providing that a "mistake in the name of any person summoned as a juror" shall not be sufficient cause for quashal, but there was presented a failure of the sheriff to comply with a judicial order which conferred substantial rights.

Insufficient Time to Summon Whole Number.—Failure to return the whole or substantially the whole number required to be summoned in the writ is not a good objection where it appears that the time allowed for the service was very short; that the officer exercised due diligence; and that the accused was not deprived of a fair and impartial jury. *Parker v. State*, 33 Tex. Crim. Rep. 111.

The Neglect of an Inferior Officer to summon a person named in the panel is not a ground for challenging the array. *Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564.

Neglect to Summon Nearly One Half the names on a special venire will be ground for quashing it. *Logan v. State*, 53 Miss. 431.

Exclusion of Jurors Summoned by Officer Without Authority.—Where the sheriff summoned but thirty-five out of

sixty persons named in the special venire, and of his own motion summoned and returned a number of persons sufficient to make up the required number of sixty, it was held that the court acted properly in finding a legal jury by excluding the names of the twenty-five persons summoned without authority, and in exhausting the portion of the panel legally summoned, and calling in talesmen. *Harris v. State*, 6 Tex. App. 97.

Jury Obtained Without Exhaustion of Peremptory Challenges.—The fact that a jury was obtained without exhaustion of the peremptory challenges is a sufficient answer to a complaint that there was a deficiency in the panel from which the jury was selected. *State v. Clyburn*, 16 S. Car. 375; *State v. Price*, 10 Rich. L. (S. Car.) 356; *State v. McQuaige*, 5 S. Car. 429.

Failure to Make Timely Objection.—The statutory right to have a specific number of qualified jurors returned and presented may be waived by a failure to interpose the objection in time. *State v. Robertson*, 71 Mo. 446. But see *State v. Waters*, 62 Mo. 196. And *State v. Davis*, 66 Mo. 684.

Failure to Object Below.—Objection to proceeding with the trial because a small number of those for whom the special venire issued had been summoned cannot be urged for the first time on review. *Jackson v. State*, 55 Miss. 530.

2. *Buford v. McGetchie*, 60 Iowa 298; *State v. Speaks*, 94 N. Car. 865; *State v. Hensley*, 94 N. Car. 1021; *Showers v. Com.*, 120 Pa. St. 573; *Rolland v. Com.*, 82 Pa. St. 306; *Smith v. State*, 21 Tex. App. 277.

3. *Alabama.*—*Gibson v. State*, 89 Ala. 121; *Arp v. State*, 97 Ala. 5; *Webb v. State*, 100 Ala. 47; *Daughdrill v. State*, 113 Ala. 7 [*citing* *McElroy v. State*, 75 Ala. 9; *Jackson v. State*, 76 Ala. 26, and *distinguishing* *Ryan v. State*, 100 Ala. 106].

Iowa.—*Buford v. McGetchie*, 60 Iowa 298.

is requisite to the jurisdiction of the court, the summoning of a less number is fatal.¹

(2) *Excessive Number*. — There seems to be no good reason for quashing a panel because more than the statutory number or the number recognized at common law were summoned, at least, unless the statutory requirement as to number is mandatory, or special circumstances exist whereby there may be prejudice.²

c. RETURN OF INCOMPETENT AND DISQUALIFIED PERSONS. — That incompetent or disqualified persons were summoned will furnish ground for challenge for cause, but it will not be deemed a sufficient reason for quashing the array.³ Thus a venire is not

Louisiana. — *State v. Kane*, 32 La. Ann. 999.

Mississippi. — *Gillum v. State*, 62 Miss. 547.

North Carolina. — *State v. Hensley*, 94 N. Car. 1021; *State v. Speaks*, 94 N. Car. 865.

Pennsylvania. — *Showers v. Com.*, 120 Pa. St. 573; *Rolland v. Com.*, 82 Pa. St. 306.

South Carolina. — *State v. Derrick*, 44 S. Car. 344.

Texas. — *Smith v. State*, 21 Tex. App. 277.

Virginia. — *Sands v. Com.*, 21 Gratt. (Va.) 871.

Prima Facie Truth of Return. — Where a special venire of sixty men is returned executed as to thirty-two, the others not being found within the county, the return will be taken as *prima facie* true. *Logan v. State*, 53 Miss. 431.

Permanent Removal—Ignorance of Officials. — It is immaterial that three jurors named on the venire were not summoned where, by the sheriff's return, it appears that they had permanently removed from the county, and there is no pretense that the officers who drew the names had knowledge of that fact, if it was a fact, at the time. *People v. Ah Chung*, 54 Cal. 398.

New Writ to Summon Jurors Not Found. — If it appears that diligent efforts have been made to summon jurors, the fact that some of them have not been found will not entitle the defendant to a new writ to secure their attendance. *Gillum v. State*, 62 Miss. 547.

1. *Donaldson v. Com.*, 95 Pa. St. 21.

2. *U. S. v. Insurgents*, 2 Dall. (U. S.) 335; *Prall v. Peet*, 3 La. 274.

At Common Law the venire facias to the sheriff was for only twelve to serve on the petit jury. But as there would

have been great inconvenience from merely summoning the number to be actually employed, and the full jury would very seldom be assembled, it seems to have always been the practice for the sheriff to return twenty-four on the panel. (Co. Litt. 155 a; 2 Hale 263.) *Com. v. Eaton*, 8 Phila. (Pa.) 428.

In Criminal Cases at Common Law the sheriff could return more than twelve jurors, for the reason that the statute of Westminster the second, which limited the panel in civil cases, did not extend to criminal proceedings. Kelyng 16; Bac. Abr., tit. Juries. And see *Com. v. Eaton*, 8 Phila. (Pa.) 428.

Return of More than Statutory Number. — It is not a just ground of complaint that more than twelve men were returned, although the statute requires the return of twelve good and lawful men. *Barber v. James*, 18 R. I. 798; *Fitchburg R. Co. v. Boston*, etc., R. Co., 3 Cush. (Mass.) 58; *Hosmer v. Warner*, 15 Gray (Mass.) 46.

Who May Complain. — Where the panel returned contains a greater number of jurors than is required by statute, the error is one of which the state alone, and not the defendant, has the right to complain. *Anderson v. State*, 5 Ark. 445.

Waiver by Failure to Object. — Where all the facts were known at the time the juror was impaneled, the fact that an excessive number of competent jurors were summoned is a mere irregularity, which is waived by failure to object. *Bronson v. People*, 32 Mich. 34.

3. *Hall v. State*, 40 Ala. 698; *Roberts v. State*, 68 Ala. 515; *Gray v. State*, 55 Ala. 86; *Jones v. State*, 104 Ala. 30; *Arp v. State*, 97 Ala. 5; *Gibson v. State*, 89 Ala. 121; *Flelds v. State*, 52 Ala. 348; *Matter of First St.*, 58 Mich.

invalidated by the fact that persons named therein are entitled to claim exemption from jury duty,¹ are absent, so that service cannot be made upon them,² are deceased,³ or are disqualified from performing jury duty.⁴

f. **ERRORS AND OMISSIONS** — (1) *Generally*. — Immaterial errors or omissions in the return or panel, especially those which are merely clerical, will not invalidate it.⁵

641; *Boles v. State*, 24 Miss. 445; *Foust v. Com.*, 33 Pa. St. 338; *Buchanan v. Com.*, (Pa. 1886) 6 Atl. Rep. 704; *Carthaus v. State*, 78 Wis. 560; *Conkey v. Northern Bank*, 6 Wis. 447. See also *infra*, IX. 6. *Challenges to the Array*.

Members of Panel Quashed. — Veniremen who were discharged because of the allowance of a challenge to the array should not be again summoned and sworn on the trial. *Combs v. Slaughter*, Hard. (Ky.) 67.

Juror Previously Challenged. — If one juror be discharged for sickness, in the trial of a criminal cause, no juror who has been once challenged can again be summoned as juror in that cause. *Garner v. State*, 5 Yerg. (Tenn.) 160.

Purging Panel. — Where two or three ineligible persons are returned, the court may purge the panel without sustaining a challenge to the array. *State v. Whisner*, 35 Kan. 271.

In *Fellows's Case*, 5 Me. 333, the return was held sufficient though a person drawn as a juror was the constable who served the venire and made the return.

1. *Jones v. State*, 104 Ala. 30; *Arp v. State*, 97 Ala. 5; *State v. Toland*, 36 S. Car. 515, *citing State v. Merriman*, 34 S. Car. 16.

2. *Gibson v. State*, 89 Ala. 121; *Smith v. State*, 21 Tex. App. 277.

The Mere Fact that the Names of Ineligible Jurors — persons outside of the county — are named in a special venire will not destroy or impair the integrity of the whole panel or in any way render it unlawful and subject on that account to challenge. *State v. Hensley*, 94 N. Car. 1021.

3. *Gibson v. State*, 89 Ala. 121; *State v. Hensley*, 94 N. Car. 1021; *Smith v. State*, 21 Tex. App. 277.

4. *Gibson v. State*, 89 Ala. 121.

Various Disqualifications. — That one of the jurors summoned was, when called, engaged in the trial of another cause; that another had not been a resident of the state and county for

one year; that another failed to answer when called; and that another was over the age of seventy years constitutes no cause of challenge to the jury selected to try the cause. *Arp v. State*, 97 Ala. 5.

Members of Venire Previously Quashed. — It is no objection to a venire that it directs the summoning of the same persons who were required to be summoned by a prior venire which was quashed. *Mitchell v. Com.*, 33 Gratt. (Va.) 845.

5. **A Mere Verbal Error** in the return of a sheriff to the venire may be disregarded. *State v. Gut*, 13 Minn. 341.

Language Ungrammatical. — Though the language of a return is not grammatically correct, yet if the facts stated are true and the meaning cannot be misunderstood, it is sufficient if it appears that all was done that was required by the statute. *Maples v. Park*, 17 Conn. 333.

Inaccurate Language. — Where, in certifying the name of a juror, the constable said: "We have appointed J. C. a juror," etc., it was held that the language, though inaccurate, was perfectly intelligible, and that by "we" was meant the town of which the constable was an inhabitant. *Fellows's Case*, 5 Me. 333.

Designation of Summoning Officer. — In *Fellows's Case*, 5 Me. 333, wherein the constable styled himself constable of the town, without stating what town, it appearing that the venire was addressed to the constable of "M.," the return was held sufficient.

Omission of Name of Venireman. — Where a constable omitted to insert the name of a juror in his return, the juror was placed on the panel on making oath that he had been summoned. *Patterson's Case*, 6 Mass. 486.

Description of Place of Abode. — In *Rex v. Stone*, 6 T. R. 527, an objection that one of the jurors was ill-described, his place of abode being stated to be Grafton street, and that, there being several streets of that name, there

(2) *Misnomer, Discrepancies, and Mistakes.* — Though there are decisions to the contrary, unquestionably the weight of authority is that mere discrepancies or inconsequential mistakes in the names of veniremen returned by the summoning officer are not available grounds of objection, nor sufficient reasons for vitiating the order, where there is no dispute that the person summoned is the person intended and the person to whom the process was directed.¹ Neither is it a ground for quashing the venire that

should have been something added to distinguish which Grafton street was meant, was overruled.

Necessity of Timely Objection. — Objection to a juror that his name was not on the return, though it appeared that he had been summoned, his name entered in the minutes, placed in the box, and drawn for trial, comes too late after verdict. *Thrall v. Smiley*, 9 Cal. 529.

Mode of Making Up Panel. — Though the manner in which the regular panel is made up is not in accordance with the statute, the irregularity will not be deemed sufficient to render the organization of the panel void. *Mueller v. Rebhan*, 94 Ill. 142.

Variance Between Order and Return. — In *People v. Jones*, 24 Mich. 215, the order directing the summoning of the jurors contained a recital that the reason for making it was that a sufficient number of petit jurors did not appear at the present term, and that the appearance of such jurors was necessary, but the copy of the order upon which the sheriff made his return stated that the grounds of the order were that no petit jury had been drawn for the present term, and it was held that the misrecital was immaterial, as it had no bearing on the duty either of the sheriff or the jurors summoned, and no influence on the selection of the names.

Statement of Absence of Persons from County. — A return that certain persons named in the venire "could not be found in the county" is sufficient statement that such persons "are absent from the county" within a statute authorizing the issuance of an alias venire in the latter contingency. *Davis v. State*, 25 Ohio St. 369.

Presumptions from Recitals in Record. — Where the record stated: "Whereupon came the jurors of the jury, to wit, etc., twelve good, etc., lawful men, etc., who were elected, tried, and sworn," etc., this was held sufficient

from which to presume that the jury had been returned according to law. *Hudson v. State*, 1 Blackf. (Ind.) 317.

1. *Alabama.* — *Bill v. State*, 29 Ala. 34; *Hall v. State*, 51 Ala. 9; *Rash v. State*, 61 Ala. 89; *Roberts v. State*, 68 Ala. 156; *Hubbard v. State*, 72 Ala. 164; *Gibson v. State*, 89 Ala. 121; *Jackson v. State*, 76 Ala. 26; *Bell v. State*, (Ala. 1897) 22 So. Rep. 526; *Williams v. State*, 81 Ala. 1.

Georgia. — *Judge v. State*, 8 Ga. 173; *Williams v. State*, 69 Ga. 11; *Pool v. Callahan*, 88 Ga. 468.

Maryland. — *Munshower v. State*, 56 Md. 514.

Nevada. — *State v. McNamara*, 3 Nev. 75.

New York. — *Haight v. Holley*, 3 Wend. (N. Y.) 258.

North Carolina. — *State v. Mills*, 91 N. Car. 581.

Pennsylvania. — *Com. v. Valsalka*, 181 Pa. St. 17.

Texas. — *Mitchell v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 367.

England. — *Wray v. Thorn*, Willes 488.

Contra. — *U. S. v. Wilson*, Baldw. (U. S.) 78.

In Case of a Jurymen. 12 East 229 (note to *Hill v. Yates*), a person duly qualified and summoned as a juror, named Robert C., answered to the name of Joseph C. and was sworn by that name, and the conviction, which was for a capital felony, was not disturbed.

Setting Aside Juror Misnamed. — A mistake in the surname of a special jurymen in a capital cause is not a ground for quashing the venire or stopping the trial, but the name should be discarded and another juror summoned. *Rash v. State*, 61 Ala. 89.

Though by statute misnomer is a ground of challenge to the array, the appellate court will not interfere with the action of the court below in refusing to sustain a challenge on the ground that a venire returned served on J. F. H. was actually served on J.

some of the jurors summoned were designated by the initials of their names instead of having their names set out in full, if the complaining party has been neither deceived nor misled, though the latter mode of designation is the better practice.¹

Where Copy of Venire Is Served. — An exception is made, however, in those jurisdictions wherein litigants or persons charged with crime are entitled to be furnished with a copy of the venire or a list of the persons summoned, and a misnomer is either made a ground of objection by statute or is of such a character as to be prejudicial because of depriving the person served of a sufficient opportunity to make inquiries as to the veniremen, or for any other reason which may have the effect of preventing him from properly preparing to make objection to the proposed jurors if he so desire.²

Wrong Person Summoned. — But where a person who is not the person intended to be summoned is returned, or answers and participates in the trial, the verdict is of no validity and the proceedings will be treated as a mistrial.³

C. H., the dissimilarity existing in the middle name, where there is no probability that by reason of the mistake the accused was injured in any respect, and the trial court, on becoming aware of the facts, directed the person appearing to stand aside. *McHugh v. State*, 42 Ohio St. 154, *distinguishing* *Price v. State*, 19 Ohio 423, decided under the former practice.

Right of Judge to Set Aside Ex Mero Motu. — Where a venire cannot be quashed because of the misnomer of a juror summoned, it is error for the court, of its own motion, to excuse a misnamed venireman who is qualified and competent, and who makes no request to be excused. *Sullivan v. State*, 102 Ala. 135.

Objections — When to Be Made. — Objections that a juror's name is erroneously entered upon the venire should be made by the accused at the time the juror is presented. *Anderson v. State*, 5 Ark. 445.

Appeal. — Where the mere dissimilarity in names of the persons summoned and the jurors who sat is alone relied on as a ground for reversal, and in no other way does it appear that all the jurors who rendered the verdict were not actually summoned, there is no available error. *People v. O'Brien*, 88 Cal. 483.

Presumption as to Identity. — Where the name, occupation, and residence of a person summoned as a juror fail to correspond exactly with any name,

occupation, and residence appearing on the list, but do correspond very nearly any *prima facie* presumption that the juror summoned was not one of those selected is rebutted by proof that there was no person to be selected of the exact name appearing on the list. *Com. v. Valsalka*, 181 Pa. St. 17.

1. *Floyd v. State*, 55 Ala. 61; *Cole v. State*, 105 Ala. 76; *Aikin v. State*, 35 Ala. 399.

2. See *infra*, VIII. *Service of Jury List or Panel*.

3. In *Hill v. Yates*, 12 East 229, the Court of King's Bench refused to set aside a verdict in a civil case where the son of one of the jurymen answered to his father's name, and actually served in his stead, although he had never been summoned. Lord Ellenborough assigned as a reason for denying a new trial that as no injustice was pretended to have been done, and the ground of a new trial was a discretionary matter, the court would not interfere, but would leave the party to get rid of the verdict in some other way if he could.

This decision is criticised in *People v. Ransom*, 7 Wend. (N. Y.) 417, wherein Sutherland, J., says: "I must confess that that case carries the doctrine to an extent which I should be unwilling to go. It appears to me to have been the verdict of but eleven men; the twelfth man was no juror; he was not upon the panel; he was not the man intended to be summoned, nor was he even in fact summoned."

(3) *Objections for Misnomer.*—Objections because of misnomer, however, to be available, like other objections of a like nature, must be interposed in apt time.¹

In *Dewey v. Hobson*, 6 Taunt. 460, a person not summoned answered to the name and served in the place of a person who had been summoned, which fact was discovered before verdict, notwithstanding which the plaintiff insisted upon retaining the juror and obtained a verdict, which was set aside, the court *distinguishing* the case from *Hill v. Yates*, 12 East 229.

In *Rex v. Tremaine*, 7 D. & R. 684, 16 E. C. L. 318, a son, under age, personated his father as a juror and joined in a verdict of guilty. There was held to be a mistrial and a new trial was granted, great importance being attached to the circumstance that the intruder had not the legal qualifications of a juror.

See *Norman v. Beamont*, Willes 484, wherein the verdict was set aside because a person who took part in the trial, though not returned in the panel, answered to the name of a person who was returned.

Names Identical.—Failure to Make Inquiries as to Identity.—In *McGill v. State*, 34 Ohio St. 228, a capital case, it appeared that the father of the person summoned, who bore the same name, answered, was accepted, and sat on the trial without the knowledge of the defendant or his counsel, and it was held that the accused, by failing to inquire of the juror whether he was the person summoned by that name, was not guilty of such negligence as precluded him from taking advantage after the trial of the juror's disqualification.

Securing Presence of Person Intended.—In *Goodwin v. State*, 102 Ala. 87, when F. G., Jr., was called, a person answered, stating that he was "F. G.," but not "F. G., Jr." He claimed exemption because over the age limit, which was allowed, and the court denied a motion to quash the venire, but directed the sheriff to summon F. G., Jr., and stayed all proceedings until the return of that person, who was then challenged peremptorily by the state. There was held to be no reversible error.

In *Colt v. Eves*, 12 Conn. 243 the name of a person duly drawn was entered in the venire, but by mistake the sheriff summoned another person having the same family name, but a different given name. On discovery of the

mistake, however the sheriff was directed to summon and did summon the right person, and there was held to be no error.

Presentation to Accused of Person Not Intended.—In *Goodwin v. State*, 102 Ala. 87, it appeared that a mistake was made by the commissioners in copying from the slips their list to be returned to the court, or that the clerk made a mistake in copying the writ for the sheriff, and that in consequence the person to whom the defendant was entitled was not the one who was on the venire and who responded to the call, and it was held that it was error to put the juror on the defendant.

Return in Distringas of Person Not Returned in Venire.—In *Fermor v. Dorrington*, Cro. Eliz. 222, it was held that if one man be returned in the venire and another in the distringas, and the latter serves, there is error. And see *Hasset v. Payne*, Cro. Eliz. 256.

Absence of Fraud or Prejudice.—In *Mann v. Fairlee*, 44 Vt. 672, it appeared that the sheriff summoned a person of the same surname as, and whom he supposed to be identical with, a juror whose name had been placed in the jury box of a town, and the person so summoned appeared, was sworn, and participated in the trial. No collusion or fraud on the part of the sheriff or any one else was claimed, and neither party was aware that the name had not been properly placed in the box and drawn therefrom until after the verdict was rendered and the jurors discharged from service in the cause; and it was held that the unsuccessful litigant was not entitled to a new trial.

Including Persons Not Summoned.—Waiver of Objection.—Objection that the sheriff placed on the venire for the week the names of persons drawn as jurors who had not been summoned, though good if made before trial, comes too late on a motion in arrest of judgment. *Thomas v. State*, 94 Ala. 74.

1. *Moon v. State*, 68 Ga. 687.

After Deposit of Names in Box.—An objection that the name of a person summoned as a juror was entered on the scroll by an erroneous middle initial, *State v. Mills*, 91 N. Car. 581, or by initials, must be taken before the name of the juror is placed in the box.

g. AMENDMENTS AND CORRECTIONS. — It may be stated as a general rule that, when necessary, amendments and corrections may be made and omissions supplied, except, of course, where the defects are of such a vital character as to preclude such action.¹

6. Disobedience to Process. — Compelling attendance, attachment, punishment, etc. See *infra*, IX. *Formation of Trial Jury.*

7. Mandatory and Directory Statutes. — As a rule, requirements respecting the procurement and attendance of jurors through the medium of process directed to the sheriff or other summoning officer are required to be more strictly observed than provisions respecting the original selection and drawing. When mandatory, a failure to obey the requirements will invalidate the array,² but

State v. Simmons, 6 Jones L. (N. Car.) 309.

After Formation of Jury. — An objection on the ground of a mistake or discrepancy in the name of the person summoned comes too late after the jury has been drawn, impaneled, and accepted by the state. *Williams v. State*, 81 Ala. 1.

After Verdict it is too late to object to mistakes in the process as to the Christian and family names of the jurors who rendered the verdict. *Jewell v. Com.*, 22 Pa. St. 94.

1. *Com. v. Miller*, 4 Phila. (Pa.) 210; *Com. v. Chauncey*, 2 Ashm. (Pa.) 91; *Dewar v. Spence*, 2 Whart. (Pa.) 211.

The Return to a Special Venire may be amended to meet defects urged as grounds of a motion to quash. *Washington v. State*, 8 Tex. App. 377; *Williams v. State*, 29 Tex. App. 89. And see *Sterling v. State*, 15 Tex. App. 249.

Statement of Diligence Used. — In *Murray v. State*, 21 Tex. App. 466, an amendment was allowed to a return which was defective because failing to state the diligence which had been used to summon jurors returned not found and the cause of the failure to summon them. See also *Powers v. State*, 23 Tex. App. 42; *Rodriguez v. State*, 23 Tex. App. 503.

Supplying Data. — In *Anonymous*, 1 Pick. (Mass.) 196, a constable who had omitted in his return to state the day on which he had summoned the jurors was allowed to amend in that particular, and was excused for his neglect on paying costs on the process for bringing him into court.

Addition of Signature. — The neglect of the sheriff to sign his return to the

jury process directed to him does not render it incurably vicious, and is not a sufficient reason to induce the court to quash the array of jurors; but the court will quash the return to the process, and, on motion, will direct the sheriff to complete his return by indorsing on his writ the execution thereof, and by signing the same. *Com. v. Chauncey*, 2 Ashm. (Pa.) 90.

Annexation of Panel to Distringas. — If the sheriff annex the panel to the venire, and not to the distringas, the latter may be amended. *Hill v. Hill*, 1 N. J. L. 302.

Presumption of Conviction. — An omission in the return of the sheriff will be presumed to have been corrected by sufficient evidence to justify the averment of record. *Mullin's Appeal*, (Pa. 1886) 5 Atl. Rep. 738.

2. *Posey v. State*, 73 Ala. 490; *State v. Windsor*, 5 Harr. (Del.) 512; *Williams v. Com.*, 91 Pa. St. 493; *Hall v. Com.*, 80 Va. 555; *Richards v. Com.*, 81 Va. 110; *Honesty v. Com.*, 81 Va. 283; *Spurgeon v. Com.*, 86 Va. 652.

In *Spurgeon v. Com.*, 86 Va. 652, in which it was held that the statute in force relative to the summoning of jurors was imperative, it was said that "the record must affirmatively show that all the essential formalities in the procedure have been complied with, and a failure to do so constitutes error on the face of the record of which advantage may be taken on a writ of error, even though objection was not made by the accused in the trial court." And see *Hall v. Com.*, 80 Va. 555.

Justice's Court. — Statutory proceedings respecting the procurement of jurors in justices' courts must be strictly complied with. *Becker v.*

where the statutes are directory, and independent of any fraud or misconduct, the mere failure to follow statutory directions may be disregarded where no rights have been impaired, no prejudice has resulted, or no injury has been sustained.¹

8. Appeal and Review — Sufficiency of Record — a. GENERALLY. — The record must be sufficient to enable the reviewing court properly to understand the objections relied on and the grounds therefor.²

b. VENIRE AS PART OF RECORD. — The venire is not necessarily a part of the record on appeal, unless objections were taken below,³ and then it must be made a part thereof by bill of exceptions.⁴ And when so required on appeal from a conviction,

Sitterly, 58 How. Pr. (Montgomery County Ct.) 38; *Brisbane v. Macomber*, 56 Barb. (N. Y.) 375.

A party who has demanded a jury trial in one of the District Courts of the city of New York has the right to insist that the jury shall be drawn as prescribed by statute, despite the fact that no prejudice could have resulted from the particular irregularity. *Equitable Gas Light Co. v. French*, 10 Misc. Rep. (N. Y. C. Pt.) 749.

1. *Siebert v. People*, 143 Ill. 571; *Johnson v. State*, 59 N. J. L. 535; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563; *Gardner v. State*, 55 N. J. L. 17; *Friery v. People*, 54 Barb. (N. Y.) 319; *State v. Stephens*, 11 S. Car. 319; *Rex v. Hunt*, 4 B. & Ald. 430, 6 E. C. L. 547; *Hill v. Yates*, 12 East 229. And see *Haight v. Holley*, 3 Wend. (N. Y.) 262.

Statutes respecting the selection, drawing, and summoning of jurors are no part of a system to procure an impartial jury to parties, but merely establish a mode of distributing jury duty among persons in the respective counties, etc., and are directory to those whose duty it is to summon the jury. *Rafe v. State*, 20 Ga. 60.

Unimportant Irregularities. — In *People v. Burgess*, 153 N. Y. 561, it was held that complaint cannot be made of the irregular manner of summoning the jurors where the complaining party was deprived of no jurors whose attendance could have been had if the service had been made in accordance with the requirements of the statute.

Improper Drawing of Additional Jurors. — Where the names of additional jurors were required to be drawn from the jury box by the clerk instead of directing the sheriff to summon talesmen as required by statute, the irregularity

was deemed unimportant. *Siebert v. People*, 143 Ill. 571.

Substantial Compliance. — While statutory directions to summoning officers should be substantially followed, unessential variations will not necessarily affect the array. *Forsythe v. State*, 6 Ohio 19.

2. A record reciting "and the jurors of the said jury, by A B, Esq., high sheriff of the said county of C, for this purpose impaneled and returned, agreeably to the statute in such case made and provided, to wit, C D," etc., is sufficient, and it is not necessary that the record should show by what authority and before whom the traverse jury was returned and impaneled. *State v. Price*, 11 N. J. L. 203.

Judicial Notice of Matters Not Shown. — In *State v. Wilson*, 85 Mo. 134, the motion for a new trial recited that there were no negroes returned on the venire, the defendant in the cause being a negro, but nothing appearing in the record to show the race or color of the persons composing the venire, or whether there were negroes within the county. The appellate court declined to take judicial notice of the matters not shown or to review the point raised.

3. *Organ v. State*, 26 Miss. 78; *Byrd v. State*, 1 How. (Miss.) 253.

The Precept to Summon Jurors need not be returned with the record. Where made up in proper form the award of process for summoning the juries only appears. *Werfel v. Com.*, 5 Binn. (Pa.) 65.

4. *Organ v. State*, 26 Miss. 78; *Byrd v. State*, 1 How. (Miss.) 253; *Spurgeon v. Com.*, 86 Va. 652.

A venire can only become a part of the record by bill of exceptions, and where the record shows that a venire

the failure of the record to show that a venire issued will warrant a reversal.¹

c. RETURN AS PART OF RECORD. — The return upon the venire constitutes no part of the record unless where the error complained of consists of misconduct or the like on the part of the summoning officer and inspection of the return is necessary properly to present the questions raised.²

9. **United States Courts.** — Congressional legislation with respect to procuring jurors to serve in the courts of the United States is included in the Revised Statutes of the United States,³ which, with the subsequent statute of 1879,⁴ practically control the manner of procuring juries in the federal courts, except in certain districts, by empowering such courts to make all necessary rules or

was issued by order of the court it will be sufficient. *Taylor v. Com.*, 90 Va. 109.

1. *State v. Dozier*, 2 Spears L. (S. Car.) 211; *Myers v. Com.*, 90 Va. 785; *Lewis v. Com.*, (Va. 1891) 12 S. E. Rep. 1050; *Jones v. Com.*, 87 Va. 63; *Hall v. Com.*, 80 Va. 555.

2. *People v. O'Brien*, 88 Cal. 483.

Presumption of Performance of Duty by Officer. — In the absence of a return of the sheriff on the writ for a special venire, it will be presumed that the officer properly performed his duty. *Richardson v. State*, 7 Tex. App. 486.

3. Rev. Stat. U. S., § 800 *et seq.* See *U. S. v. Insurgents*, 2 Dall. (U. S.) 335. See also *supra*, VI. 3. *United States Courts.*

4. By the Act of June 30, 1879 (21 Stat. at L. 43), it is provided that petit jurors, including those summoned during the session of the court, shall be publicly drawn from a box containing at the time of each drawing the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the Revised Statutes, "which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioners shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of

jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state."

Order for Venire in Circuit Court by District Judge. — By the terms of the Act of Congress of June 30, 1879, c. 52, § 2, "any judge" is authorized to order the names of jurors to be drawn from the boxes used by the state authorities, therefore a district judge may order a venire for the Circuit Court. *U. S. v. Hanson*, 28 Fed. Rep. 74.

Number of Jury Boxes. — The Act of Congress of 1879, respecting jurors in the courts of the United States, requires that there shall be as many jury boxes as there are clerks for places of holding court, and this act was held complied with in the eastern district of Virginia by having three boxes in the Circuit Court, although the court had but one clerk — nearly all criminal indictments and informations being brought therein — there being three clerks for the District Court, and one for each place of holding. *U. S. v. Munford*, 16 Fed. Rep. 164.

Discrimination Against Part of District.

— By section 802 of the Revised Statutes it is provided that "jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services," and in *U. S. v. Munford*, 16 Fed. Rep. 164, this provision was held to empower the court to discriminate against one part of the district as against other parts, relative to the number of jurors to be taken from the different boxes.

orders which will conform the designation and impaneling of juries, in substance, to the laws and usages relative to the formation of juries in the state courts, so far as the same may be practicable.¹ By this legislation, however, Congress did not impose upon the federal courts the duty of following the state practice, except so far as the court might by general standing rule, or by special order, adopt the state practice in that regard;² therefore, unless some such order or rule has been made or promulgated, the courts may resort to the common-law practice,³ and it has been held that the several acts prior to that of 1879 were applicable only to the mode of selection, and not to the number to be summoned.⁴

1. The special provisions relative to the United States courts in *Pennsylvania* (Rev. Stat. U. S., §§ 800, 801) were repealed by the Act of June 30, 1879 (21 Stat. at L. 23).

2. **Following State Practice.** — The state practice should be followed as nearly as may be. *U. S. v. Woodruff*, 4 McLean (U. S.) 105.

Power to Make Rules. — The Act of Congress of July 20, 1840 (5 Stat. at L. 394), conferred upon the courts of the United States the power to make all necessary rules and regulations for conforming the impaneling of juries to the laws and usages in force in the states. *U. S. v. Shackelford*, 18 How. (U. S.) 588.

Who May Serve Process. — "Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ." Rev. Stat. U. S., § 803.

3. **Necessity of Adoption of State Practice.** — State practice as to summoning jurors will not control the federal courts unless expressly adopted by them. *Alston v. Manning*, Chase's Dec. (U. S.) 460. See also *Pointer v. U. S.*, 151 U. S. 396; *U. S. v. Shackelford* 18 How. (U. S.) 588; *U. S. v. Richardson*, 28 Fed. Rep. 69; *Silsby v. Foote*, 14 How. (U. S.) 218.

Failure to Adopt Rule. — Where an Act of Congress does not itself fix the number of jurors, and no state rule for that purpose is expressly adopted, it is the

necessary consequence that the subject must depend on the common law, by which the court may direct any number of jurors on a consideration of all the circumstances under which the venire is issued. *U. S. v. Insurgents*, 2 Dall. (U. S.) 335.

Summoning under Former State Practice. — In *Alston v. Manning*, Chase's Dec. (U. S.) 460, it was held that the jury was properly summoned under what had been for a long time the practice of the state courts, but which at the time of the trial had been materially modified.

Return under Both State and Federal Law. — In *U. S. v. Insurgents*, 2 Dall. (U. S.) 335, the fact that the marshal returned twelve jurors in pursuance of the Act of Congress and sixty jurors in pursuance of the state law was held not to constitute error.

4. **Right of Federal Courts to Determine Number.** — The courts of the United States must determine for themselves the number of jurors to be summoned, and may, if they see fit, as was the settled usage in some circuits, have them summoned or drawn by their own officers. *U. S. v. Richardson*, 28 Fed. Rep. 61; *U. S. v. Dow*, Taney's Dec. (U. S.) 34; *U. S. v. Reed*, 2 Blatchf. (U. S.) 435; *U. S. v. Tallman*, 10 Blatchf. (U. S.) 25; *U. S. v. Woodruff*, 4 McLean (U. S.) 105; *U. S. v. Collins*, 1 Woods (U. S.) 499; *Alston v. Manning*, Chase's Dec. (U. S.) 460.

Number to Be Summoned as Affected by State Laws. — The Act of Congress of September 24, 1789, c. 20, § 29, in referring to the laws of the states in relation to juries, applies only to the mode of selecting them and not to the number to be summoned. The Circuit Courts are bound to follow the laws of the respective states in which they are

10. Territorial Courts.—In the territorial courts, where the United States is a party, or the case is one arising under the Constitution and laws of the United States, and in the absence of statutes on the subject, the common law will prevail, and a venire may issue to the United States marshal, directing him to summon jurors from the body of the district at large.¹

VIII. SERVICE OF JURY LIST OR PANEL—**1. Object.**—The object of statutes requiring a list of the jurors, or the panel, to be furnished to a person accused of crime is to afford him or his counsel an opportunity to make proper inquiries concerning the antecedents, predilections, character, and qualifications of the persons who are to pass on the facts of the case, and thus enable them to prepare with intelligence such objections as they may choose to present.²

2. Right to List—*a. ORIGIN OF RIGHT.*—The right of a person accused of crime to be served with a list of the names or a copy of the panel of the jurors from whom a jury might be selected to try him was conferred in *England* at an early day.³

held in the mode of forming the juries and in determining upon their qualifications, but the laws of the several states do not regulate the courts of the United States in the number to be summoned, they being governed upon this subject by the rules of the common law. *U. S. v. Dow*, Taney's Dec. (U. S.) 34.

Several Writs of Venire on Trial of Several Persons.—Where an Act of Congress directs that twelve jurors shall be summoned from the county in which the offense is alleged to have been committed, on the trial of several persons separate writs may be issued in each case, and a separate panel returned in conformity to each writ. *U. S. v. Insurgents*, 2 Dall. (U. S.) 335.

Race Discrimination—Power to Order New Venire.—In *Ex p. Reynolds*, 3 Hughes (U. S.) 559, on habeas corpus, the court acted on an allegation that the prisoners, who were colored, had not been accorded a trial by a jury drawn without distinction of race or color, having been tried by a jury composed entirely of white persons, and authorized the clerk to issue forthwith a writ of habeas corpus *cum causa* to the marshal to take the bodies of the defendants, etc., and a writ of venire to the marshal commanding him to summon a panel of jurors qualified by the state laws, without distinction of race or color.

1. *Beery v. U. S.*, 2 Colo. 186; *U. S. v. Beebe*, 2 Dakota 292; *U. S. v.*

Kuntze, 2 Idaho 446. And see *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434.

Jury from Body of District.—Under section 4 of the Act of Congress of June 23, 1874, 18 Stat. at L. 254, "in relation to courts and judicial officers in the territory of Utah," where the names in the jury box of two hundred jurors, provided for by that section, are not exhausted in the trial of an indictment when the jury is only partly impaneled, the District Court may issue a venire to summon jurors from the body of the judicial district, and the jury may be completed from persons thus summoned. *Clawson v. U. S.*, 114 U. S. 477.

2. *Stratton v. People*, 5 Colo. 276; *State v. Howell*, 3 La. Ann. 50; *State v. Chambers*, 45 La. Ann. 36; *People v. Considine*, 105 Mich. 149; *State v. Aaron*, 4 N. J. L. 268; *State v. Shaw*, 2 Dev. L. (N. Car.) 198; *State v. Washington*, 90 N. Car. 664; *State v. Hensley*, 94 N. Car. 1021; *Craft v. Com.*, 24 Gratt. (Va.) 602; *U. S. v. Insurgents*, 2 Dall. (U. S.) 335.

3. 42 Edw. III., c. 11; 7 and 8 Wm. III., c. 3, § 7; 7 Anne, c. 21. See also 3 Coke's Inst. 175; 2 Hawk. P. C., c. 41, §§ 21, 22; Bac. Abr., tit. Juries(B); 4 Black. Com. 352.

Historical Statement.—"By the 42 Edw. III., c. 11, it is recited that divers mischiefs had happened because that the panels of inquests which had been taken before justices by writ of *scire facias* and other writs had not been re-

b. THE RIGHT IN THE UNITED STATES. — The right does not exist in all of the United States, though in a number of them, by force of express statutes, the accused is entitled to be furnished with a list of the persons summoned or directed to attend,¹ for

turned before the sessions of the justices at the nisi prius, and otherwise, so that the parties could not have knowledge of the names of the persons which should pass in the inquest, whereby divers of the people had been disinherited and oppressed; and thereupon it is ordained 'that no inquest but assizes and deliverances of jails be taken by writ of nisi prius, nor any other manner, at the suit of the great or small, before the names of all of them that shall pass in the inquest be returned in the court.' * * * In trials before the justices of jail delivery, the prisoner has no right to a copy of the panel before the time of his trial, except only in cases within the purview of 7 & 8 Wm. III., c. 3, § 7, which enacts 'that all and every person or persons who shall be accused, indicted, and tried for high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or for misprision of such treason, shall have copies of the panel of the jurors who are to try them duly returned by the sheriff, and delivered unto them and every of them so accused and indicted respectively, two days at the least before he or they shall be tried for the same.' 5 Bac. Abr., tit. Juries, (B) 8, 334.

The English Statute of 7 Anne, c. 21, § 11, enacted that "when any person is indicted for high treason or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode of the said witnesses and jurors, be also given, at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offenses aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial and in presence of two or more credible witnesses." Logan v. U. S., 144 U. S. 263. See also 4 Black. Com. 352.

The statute of 7 Anne, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, was repealed

by the statute 6 Geo. III., c. 53 4 Black. Com. 352.

1. *Alabama*. — State v. McLendon, 1 Stew. (Ala.) 195; Parsons v. State, 22 Ala. 50; Williams v. State, 48 Ala. 85; Bell v. State, 59 Ala. 55; Bain v. State, 70 Ala. 4; Nutt v. State, 63 Ala. 180; Phillips v. State, 68 Ala. 469; Roberts v. State, 68 Ala. 515.

Delaware. — State v. Windsor, 5 Harr. (Del.) 512.

Mississippi. — Boles v. State, 24 Miss. 445.

New Jersey. — State v. Aaron, 4 N. J. L. 268.

Tennessee. — Link v. State, 3 Helsk. (Tenn.) 252.

Texas. — Robles v. State, 5 Tex. App. 346.

United States. — U. S. v. Dow, Taney's Dec. (U. S.) 34; U. S. v. Insurgents, 2 Dall. (U. S.) 335.

Special Jurors — Louisiana. — Where jurors are drawn for the special purpose of passing on a particular case, it is necessary that a list of the jurors so drawn shall be served on a defendant as prescribed by statute in the case of regular jurors. State v. Pollet, 45 La. Ann. 1168.

Talesmen. — In the absence of any law requiring the state to furnish the accused with a list of the talesmen as they are summoned, a refusal to furnish such a list is not error, but where several talesmen have been summoned and are in attendance, the reasonable request of the prisoner to be furnished a list ought not to be refused. State v. Henry, 15 La. Ann. 297.

Murder Cases — Colorado. — By the General Statutes of Colorado (§ 814) every person charged with murder must be furnished, previous to his arraignment, with a list of the jurors. See Stratton v. People, 5 Colo. 276.

In Texas a defendant indicted for a capital felony is entitled to have served on him a list of the names summoned under a special venire. Sharp v. State, 6 Tex. App. 650; Drake v. State, 5 Tex. App. 649; Harrison v. State, 3 Tex. App. 558.

Mandatory Statute. — The Texas statute (Code Crim. Pro., art. 617) providing that "no defendant in a capital

in the absence of statutory provision to that effect the accused has no right to be furnished with the names of the proposed jurymen.¹

c. NATURE OF RIGHT. — This right, when conferred by statute, is regarded as a substantial and important one, which should not be impaired, or of which the accused should not be deprived by any irregular action of the court or its officers.²

case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special venire facias, except when he waives the right or is on bail," is mandatory. *Jones v. State*, 33 Tex. Crim. Rep. 617.

Jurors for Term Other than That of Trial. — An accused whose case is fixed for the second week of the term has not the right to require service of the list of jurors drawn for the third week of the term. *State v. Pierre*, 38 La. Ann. 91.

Alabama. — Statutes requiring the service of jury lists are mandatory, and failure to comply with them will constitute reversible error. *Roberts v. State*, 68 Ala. 515. And see *Nutt v. State*, 63 Ala. 180; *Bell v. State*, 59 Ala. 55; *Williams v. State*, 48 Ala. 85; *Parsons v. State*, 22 Ala. 50.

Reasons Assigned for Refusing Copy of the Panel. — In *State v. Williams*, 2 Hill (S. Car.) 381, the court, in holding that a prisoner was not entitled to a copy of the panel of the plea and petit jury annexed to the venire, and had no ground for complaint that if talesmen were to try him he had no means of knowing them until they were called into the box, said: "There is, I think, great wisdom in not allowing a copy of the panel to the prisoner; if he were allowed to have it, it might be the means of enabling him to obtain an acquittal by bribery or influence."

Unnecessary Service of List. — There is no ground for complaint that a list for another week was served if the list of jurors who were to pass on the defendant's case was furnished to him. *State v. Casey*, 44 La. Ann. 960.

1. *Driskill v. State*, 45 Ala. 21.

There is no obligation to furnish a list of jurors to the defendant before the trial, in the absence of any statutory requirement to that effect. *Green v. State*, 38 Ark. 304; *Wright v. State*, 35 Ark. 639.

Second Service at Same Term. — When a party is indicted, and notice of the

venire list is served on him, and the indictment is afterward nolle prosequi, and an information is filed against the accused at the same term of court, charging the same offense, it is not necessary again to serve a copy of the venire on the accused. *State v. Washington*, 40 La. Ann. 669.

Service at Second Trial. — Where a defendant has been duly served with a list of the jurors prior to his arraignment, in accordance with a statute requiring service of the list at that time, after such service has been made there is no duty imposed to furnish another list at a second trial had at a subsequent term. *Heller v. People*, 2 Colo. App. 450.

2. *Phillips v. State*, 68 Ala. 469; *State v. McLendon*, 1 Stew. (Ala.) 195; *Parsons v. State*, 22 Ala. 50; *Bain v. State*, 70 Ala. 4; *Roberts v. State*, 68 Ala. 515; *Nutt v. State*, 63 Ala. 180; *Bell v. State*, 59 Ala. 55; *Williams v. State*, 48 Ala. 85; *Stewart v. State*, 13 Ark. 720; *Minich v. People*, 8 Colo. 440; *Mooney v. People*, 7 Colo. 218; *Stratton v. People*, 5 Colo. 276; *Powell v. People*, 5 Hun (N. Y.) 69, 63 N. Y. 88, *Robles v. State*, 5 Tex. App. 346.

Illiterate Defendant. — The failure to serve a copy of a special venire upon the defendant, as required by statute, is not excused by the fact that he "could not read writing" and that service was made upon his counsel. *Jones v. State*, 33 Tex. Crim. Rep. 617.

Defendant Standing Mute. — Though a defendant, by standing mute and refusing to plead, is treated as pleading not guilty, he is entitled to have a list of the jurors furnished him within a reasonable time before the announcement of the formation of the jury. *Link v. State*, 3 Heisk. (Tenn.) 252.

Rejection of Competent Persons on List. — The right to a list of the jurors summoned is impaired by the action of the court in erroneously rejecting, as incompetent, persons returned upon the original list furnished to the prisoner

d. **WAIVER OF RIGHT.** — The right to a list, or to a list free from imperfections, is a right created for the benefit of the accused, and one which he may waive¹ by failure properly to claim it, or to claim it at the proper time,² or by going to trial without objections.³

3. Form and Sufficiency of List—*a.* **GENERALLY.** — The list served on the accused should contain the names of all the persons summoned or otherwise required to be in attendance for service as jurors in the trial of the cause,⁴ but it is not a good ground of complaint that the list includes the names of persons other than those actually summoned;⁵ and while it has been

and to put him on talesmen to make up the jury. *Atkins v. State*, 16 Ark. 571.

Affording Opportunity to Examine List. — In *People v. Colt*, 3 Hill (N. Y.) 432, 1 Park. Cr. Rep. (N. Y.) 611, but nineteen jurors answered to their names, and by the direction of the court three hundred additional jurors were summoned, and it was held that no exception would lie to a refusal of the court to delay the trial for two or three days for the purpose of affording to the defendant an opportunity of examining the list of jurors.

1. *Williams v. State*, 48 Ala. 85; *Henderson v. State*, 98 Ala. 35; *State v. Price*, 6 La. Ann. 691; *State v. Vester*, 23 La. Ann. 620; *State v. Klinger*, 46 Mo. 224; *Robles v. State*, 5 Tex. App. 346.

2. *Bill v. State*, 29 Ala. 34; *State v. Vester*, 23 La. Ann. 620; *State v. Klinger*, 46 Mo. 224.

Continuance for Want of List. — A defendant is not entitled to a continuance because not furnished with the copy of the indictment and a list of the jurors, if it appears that he made no application for the list. *U. S. v. Shive*, 1 Baldw. (U. S.) 510.

3. *Alabama.* — *Bill v. State*, 29 Ala. 34.

4. *Arkansas.* — *Freel v. State*, 21 Ark. 213, *Dawson v. State*, 29 Ark. 116; *Benton v. State*, 30 Ark. 344.

Louisiana. — *State v. Jackson*, 12 La. Ann. 679.

Missouri. — *Lisle v. State*, 6 Mo. 428; *State v. Green*, 66 Mo. 631.

New Jersey. — *Patterson v. State*, 48 N. J. L. 381.

Texas. — *Houillion v. State*, 3 Tex. App. 537.

Requesting Enlargement of Time. — If the defendant does not object to going to trial because the venire has not been

served on him, and does not ask for an enlargement of time, he waives the objection of want of service. *Durrah v. State*, 44 Miss. 789.

4. *Territory v. Kelly*, 2 N. Mex. 292; *Murray v. State*, 21 Tex. App. 466.

Persons Actually Summoned. — In *Shelton v. State*, 73 Ala. 5, a statute requiring service of a list of persons summoned, including those summoned for the regular jury for the second week, etc., was held to be sufficiently complied with by giving a list of the names of the persons actually summoned, including a list of names constituting the venire, *criticising* *Floyd v. State*, 55 Ala. 61, wherein it was held that by "those summoned on the regular juries for the week" regular jurors "in attendance" was meant.

Designation of Persons Drawn. — A statute requiring service of a copy of the names of persons summoned, etc., is not complied with by service of a copy of the names of persons drawn. *Harrison v. State*, 3 Tex. App. 558.

Failure to Include Names of Jurors Drawn. — A jury list is not invalid because containing the names of those summoned only, and not the names of those drawn. *State v. Wright*, 41 La. Ann. 600.

Designation of Duly Qualified Persons. — *Wagner's Statutes (Mo.)*, p. 1102, §§ 7, 8, respecting the service of a panel of forty veniremen upon a defendant charged with murder in the first degree, only requires service of the panel summoned by the sheriff, and not a list of forty men who have been passed on by the court and found qualified. *State v. Melton*, 67 Mo. 594.

5. The Practice under the Texas Code of Criminal Procedure contemplates that there shall be no material difference between the list certified by the sheriff and the certified copy thereof prepared

held that the omission to include the names of all the persons summoned may furnish a good ground of objection,¹ it has also been held that the list or venire served is not invalidated by the fact that the persons therein named did not respond to the summons, either because they could not be found or because they had been excused.²

b. CAPTION. — Unless so prescribed by statute, it does not seem necessary that the list served should have a caption if enough appears to acquaint the accused with the fact that it is

for service on the defendant. *Clark v. State*, 8 Tex. App. 350.

In *Alabama*, where provision is made for a special venire for a capital case consisting of the regular jurors for the week and additional jurors to be drawn in open court, where a copy of the names of the jurors is served upon the defendant it is no objection that some of them were not then summoned or were not summoned at all. *Parsons v. State*, 81 Ala. 577, *distinguishing Posey v. State*, 73 Ala. 490, and *Shelton v. State*, 73 Ala. 5.

Inclusion of "Jurors for the Week." — In *Thomas v. State*, 94 Ala. 74, the defendant was served with a list of seventy-five names, including the names of thirty-six persons summoned for the week during which the cause was set for trial. On the day set the cause was again set for a day in the following week, at which time the defendant moved to quash the venire on the ground that the list served on him did not contain the names of those summoned for that week, and it was held that the court properly overruled the motion and required the defendant to select a jury from the names contained in the list served on him.

Failure to Have List Corrected. — Where the accused could readily see that the list furnished him contained an excess of names, for the reason of the inclusion of the names of persons not served and others excused, and the list might have been corrected had the attention of the court been called to the fact, he cannot be heard to complain when it is plain that he sustained no injury from the irregularity. *Goodhue v. People*, 94 Ill. 37.

Erasure of Names of Persons Not Summoned. — Article 617 of the *Texas Code of Criminal Procedure* requires no more than that the names of all the jurors summoned under the special venire shall be served, and the provisions

thereof are not subverted by the fact that the certified copy served contained other names, which were erased. *Murray v. State*, 21 Tex. App. 466.

Inclusion of Grand Jurors. — The accused cannot complain that the list of jurors served on him contained the names of the whole panel drawn for the term of court, including the grand jurors, etc., if said list designated those who were to serve during the week in which his case was to be tried. *State v. Washington*, 33 La. Ann. 896.

1. Omission of Considerable Number. — Where a defendant is entitled to service of a copy of the names of persons summoned under a special venire, it is good ground for quashing the venire that the copy served omitted the names of seven veniremen summoned by the sheriff, as shown by his return. *Kellum v. State*, 33 Tex. Crim. Rep. 82.

Omission of Person Summoned but Not Drawn. — The omission from the venire served of the name of a person who, though summoned, had not been drawn is not a ground of objection on the part of the defendant. *Green v. State*, 97 Ala. 59.

Passing by Omitted Juror. — In *State v. Powell*, 7 N. J. L. 244, in calling the jury it appeared that, by mistake, the name of one of the jurors had been omitted from the copy of the panel delivered to the prisoner, and on objection by the latter to the jurors being sworn, the presiding judge ordered that the juror in question be passed by and that the jurors be called according to the list delivered.

Time of Making Objection. — An objection that the name of a juror was not on the list delivered to the accused should be made when the juror is presented to be sworn. *State v. Dubord*, 2 La. Ann. 732.

2. State v. Guidry, 28 La. Ann. 630.

The Accused Cannot Refuse to Go to Trial on the grounds that on the list of

intended to designate the persons who may be presented to him for the trial of his case.¹

c. NUMBER OF VENIREMEN. — A requirement that a list containing the names of a designated number of persons shall be served on the accused is not complied with by the service of a list containing less than the prescribed number.²

d. RESIDENCE OF VENIREMEN. — In general it is necessary that the residence or place of abode of the persons to be presented to the accused should be set out with sufficient particularity to enable him to identify the persons proposed to be put upon him.³

e. OCCUPATION OF VENIREMEN. — For the like reason, where there is a positive requirement as to designating the occupation of the persons named in the list, the designation should be sufficient to distinguish the persons intended from others of the same name, and although there may be no such requirement, it certainly is not objectionable.⁴

f. QUALIFICATIONS. — The accused is not entitled to have served on him the names of competent persons or persons duly qualified to serve as jurors, since one of the objects of furnishing

jurors served on him some had been excused, some had not been summoned, and the names of two of them were not on the original venire. *State v. Kane*, 32 La. Ann. 999.

1. It is not necessary that the list served should have any caption, but it is sufficient if the list is correct and the defendant or his counsel is served with a copy and informed by the sheriff that it composes the special venire drawn and summoned in his case. *Henderson v. State*, 98 Ala. 35.

In Louisiana, a list of the jurors, headed "List of jurors drawn to serve as petit jurors for the third and fourth weeks of the October term, 1858, of the District Court for the Parish of Caddo," duly served on the prisoner, was held to be a sufficient compliance with the law. *State v. Ward*, 14 La. Ann. 684.

2. *Roberts v. State*, 68 Ala. 515.

The service of a list containing one name less than the number directed to be summoned, but more than the lesser number required by law to be summoned, is a mere irregularity which may be waived by the failure to object. *Williams v. State*, 48 Ala. 85.

3. *Showing Ward of Parish*. — In the absence of any requirement to that effect, the copy of the venire served need not show the wards of the parish

wherein the jurors reside. *State v. Underwood*, 49 La. Ann. 1599.

Abbreviation of Names of Townships. — It is not a good objection that the names of the townships, indicating the residences of the members of the panel on the list served, are abbreviated, if the designation is sufficiently clear. *State v. Brooks*, 30 N. J. L. 356.

Designation of County. — In *U. S. v. Insurgents*, 2 Dall. (U. S.) 335, a specification of the residence of the proposed jurors by mentioning the counties wherein they resided was deemed objectionable, and it was held that the lists should sufficiently designate the jurors by giving their places of abode, or at least the townships in which they resided.

4. See *supra*, VII. *Procuring Attendance of Jurors at Trial Court*.

The Employment of Ditto Marks to Indicate the Occupation of persons on the list, while reprehensible, will not require quashal of the venire where neither the defendant nor his counsel was misled thereby. *Cole v. State*, 105 Ala. 76.

United States Courts. — In *U. S. v. Insurgents*, 2 Dall. (U. S.) 335, it was held that as the Act of Congress did not require a designation of the occupation of the jurors, it was immaterial that no designation in that respect was made,

names is to enable him to ascertain the fitness or unfitness of such persons.¹

g. DESIGNATION OF OFFENSE. — In the absence of statutory provisions on the subject, a copy of the venire served on the accused need not designate the offense with which he is charged.²

h. MISNOMER OF VENIREMEN. — While the accused undoubtedly has the right to insist that the names of the persons summoned or intended to be included in the panel shall properly appear therein,³ mistakes or imperfections in the names of the persons so designated which are not misleading or prejudicial, or of such a character that the persons intended cannot be sufficiently identified,⁴ or the designation of the veniremen by the

although by the state act such designation was necessary.

1. *State v. Melton*, 67 Mo. 594.

In *Henderson v. State*, 98 Ala. 35, on drawing the name of a juror the sheriff announced "over age," and proceeded to draw another juror, whereupon the defendant objected, and the court proposing to recall the juror, the ground of objection was stated to be that the defendant was "entitled to be served with competent jurors." It was held that the objection was without merit.

Excusing Objectionable Jurors. — An objection that a list of a special venire contained the names of persons who had been present on a former trial is obviated by the fact that such jurors were excused by the court. *Carthaus v. State*, 78 Wis. 560.

2. *Bowen v. State*, 3 Tex. App. 617.

3. **Right to Person Intended.** — The defendant is entitled to the juror drawn by the commissioners, and cannot be required to have one of the same name whose name was erroneously placed on the venire and who responded to the name of the juror drawn. *Goodwin v. State*, 102 Ala. 89.

Right to Person Returned. — Only the persons named on the sheriff's return can be sworn as jurors, and hence it is a ground of error that a juror of a name different from the one furnished the prisoner was sworn upon the panel. *Mingia v. People*, 54 Ill. 274.

4. *Johnson v. State*, 47 Ala. 9; *Hall v. State*, 51 Ala. 9; *Floyd v. State*, 55 Ala. 61; *Roberts v. State*, 68 Ala. 156; *Hubbard v. State*, 72 Ala. 164; *Jones v. State*, 104 Ala. 30; *Simon v. State*, 108 Ala. 27; *Bell v. State*, (Ala. 1897) 22 So. Rep. 526; *Kimbrough v. State*, 62 Ala. 248; *State v. Brooks*, 92 Mo.

542. And see *Reg. v. Mellor*, 27 L. J. M. C. 121.

Immaterial Mistakes. — A venire should not be quashed for mistakes in the names of persons included in the list delivered to the accused where by statute such mistakes are not sufficient cause for quashal. *Hall v. State*, 51 Ala. 9.

Nonattendance of Misnamed Juror. — If a defendant in a capital case, not being in actual confinement, and having counsel entered on the docket, proceed to trial without objecting to the panel of jurors summoned, he cannot have the entire panel set aside on account of the misnomer of one of the jurors, who was summoned but failed to attend. *Bill v. State*, 29 Ala. 34.

Conclusiveness of Determination of Judge as to Misnomer. — It is within the province of the trial judge to determine as to whether the name of a juror is properly written in the list delivered to the accused, and his judgment in this respect is final unless the proofs show that he was perversely mistaken. *Taylor v. State*, 48 Ala. 180.

Failure to Ask for Correction. — The improper designation of a person summoned and a discrepancy between the name by which he was summoned and his name as contained in the list furnished, which could have been corrected had the attention of the court been called to the matter, and from which no injury resulted, will be deemed mere harmless irregularities. *Goodhue v. People*, 94 Ill. 37.

Timely Objection. — If a defendant fails to challenge the array for any cause going to show that it was not fairly or properly put upon him, he cannot thereafter object that the name

initials of their given names instead of by writing out the names in full or as contained in the original process,¹ or variance or discrepancies between the original list and the copy served, will not ordinarily be deemed of sufficient importance to require a quashal of the venire, or of such a nature as to vitiate the proceedings in which the alleged irregularities occurred.² However, though

of one of the jurors was incorrectly written on the list. *Moon v. State*, 68 Ga. 687.

1. *Cato v. State*, 72 Ga. 749.

Correct Initials. — The omission to insert the Christian name of a juror in full in a panel served is immaterial if the initial letter of the name is correctly stated. *Bill v. State*, 29 Ala. 34.

Jurors Known by Initials Given — Absence of Prejudice. — Nor is the omission a sufficient ground for quashing the venire where it is not pretended that the defendant had been deceived or misled in any way by the list furnished him, and in the absence of proof that the jurors were not generally known by the names as given in the list. *Aikin v. State*, 35 Ala. 399.

Person Known by and Using Different Middle Initials. — A juror who is sometimes known as "W. W. B." and sometimes as "W. M. B.," and who writes his name indifferently one way and the other, may be described in the jury list by either name, and no objection will lie on that ground if there is no question of his identity as the person intended. *Pool v. Callahan*, 88 Ga. 468.

2. *Hall v. State*, 51 Ala. 9; *Hubbard v. State*, 72 Ala. 164; *Roberts v. State*, 68 Ala. 156; *Bell v. State*, (Ala. 1897) 22 So. Rep. 526; *State v. Rodrigues*, 45 La. Ann. 1040.

The List Served Need Not Be a Copy of the *proces verbal* of the drawing, but it will be sufficient if it is complete and correct. *State v. Sopher*, 35 La. Ann. 975.

Availability of Objection on Motion to Quash. — A motion to quash because of a variance between the original venire and the copy served in respect to the name of a venireman cannot prevail where the ground is not one recognized by statute. *Swofford v. State*, 3 Tex. App. 76.

Persons Improperly Designated Not Serving. — Where there was no showing that the accused was misled or prejudiced, a motion to quash was held to have been properly overruled,

it further appearing that none of the persons in question served as jurors. *Bowen v. State*, 3 Tex. App. 617.

Absence of Prejudice. — Alleged irregularities consisting of supposed discrepancies and defects in and between the venire and the copy thereof served on the defendant, which are not of a serious character, will not constitute reversible error where it appears that the jury which tried the case was accepted by the defendant, and that no juror was forced upon him by reason of the exhaustion of his challenges. *Scott v. State*, 29 Tex. App. 217.

Variance Between Names on List and Jurors Serving. — A verdict will not be disturbed on the ground of a variance between the names of the jurors who were sworn and who tried the case and those on the list furnished to the accused before the trial. *State v. Dubord*, 2 La. Ann. 732.

Variance as to Persons Summoned. — In *Fortenberry v. State*, 55 Miss. 403, some of the names on the copy of the list furnished to the accused were marked as served with the writ of special venire though they were not so marked in the original, and other names were marked in the writ as served which were not so marked in the copy. A continuance was refused on the ground that the errors were clerical and of such account as could not prejudice the accused.

Discrepancy Between Venire and Ballot Drawn. — An unimportant discrepancy between the name on the venire served and that on the ballot drawn from the box will not furnish a good ground of objection. *Simon v. State*, 108 Ala. 27.

Ascertainment of Identity. — On objection made, the trial court may satisfy itself as to the identity of a person as to whom there is a variance in the original list and the copy served by reason of a difference in the initial letter of his middle name, and its determination in that respect will not ordinarily be revised. *Johnson v. State*, 94 Ala. 35.

irregularities of this character may not be sufficient to justify quashal, they are sometimes treated as sufficient grounds for rejecting the person improperly designated.¹

i. ERASURE OF NAMES. — The list served should be a legible document, free from scratches or erasures, and should be such as to leave no question or doubt as to the person intended to be presented to the accused.²

4. Service of List or Panel — a. WHO MAY SERVE. — In the absence of any statutory designation of the officer whose duty it shall be to serve the list, service thereof may be made by the sheriff or corresponding officer as the officer of the court, or by his deputy.³

b. MODE OF SERVICE. — The list or copy of the venire or panel must be served in the manner indicated by the statutes conferring the right thereto.⁴ In some jurisdictions it may be

1. *Hubbard v. State*, 72 Ala. 164; *Ezell v. State*, 102 Ala. 101; *Thompson v. State*, 19 Tex. App. 594; *Bowen v. State*, 3 Tex. App. 618; *Hudson v. State*, 28 Tex. App. 323; *Swofford v. State*, 3 Tex. App. 76; *Mitchell v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 367.

A mistake in the surname of a special juror in the list served on the accused will not furnish ground for quashing the array, although, excluding the name of the juror, the number specially summoned is less than that required by statute; but the name may be discarded and another juror be summoned. *Floyd v. State*, 55 Ala. 61.

Objection by State After Acceptance by Accused. — Where, in the list furnished, the name of a talesman was given as "H. C. B.," there was held to be no error in discharging him, after his acceptance by the prisoner, on motion of the state's attorney, upon discovery that his true name was "R. C. B." *Mingia v. People*, 54 Ill. 274.

Direction to Summon Person Intended. — Where the list served contained the name of F. G., Jr., which name when called was answered by F. G., who claimed and was allowed exemption for being over age, it was held that the court properly refused to quash the venire, and that it was not erroneous to direct that F. G., Jr., be summoned and to stay the proceedings until his appearance. *Goodwin v. State*, 102 Ala. 87.

2. *Cole v. State*, 105 Ala. 76.

A Cross over the Name of one of the persons on the list served will not vitiate the panel if the name is plainly

legible. *State v. Brooks*, 30 N. J. L. 356.

Pen Line through Names. — The erasure of names on the list served on the accused by drawing a pen line through them is not good practice, but will not be deemed error sufficient to justify the quashal of the venire where the defendant or his counsel were not thereby misled. *Cole v. State*, 105 Ala. 76.

3. **When the Statute Is Silent** as to who shall furnish the accused with a copy of the venire, the sheriff, as an officer of the court, is competent to make the service. *Friar v. State*, 3 How. (Miss.) 422.

Confinement of Accused in Jail Out of Jurisdiction. — A prisoner who, for want of a safe jail in the parish, is confined in the jail of an adjoining parish remains in the legal custody of the sheriff and subject to the jurisdiction of the court of the parish where he is under prosecution, and service on him of notice of trial and list of jurors by the sheriff of the latter parish, though made at the jail in another parish, is a sufficient compliance with Rev. Stat. La., § 992. *State v. Washington*, 37 La. Ann. 828.

Service by Deputy. — A venire will not be quashed for failure of the sheriff to serve a copy of it on the defendant where it appears that the list was served by the sheriff's deputy, according to law, who made a report of that fact on behalf of the sheriff and the defendant admitted the fact in open court. *Griffin v. State*, 90 Ala. 596.

4. *State v. Pollet*, 45 La. Ann. 1168; *State v. Stewart*, 34 La. Ann. 1037;

served on either the defendant in person or his counsel.¹ Where the accused is in actual confinement, and it is required that personal service be made on the prisoner or that service be made in some particular manner, the failure to conform to the requirements of the law will constitute prejudicial error.²

c. PROOF OF SERVICE. — Service is proved, as a rule, by return or certificate of the officer to whom is intrusted the duty of furnishing the names of the accused and his counsel, its sufficiency depending, of course, on the facts and circumstances of each case.³

d. TIME OF SERVICE. — The time within which the service is

State *v.* Chambers, 45 La. Ann. 36. And see State *v.* Kring, 11 Mo. App. 92.

1. Johnson *v.* State, 94 Ala. 35.

Service on Counsel. — A statute allowing service of the list on counsel appearing for defendant is sufficiently complied with by service on counsel whose name, with that of the person retained, appears on the docket as counsel for the defendant. Reese *v.* State, 90 Ala. 626.

Where service of the list may be made either on the defendant personally or on counsel appearing for him, service on counsel is sufficient although the order directs that it be served on the defendant. Henderson *v.* State, 98 Ala. 35.

2. The omission to serve a list of the jurors summoned on a defendant in actual confinement is reversible error. Flanagan *v.* State, 46 Ala. 703; Croker *v.* State, 47 Ala. 53.

Service on Counsel. — Where, by statute, the list is required to be served upon a defendant confined in jail, and an order is made directing service upon the prisoner or his counsel, if service is made upon counsel and not upon the prisoner there is error requiring reversal. Robertson *v.* State, 43 Ala. 325.

Service on Prisoner. — If the defendant is in prison, a list of the jurors may be served on him there in the absence of his counsel. Hurley *v.* State, 29 Ark. 17.

Under art. 617 of the Texas Code Crim. Pro., requiring one day's service of a copy of the names of persons summoned under a special venire, except where the defendant is on bail, and if on bail that he shall not be brought to trial until one day from the time the list of persons so summoned is returned to the clerk, etc., it was held, where the defendant was on bail, and on the day

of the return to the clerk the latter furnished his counsel with a copy of the list, the defendant being placed in jail on the same day, that service of a copy on him the next day was sufficient, it further appearing that the defendant was not placed on trial until two days thereafter. Campbell *v.* State, 30 Tex. App. 645.

3. **Conclusiveness of Return.** — The return of a sheriff that he has served the prisoner with a list of the jurors is conclusive, and cannot be questioned incidentally. Woodsides *v.* State, 2 How. (Miss.) 655.

Failure of Minutes to Show Service. — The service of the list should be shown by the return of the sheriff, hence an objection, not that there was no service, but that the minutes of the court do not show service, is untenable. State *v.* Blackman, 35 La. Ann. 483.

Sufficiency of Statement of Service. — A record which recites that the defendant was "served" with a list of the jurors summoned for his trial sufficiently shows that a copy of the list of the jurors summoned for his trial, including the regular jury, was delivered to him according to law. In this case it was also held that the word "served" was not equivalent to the words "delivered," or "have." Stephens *v.* State, 47 Ala. 696.

Information to Prisoner as to Cause in Which Jurors Were Procured. — Proof that the sheriff, when serving the list on the prisoner, informed him that it was a list of the jury summoned to try his case for the murder of H. at the present term of the court, and that he read said list over to the prisoner at the same time, is a complete answer to an objection that the venire did not state that the jurors were summoned to try the case of the prisoner. Aikin *v.* State, 35 Ala. 399.

to be made is a matter entirely regulated by statute, to which resort must be had in any given case where the question of timely service arises.¹ It may be said generally that great care should be taken to notify the accused in due time as to what may constitute the panel out of which the jurors for his trial are to be called, and where it is made to appear that a defendant has been put at a disadvantage from a failure to give him timely notice, his conviction may be set aside.²

1. Under the Revised Code of *Alabama*, § 4171, it is sufficient if a list of jurors summoned on a special venire is delivered to the accused one entire day before the day appointed for the trial. *Levy v. State*, 48 Ala. 171.

In *Louisiana* service of the list two days before the trial was held sufficient. *State v. Chambers*, 45 La. Ann. 36.

In *Missouri*, by statute, the defendant is entitled to have a list of the jurors furnished to him forty-eight hours before the trial. *State v. Buckner*, 25 Mo. 167.

In *New Jersey* the accused is entitled to two days' service of the tales. *Patterson v. State*, 48 N. J. L. 381.

Under the New Jersey Act of March 6, 1795, a person accused of and indicted for murder was entitled to have a copy of the indictment and a list of the jury, mentioning the names and places of abode of such jurors, delivered to him two entire days at least before the trial. *State v. Aaron*, 4 N. J. L. 270.

In *Texas* a person is entitled to have a list of the veniremen summoned served upon him one day before the commencement of the trial. *Bates v. State*, 19 Tex. 122.

United States Courts. — The accused is entitled to a copy of the indictment and a list of the jury, mentioning the names and places of abode of such jurors, to be delivered to him two entire days before his arraignment. *U. S. v. Dow*, Taney's Dec. (U. S.) 34.

Under an early Act of Congress (1 Rev. Stat., p. 112, § 29) a person accused and indicted for treason was entitled to have a copy of the indictment and a list of the jury and witnesses delivered to him at least three days before the trial. *U. S. v. Insurgents*, 2 Dall. (U. S.) 335.

Service Within Prescribed Time Before Actual Trial. — The law does not require that a copy of the indictment and a list of the jury which are to pass on the trial of the accused should be deliv-

ered to him before arraignment. They should be delivered to him two entire days before trial, but not before the fixing of the case for trial. *State v. Kane*, 32 La. Ann. 999; *State v. Holmes*, 7 La. Ann. 567; *State v. Fulford*, 33 La. Ann. 679.

Under Wagner's *Missouri* Statutes the defendant is not entitled to a list of the jurors forty-eight hours prior to the trial, but only before the jury is sworn, and then only if a list is required. *State v. Ray*, 53 Mo. 345. And see *State v. Klinger*, 46 Mo. 224.

When Trial Deemed to Begin. — In conforming to a statutory provision relative to a list of the jurors a prescribed time before the trial begins, the trial is to be considered as beginning when the jury is made up and sworn. *U. S. v. Neversen*, 1 Mackey (D. C.) 152.

Service of List Before Summoning of Jurors. — A correct list, served two entire days before the trial and before the jurors are summoned, is a compliance with the law. *State v. Chambers*, 45 La. Ann. 36.

2. *Crocker v. State*, 47 Ala. 53; *Atkins v. State*, 16 Ark. 568; *Goodhue v. People*, 94 Ill. 37; *State v. Pollet*, 45 La. Ann. 1168; *State v. Stewart*, 34 La. Ann. 1037; *State v. Chambers*, 45 La. Ann. 36; *Patterson v. State*, 48 N. J. L. 381; *State v. Aaron*, 4 N. J. L. 263; *Powell v. People*, 5 Hun (N. Y.) 169, 63 N. Y. 88; *Houillion v. State*, 3 Tex. App. 537; *Robles v. State*, 5 Tex. App. 346.

Postponement of Trial. — If the venire is not served at a proper time there is good reason to postpone the trial until the accused has had the time allowed to examine and purge the panel, but it is not a good ground for quashing the writ. *Durrah v. State*, 44 Miss. 789; *Loper v. State*, 3 How. (Miss.) 432.

Affording Time to Examine List. — If a prisoner receives a list of the jurors at any time before the trial is commenced, though not until the case is

More Time than Prescribed. — Although service less than the prescribed time will ordinarily invalidate the proceeding, there seems to be no serious objection to furnishing the list or affording an opportunity for its inspection at a remoter time than that prescribed.¹

In Computing the Time of delivering a list or otherwise furnishing the names, the day of delivery and the day of trial, or the day of service and the day of trial, should be excluded;² and where Sunday intervenes, it has been variously held that it may or may not be excluded.³

c. PRESUMPTIONS. — Where a defendant entitled to a list of the venire proceeds to trial without objecting that he was in any way deprived of his rights, and there is no affirmative showing that a proper list was not furnished or directed in the mode prescribed by law, the silence of the record on the subject, or its failure to show any impairment of the right, will justify the presumption that the requirements of the law or the direction of the

called, it would be proper to give the prisoner a reasonable time to examine the list of jurors, if he asks it, but it is not a ground for continuing the cause until the next term of the court. *Craft v. Com.*, 24 Gratt. (Va.) 602.

1. A defendant cannot complain that the list was served upon him a longer period before the trial than that required by statute. *Roberts v. State*, 30 Tex. App. 291.

The list may be served at any time after indictment, provided that the accused is afforded the time prescribed by statute. *Robles v. State*, 5 Tex. App. 346.

A service of the duly certified list of the jurors for the term at which the accused was tried, made on the accused during that term and made two weeks before his trial, is a sufficient compliance with the law requiring such service to be made two days before the trial. *State v. Toby*, 31 La. Ann. 756.

Excess of Two or Three Days. — The procurement, examination, and qualification of a number of jurors, and the furnishing of a list to the defendant three or four days prior to the day when the trial proceeded, is not erroneous for the reason that the jurors might have become disqualified in the interim when that fact could have been ascertained before the trial actually proceeded. *State v. Collins*, 86 Mo. 245.

2. *State v. McLendon*, 1 Stew. (Ala.) 195.

Under the Act of Congress of April

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30, 1790, c. 36, § 28, the arraignment was regarded as the commencement of the trial and, in computing the time within which the list must be served, two entire days must be exclusive of the day of the delivery of the copy. *U. S. v. Dow*, Taney's Dec. (U. S.) 34.

Exclusion of Day of Service and Day of Trial. — In computing "one day's service" of a copy of a special venire required by statute, both the day of service and the day of trial must be excluded; hence, where a copy was served at half-past one o'clock P. M. of one day, and the accused was compelled to go to trial at three o'clock P. M. the next day, it was held that a reversal was required because he had been deprived of a legal right. *Speer v. State*, 2 Tex. App. 246.

3. **Exclusion of Sunday.** — Service of the list one entire day before the day appointed for the trial means one entire legal day, hence service at eight P. M. Saturday is not sufficient where the trial has been set for the following Monday. *Robertson v. State*, 43 Ala. 325.

Sunday may be included within days limited for the service of the jury list. *U. S. v. Neverson*, 1 Mackey (D. C.) 152.

A service on the Saturday before the Monday of the trial is a compliance with a statute requiring one entire day's service of the venire before trial of the case. *Adams v. State*, 35 Tex. Crim. Rep. 285.

court were duly complied with or were waived.¹

5. **Amendments.** — Where the copy of the venire or of the list of jurors served is imperfect or defective in any particular, it does not go to the validity of the document itself; and if the proof of service fails sufficiently to state the facts as to a proper service made, there appears to be no good reason why the omission should not be supplied or amendments be made in conformity with the facts.²

6. **Objections.** — See *infra*, IX, *Formation of Trial Jury*.

7. **Talesmen.** — As to necessity of service of list on talesmen and additional jurors, see *infra*, IX. 4. *Talesmen and Additional Jurors*.

1. *Mitchell v. State*, 58 Ala. 417 [*following* *Paris v. State*, 56 Ala. 235, and *overruling* *Robertson v. State*, 43 Ala. 325, which holds that the record must affirmatively show compliance with the law]; *Lewis v. State*, 51 Ala. 1; *Rash v. State*, 61 Ala. 94; *Spicer v. State*, 69 Ala. 159 [also *overruling* *Robertson v. State*, 43 Ala. 325]; *Shelton v. State*, 73 Ala. 5; *Walker v. State*, 91 Ala. 761 [*citing* *Clarke v. State*, 78 Ala. 474; *Breden v. State*, 88 Ala. 20]; *Freel v. State*, 21 Ark. 213; *Dawson v. State*, 29 Ark. 116; *Benton v. State*, 30 Ark. 344; *Patterson v. State*, 48 N. J. L. 381.

But see *contra*, holding that there must be an affirmative showing in the record, *Lacy v. State*, 45 Ala. 80; *Flanagan v. State*, 46 Ala. 703; *Hugg v. State*, 47 Ala. 50.

Where no objection was made in the court below that an order directing service of the list, together with the indictment, was not properly executed, it will be presumed that the officers of the court performed their duty, or that the execution of the order was waived. *Lewis v. State*, 51 Ala. 1.

8. *Washington v. State*, 8 Tex. App. 377.

Under the Alabama Code of 1876, § 4873, the making of the jury list is clerical, and its service executive or ministerial, and if errors occur while the proceedings are *in fieri*, under the control of the court, they may be corrected by amendment under its order. *Kenan v. State*, 73 Ala. 15; *Gray v. State*, 55 Ala. 86.

Caption. — It is competent to strike out the caption to a special venire or to amend it at any time. *Henderson v. State*, 98 Ala. 35.

Title of Cause. — The court may direct the sheriff to amend a list of jurors served so that it may correspond to the

title of the cause. *Kenan v. State*, 73 Ala. 15.

Necessity of Moving for a New Trial. —

If an imperfect list of the jurors is furnished, and the court refuses on motion of the accused to cause a correct list to be furnished a sufficient time before the trial, and compels the accused to go to trial without the list, he may except to such refusal and rest upon his exceptions without moving for a new trial. *Stewart v. State*, 13 Ark. 721.

Amendment of Return. — Where a statute providing for the service of a list of persons summoned on a special venire does not require the clerk to make a copy of the sheriff's return upon the venire, but merely to copy a list of the names of those summoned, it is immaterial that he attach to the copy the official signature of the sheriff to the return, but even if that should be necessary there is no error in permitting him to amend by annexing the signature. *Sterling v. State*, 15 Tex. App. 249.

The sheriff may correct his return of service of the list to conform to the facts. *Kenan v. State*, 73 Ala. 15.

Right to Service of Amended Venire. —

Where a list of the names of all the persons summoned has been served on the accused in due time, he is not entitled to have served on him a copy of the special venire as amended in particulars relative to the reasons for failing to serve persons whose names were erased. *Murray v. State*, 21 Tex. App. 466.

Suspension of Trial. — In *U. S. v. Insurgents*, 2 Dall. (U. S.) 336, the trials were suspended to afford the district attorney the three days required by the act of Congress for delivering to the prisoners amended copies of the lists of jurors, etc.

IX. FORMATION OF TRIAL JURY — 1. Nonattendance of Veniremen

— **a. COMPELLING ATTENDANCE.** — It is the duty of a person summoned as a juror to obey the command and to appear and serve, or to make a reasonable excuse,¹ and if he disobeys the summons or mandate by failure to appear, his attendance may be compelled by attachment or by other summary process.² However, the issuance of process for the person in default is not always a matter of right, but may be insisted on only where there is some statutory requirement that all the persons summoned shall be presented for acceptance or rejection, or where there is not a sufficient number of persons present from whom a jury may be impaneled.³ But where process does issue, unless

1. *Robbins v. Gorham*, 25 N. Y. 588, *affirming* 26 Barb. (N. Y.) 586.

Failure to Respond to Call of Name. — That some of the general panel directed to be summoned by statute fail to answer their names or are not present when the case is called for trial is not a good ground of exception. *Patterson v. State*, 48 N. J. L. 381.

2. *State v. Harris*, 64 Iowa 287; *Pennell v. Percival*, 13 Pa. St. 197; *Shaw v. State*, 32 Tex. Crim. Rep. 155; *Hudson v. State*, 28 Tex. App. 323; *Habel v. State*, 28 Tex. App. 588; *Suit v. State*, 30 Tex. App. 319; *Jackson v. State*, 4 Tex. App. 292; *Stephens v. State*, 31 Tex. Crim. Rep. 365; *Sinclair v. State*, 35 Tex. Crim. Rep. 130. And see in general the statutes of the various states.

Persons Not Duly Notified cannot be compelled to attend as jurymen. *Opinion of Ct., 1 Browne* (Pa.) 200.

Where an attachment cannot issue except for a person "summoned," there is no error in refusing to issue an attachment for a person named in the venire but who was not summoned. *Thompson v. State*, 19 Tex. App. 593.

Refusal to Stay Proceedings and to Issue Attachment. — Where, in impaneling a jury in a capital case, persons summoned on a special venire fail to appear or answer their names, the action of the court in refusing to stay the impaneling for the purpose of compelling the attendance of the absentees by attachment, and in completing the jury from those in attendance, is reversible error. *Boles v. State*, 24 Miss. 445.

Under the Provisions of the Texas Criminal Code, art. 617, respecting service of the copy of the list, art. 618, respecting the attachment of persons summoned who failed to attend, and art. 640, providing that the names of the persons

summoned shall be called in the order in which they appear on the list furnished, and that the case shall not be unreasonably delayed because of the failure of a person summoned to appear, it was held error to select a juror from the persons summoned on a special venire in attendance without first directing the attachment of those who had been summoned and who had failed to respond. Also that it was error to refuse to draw from the regular panel for the week and to order talesmen. *Cahn v. State*, 27 Tex. App. 709.

Refusal of Court to Grant Motion to Bring In Imprisoned Juror. — Where a juror who has been duly summoned is in jail, under an order or sentence of the court, and fails to respond when called, if the court refuses to send for him and have him brought in, on motion of the accused, it is error requiring reversal of the judgment. *Johnson v. State*, 47 Ala. 9.

Time of Issuance. — Unless so prescribed by statute, authority to bring a defaulting juror before the court by summary process is not limited to the time while the suit in which the venire issued is pending, but the juror may as well be brought in after as before the close of the case, and any time before the penalty is barred by the statute of limitations. *Robbins v. Gorham*, 25 N. Y. 588.

Waiver of Right to Attachment. — If a party fails to ask for an attachment against an absent juror at the proper time, he waives his right thereto. *Jackson v. State*, 30 Tex. App. 664; *Kennedy v. State*, 19 Tex. App. 618; *Thompson v. State*, 19 Tex. App. 593; *Sinclair v. State*, 35 Tex. Crim. Rep. 130; *State v. Miller*, 53 Iowa 84.

3. *Bond v. State*, 23 Ohio St. 349.

Proceeding with Drawing. — Where a

under special circumstances, as when the right exists to have the jurors presented in a prescribed order, there is no necessity for unreasonably delaying the proceedings or suspending the forming or impaneling of the jury until the return of the process, but the court may proceed and secure a jury from those in attendance,¹

juror whose name appears on the list furnished to the defendant as one of the regular panel has been duly summoned, but fails to attend, the court need not order another juror to be summoned to supply his place, but may proceed with the drawing from the hat. *Johnson v. State*, 94 Ala. 35. And see *Hall v. State*, 51 Ala. 13.

Absentee Near at Hand.—In *Johnson v. State*, 47 Ala. 10, it was held that the court is not bound to send for an absent juror who, having been duly summoned in a capital case, fails to answer when his name is called, although he is then in the city and near at hand.

In Louisiana no law authorizes a motion for attachment against absent jurors on the list in order to bring a greater number, where there are enough present to complete the panel. *State v. Shonhausen*, 26 La. Ann. 421; *State v. Farrer*, 35 La. Ann. 315; *State v. Breaux*, 32 La. Ann. 222.

After a Trial Has Begun the court will not grant attachments for absent jurors. *State v. Saunders*, 37 La. Ann. 389; *State v. Farrer*, 35 La. Ann. 315; *State v. Washington*, 37 La. Ann. 828.

Selection from Veniremen "Summoned and in Attendance."—Where a statute requires the jury to be impaneled from those "summoned and in attendance" under a special venire, unless that shall have been exhausted without securing a jury, in which event resort shall be had to the regular panel, etc., the court may refuse to direct compulsory process for a special venireman who was duly summoned but who failed to attend. *Hale v. State*, 72 Miss. 140, *distinguishing* *Boles v. State*, 24 Miss. 445.

Exception to Refusal to Issue Attachment.—No exception will lie to the refusal to issue an attachment for a juror. *Foster's Case*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 372, note.

1. *People v. Collins*, 105 Cal. 504; *State v. Rountree*, 32 La. Ann. 1144; *Barthet v. Estebene*, 5 La. Ann. 315; *Fletcher v. Henley*, 13 La. Ann. 191; *Habel v. State*, 28 Tex. App. 588; *Suit v. State*, 30 Tex. App. 319; *Stephens v. State*, 31 Tex. Crim. Rep.

365; *Deon v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 266; *Jones v. State*, 31 Tex. Crim. Rep. 177.

In *State v. Harris*, 64 Iowa 287, it was held that when a portion of the persons summoned on the regular panel fail to appear, the court may direct an attachment, refuse to order the panel filled from the jury lists or to delay the trial until the return of the attachment, and complete the panel from bystanders.

Where the Accused Declines an Offer of the Court to Suspend the Call and order attachments for absent jurors, he cannot thereafter complain if it appears that the call of the venire was proceeded with without opposition, and that the jury was completed without exhausting the venire. *Jackson v. State*, 4 Tex. App. 292.

Exhaustion of Venire in Absence of Persons Disqualified.—Judgment will not be reversed because of the action of the court in relation to absent jurors, and in exhausting the panel in their absence, where, on such exhaustion, the defendant requiring the presence of the absentees, the court suspended proceedings, brought them into court by attachment, and, on examination, they were disqualified or challenged. *Sinclair v. State*, 35 Tex. Crim. Rep. 130. And see *Shaw v. State*, 32 Tex. Crim. Rep. 155.

Necessity of Showing Injury.—To avail himself of an objection that at the request of the defendant the court refused to suspend the proceedings and issue attachments for the absentees, the defendant must show that he has sustained injury. *Jackson v. State*, 30 Tex. App. 664.

In Maryland it has been the uniform practice to make up and swear the panel from such jurors or talesmen as have been found attending the court, without waiting for or directing process against others who may have failed to attend, and whose names have been first drawn, or who may have been first summoned. *Johns v. State*, 55 Md. 350.

Continuance to Procure Panel from Regular Jury.—There is no error in refus-

or from additional jurors or talesmen.¹

1. **PUNISHMENT.** — Disobedience to the summons may likewise be punished as for a contempt,² by fine or otherwise.³

2. **Mode of Impaneling** — *a.* **GENERALLY.** — The mode of forming or impaneling the trial jury is usually prescribed by statute. When not so prescribed there may be a resort to the common-law practice,⁴ but where the manner in which the call is required

ing to complete the jury by calling talesmen, and in continuing the cause until the next day, and then completing it from the regular panel. *Cook v. Fogarty*, (Iowa 1897) 72 N. W. Rep. 677.

Right of Party to Complain of Suspension of Proceedings. — The defendant cannot complain successfully of the action of a trial judge in suspending proceedings, sending for an absent juror, and commencing anew to make up a jury, where, in the judge's opinion, such a course is made proper by the objection of the defendant because of the absence of the juror by leave of the judge. *Coleman v. State*, 59 Miss. 484.

Where, by Statute, No Cause Shall Be Unreasonably Delayed because of the absence of persons summoned (Code Crim. Pro., art. 640), if the court has used proper diligence to secure the presence of an absentee, and awarded a reasonable time to secure his attendance, it may pass his name and proceed to impanel the jury. *Mitchell v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 367; *Sinclair v. State*, 35 Tex. Crim. Rep. 130; *Cahn v. State*, 27 Tex. App. 709; *Hudson v. State*, 28 Tex. App. 323.

1. See *infra*, IX. 4. *Talesmen and Additional Jurors*.

2. **Contempt.** — The refusal to obey a summons is a contempt, but not a criminal contempt. *Shaw v. Shaw*, 25 L. Rep. 106, cited in *Robbins v. Gorham*, 25 N. Y. 594.

Sufficiency of Conviction for Contempt. — A conviction of a juror, under 2 Rev. Stat. N. Y., for contempt in failing to respond to the summons, is unaffected by the failure of the justice who instituted the proceedings to enter a minute of the proceedings in his docket. *Robbins v. Gorham*, 25 N. Y. 588.

Right to Notice to Show Cause. — A defaulting juror should not be punished without first giving him reasonable personal notice, in writing, to appear and show cause. *State v. Hollingshead*, 16 N. J. L. 539.

A Joint Conviction of Defaulting Jurors is illegal, and is no part of the record of the cause in which they defaulted. *State v. Hollingshead*, 16 N. J. L. 539.

3. **A Person Duly Summoned May Be Fined** for failing to appear and serve or present any valid excuse he may have. See *People v. Holdridge*, 4 Lans. (N. Y.) 511; *Robbins v. Gorham*, 25 N. Y. 588.

Nonappearance Before Completion of Panel. — The court may fine a juror who has been selected and who, before the completion of the panel, fails to appear within a reasonable time. *People v. Barker*, 60 Mich. 277.

Execution Against the Body. — An execution to collect a fine imposed on a defaulting juror will not authorize the taking of his body for want of goods. *State v. Hollingshead*, 16 N. J. L. 539.

4. **"Impaneling" Defined.** — "Impaneling" is the final act of the court in ascertaining who should be sworn immediately preceding the administration of the oath to the jurors. *State v. Ostrander*, 18 Iowa 435.

Time of Impaneling. — In a criminal case a jury should not be selected and sworn until after arraignment and plea. *State v. Hughes*, 1 Ala. 655.

Demanding Formation of Jury According to Law. — Counsel is not obliged to state his reasons for demanding that the jury be drawn in the mode prescribed by statute. *Gulf, etc., R. Co. v. Keith*, 74 Tex. 287.

Absence of Statutory Provisions. — In the absence of a statute respecting the impaneling of juries, the practice must not conflict with nor prejudice the right as it existed at common law. *Lamb v. State*, 36 Wis. 424.

Trial of Appeal. — In *New Jersey* the jury returned for the trial of an appeal to the Court of Common Pleas must be drawn from the box as in other cases. *Paterson Gas Light Co. v. Brady*, 27 N. J. L. 245.

In *West Virginia*, on trial of an indictment against a railroad corporation for Sabbath breaking, a jury may be formed

to be made or in which the drawing shall proceed is specifically pointed out by statute, the provisions relative thereto should be followed.¹

in the same manner as juries are formed in civil cases. *State v. Baltimore, etc.*, 15 W. Va. 362.

Extent of Discretion of Court. — It is within the discretion of the court to organize the traverse jurors from the list of jurors returned, in any manner which the court may deem proper, and to rearrange and organize them anew at any time, either with or without reference to the trial of a particular cause; and this may be done by removing any number of the jurors from one jury and substituting others from the other jury, without motion of either party, and when no cause of challenge exists against the jurors so removed. *Watson v. Walker*, 33 N. H. 131; *Walker v. Kennison*, 34 N. H. 257; *Ware v. Ware*, 8 Me. 42.

Under a Statute Providing that the Clerk Shall Prepare by Lot a list of the names of jurors, that the first twelve must be sworn and called the first jury, the next twelve the second jury, and if there are others in attendance they may be placed on a third jury or put on either of the other juries, and that jurors may be transferred from one jury to another, the court may at once put upon the state and the defendant twelve of the regular jurors or a smaller number, and may transfer regular jurors from one jury to another, and its discretion thus exercised will not be interfered with unless some right of the defendant has been denied or impaired. *Wilson v. State*, 31 Ala. 371.

Right to Particular Jury. — Neither party has the right to have a cause tried by a particular jury as it may happen to be organized when the cause comes on for trial, though there may be a practice to try the causes in their order upon the trial list by the two juries alternately, and according to that practice the cause would come in its order before that particular jury. *Watson v. Walker*, 33 N. H. 131.

Adoption of Unobjectionable Mode. — Where a statutory provision as to drawing a special venire of freeholders is merely directory, and the court adopts a mode of obtaining a qualified jury which is not objectionable, and could not prejudice the prisoner, no error can be predicated on the action of the

court, though the course pointed out by the statute may be preferable. *State v. Whitson*, 111 N. Car. 695.

United States Circuit Courts. — The authority of the Circuit Courts of the United States to deal with the subject of impaneling juries in criminal cases by rules of their own, subject to the condition that such rules must be adapted to secure all rights of the accused, was recognized in *Lewis v. U. S.*, 146 U. S. 379.

Failure to Object to Mode of Drawing. — By failing to object to the manner in which jurors are drawn, or to demand that they be drawn from a jury box, the accused waives the irregularity. *Wells v. State*, (Ark. 1891) 16 S. W. Rep. 577.

1. Place of Calling Names. — In the absence of any law or rule of practice in that behalf, it is not necessary that persons summoned as jurors should be called at the doors of the courthouse, or that they should be sent for, after their names have been called by the clerk and they have failed to respond. *Waller v. State*, 40 Ala. 325.

It is matter discretionary with the court whether the names of the jurors drawn should be called only from the clerk's desk, or should be called from the outer door of the courthouse. *Hall v. State*, 51 Ala. 9.

Calling Names in Listed Order. — Article 640 of the Texas Code Crim. Pro., directing that the jurors' names be called "in the order in which they appear upon the list furnished the defendant," applies in the case of a special venire, and must be complied with, notwithstanding objection to the exposure of the list. *Clark v. State*, 8 Tex. App. 350.

In *Osborne v. State*, 23 Tex. App. 431, it appeared, when the eighth name in order on the list served on the accused was reached, that the person named had not been summoned although so returned on the special venire, and the court proceeded to form a jury from the remainder of the venire and talesmen over the defendant's objection. It was held, in view of a requirement that in selecting the jury the names should be called in the order in which they appeared on the list, that the court was in error, and

b. DRAWING NAMES — (1) Box — Ballots. — The usual mode of presenting the jurors for acceptance or rejection is by drawing, from a box or other receptacle,¹ ballots, slips, or substitutes therefor, containing the names of the persons summoned or directed to attend,² which have been placed therein in accordance

that under the circumstances the proceedings should have been suspended until the juror in question was brought in or that a new venire should have issued.

Passing Name Omitted in List. — In *State v. Powell*, 7 N. J. L. 246, the name of one of the jurors was omitted by mistake in the copy of the panel delivered to the prisoner, and the court ordered the name to be passed, and the jurors called according to the list delivered to the prisoner.

Failure to Call in Prescribed Order. — Disregard of a statutory provision that after the exhaustion of challenges the first twelve names on the list shall be called and shall constitute the jury, by omitting to call the names of two persons among the first twelve, is ground for reversal. *State v. Holme*, 54 Mo. 153.

Failure to Draw Names in Mode Prescribed. — In *Becker v. Sitterly*, 58 How. Pr. (Montgomery County Ct.) 38, it appeared that at the request of the defendant the justices drew out of the box the names of all the jurors summoned, who, being called, answered to their names, and the refusal by the justices of the request of the plaintiff to return the names and draw the trial jury therefrom was held error in view of a statutory provision that after the deposit of the ballots containing the names of the persons summoned, the justice should draw out six, or such other number as the parties might agree on, "one after another," etc.

Time of Objection. — When, after three jurors are impaneled, the accused objects for the first time that the list has not been called in regular order, and when, thereafter, the names are so called as required, no ground of complaint exists. *State v. Washington*, 37 La. Ann. 828.

1. For mode of drawing talesmen and additional jurors, see *infra*, IX. 4. *Talesmen and Additional Jurors.*

A Revolving Barrel Is a "Box" within the requirements of a statute prescribing the method of impaneling juries. *Com. v. Bacon*, 135 Mass. 521.

Improper Receptacle. — Although cor-

rect practice requires that the names be called from a box, yet if the names are drawn from a hat, or from the table, and no objection is made at the time to that method of drawing the jury, and no prejudice is shown, there is no such irregularity as will vitiate the verdict. *Birchard v. Booth*, 4 Wis. 67.

Refusal of Party to Proceed Where Unfairness Is Evident. — If, in the course of drawing a jury, a party plaintiff discovers that the ballots have been arranged in an open box, with the apparent design of drawing particular names therefrom, and other suspicious circumstances exist which will warrant a presumption of unfairness, he may refuse to proceed, and on being nonsuited will be excused from the payment of costs. *Pringle v. Huse*, 1 Cow. (N. Y. 432.

2. See *Brazier v. State*, 44 Ala. 392.

It is immaterial that the given names on the scrolls are indicated by initial letters. *State v. Simmons*, 6 Jones L. (N. Car.) 21.

Failure to Roll Ballots. — Where the clerk of a court is required to write the name of each juror on the list on a separate slip and to roll the same up before putting the slips in the box, the fact that the slips were laid in the box flat instead of rolled and were then shuffled is such a failure to comply with the law as will furnish a sufficient ground for a challenge to the array. *McGann v. Hamilton*, 58 Conn. 69.

Exposed Names. — It is improper for a clerk to leave the ballots, unrolled, exposed in an open box and to draw them in this situation. *Pringle v. Huse*, 1 Cow. (N. Y.) 432.

In *Cole v. Perry*, 6 Cow. (N. Y.) 584, a motion was made to set aside a verdict on the ground that the ballots containing the jurors' names were placed in the box in such a manner that the names could easily be seen by the person drawing them. The affidavit of the clerk who drew the jury denied that he saw the names until after they were drawn, and the motion was denied on the ground that the statute was directory merely, and that the mistake of the officer was not a ground for setting

with the requirements of law.¹

(2) *Number of Names.* — As a rule, a party to an action or a person accused of crime is entitled to have the names of all the jurors from whom the trial jury is to be drawn placed within the jury box before the impaneling is begun.²

(3) *Omission of Names* — (a) *Generally.* — Where, through inad-

aside the proceedings where no injury was shown or pretended.

Designation of Juror's Occupation. — "Liquors" on a card containing the name of one of the jurymen and placed in a box from which the trial jury is to be drawn is a perfectly intelligible indication of his occupation. *Com. v. Bacon*, 135 Mass. 521.

1. Where the statute requires that the names be placed in the box, drawn therefrom one at a time, recorded in the order they come out on two lists until the box is exhausted, and the lists given, one to each party, for challenges and peremptory challenges, it is error to require the clerk to hand a list to the defendant at the beginning of the trial, and to refuse the demand of his attorney that the names be drawn from the box, etc. *Gulf, etc., R. Co. v. Keith*, 74 Tex. 287.

Depositing Names in Box in Absence of Statutory Requirement. — If the jurors are returned for the term their names should be placed on ballots to be drawn by lot from the box; if merely for a special trial, while it is better that the name should be placed in the box, yet, in the absence of any legal requirement, that course of procedure is unnecessary. *State v. Green*, 20 Iowa 424; *State v. Ryan*, 70 Iowa 154.

Unless so required by statute it is not necessary that the names of jurors who have been drawn and summoned and who are in attendance should be put in a box and drawn therefrom by ballot. *State v. Hall*, 31 W. Va. 505. See *State v. Doty*, 1 Pin. (Wis.) 396.

In *State v. Woodson*, 43 La. Ann. 905, it was held, under the law then in force, that the refusal of the trial judge to order the names of petit jurors previously drawn and placed on the list handed by the clerk to the sheriff to be put in a box and drawn therefrom was error, where such course was the usual mode of calling and selecting the members of the petit jury in the locality in the absence of any adverse legislation.

Purging Box of Illegally Deposited Names. — Where it is brought to the

attention of the court that names have been illegally placed in the box, on being satisfied of the fact by evidence, the court may order the box to be purged of the illegal names and order the drawing to proceed. *Smith v. State*, 61 Miss. 754.

Clandestine Removal of Ballots from Box. — In *Alexander v. Com.*, 105 Pa. St. 1, after eight jurors had been drawn and separately sworn, it was discovered that a number of the paper pellets had been clandestinely removed. The action of the trial court in directing the clerk to prepare pellets in their stead, put the whole number in the box, and draw from the box *de novo* was approved.

2. See *infra*, 5. *Presentation of Jurors*; *People v. Edwards*, 101 Cal. 543.

Names — Full Complement of Names. — In a justice's court wherein a jury of six is required, the names of but five in attendance on the venire should not be placed in the box and the attempt made to form a jury, but another venire should be issued that enough names may be put in the box and the jury be drawn therefrom. *Brisbane v. Macomber*, 56 Barb. (N. Y.) 375.

Nonresident or Deceased Juror. — If the clerk omit to throw aside a ballot containing the name of any juror who has died or removed, as provided in the Act of February 9, 1831, the whole array, if challenged, must be set aside and a new venire be awarded, and the death or removal may be proved when the array is challenged. *Jones v. State*, 8 West. L. J. (Ohio) 508.

Presumption that All Names Were Drawn. — Where, by statute, it is provided that if there is less than the maximum number of names (twenty-four) in the box, the clerk shall draw all the names from which to select a jury, and that if there are more than twelve the party shall proceed to select, etc., in a case where fourteen names were drawn and a selection was made therefrom, it was presumed that the clerk drew all the names from the box. *Davis v. State*, 9 Tex. App. 634.

vertence or without design, names have been omitted from the box or hat, the proceedings will not be vitiated for that reason where the omission has been supplied by depositing the omitted names before completion of the jury, and no injury has resulted because of the irregularity.¹

(b) *Disqualified Persons.* — It has been held that the court, in its discretion, may direct that the names of the persons known to be disqualified may be omitted in calling over the list or panel.²

1. *Supply of Omission.* — In *Morrison v. State*, 84 Ala. 405, in forming a trial jury, by mistake names were omitted from the hat, which omission was not discovered until all the ballots had been drawn and seven jurors secured, and it was held that the court properly directed the omitted ballots to be placed in the hat, and the drawing to proceed, instead of completing the jury by talesmen.

In *State v. Boon*, 82 N. Car. 647, an irregularity to which no objection was made, and which was held not to necessitate a reversal, consisted in the mistake of the clerk in omitting to place in the box the names of four jurors who were on the list; but upon his discovery of that fact the names were placed therein and drawn.

Absence of Prejudice. — The failure of the clerk, on forming the jury, to put the names of persons returned in the box wherein names of persons to be drawn as trial jurors are required by statute to be placed is not ground for a new trial where it subsequently appears that the complaining party could not have been prejudiced by the omission. *People v. Ransom*, 7 Wend. (N. Y.) 417. In this case it appeared that after the clerk had called the names of twenty-eight persons, eleven of whom were accepted and seventeen challenged, it was discovered that the name of a venireman who had answered the general call was not in the box, and on search being made the ballot was found and placed therein, and his name was drawn by order of the court, whereupon he took his seat and served on the jury, it being considered that the irregularity was because of the neglect of the clerk, and not from design.

Noncompliance with Statutory Provisions. — In *Brazier v. State*, 44 Ala. 392, it appeared that one slip placed in the hat contained the names of two persons, written on opposite sides of the same slip, which fact was not dis-

covered until ten jurors had been accepted without objection and impaneled. When the hat was exhausted it was found that the names of four persons which were on the lists served on the defendant had not been drawn, three of such names never having been put in the hat, and the fourth being one of the two names on the same slip, and it was held that there was such a failure to comply with a statutory requirement that the names of the jurors should be written on separate slips of paper, and each slip by itself folded or rolled up, placed in a receptacle, and after being shaken up be drawn out one by one until the completion of the jury, as would require quashal of the panel.

Acceptance of Juror Whose Name Was Omitted. — In *State v. Campbell*, 35 S. Car. 28, after eleven jurors had been sworn and the hat exhausted, it was discovered that the names of six persons had been accidentally omitted, and these being placed in the hat and the defendant having accepted the first juror drawn, there was held to be no valid ground of complaint. *State v. Campbell*, 35 S. Car. 28. See, deciding the same principle, *State v. Jackson*, 32 S. Car. 27.

2. It is within the discretion of the court to direct the clerk, in calling a panel, to omit the names of such jurors as are presumably disqualified or unable to serve; for example, such as have been present and listened to a former trial of the same cause or a trial involving the same questions; those who are ill or whose family are, and many other instances. A wide discretion is allowed the court in such cases, and until a panel is complete a party has no vested right in any particular juror that may not be taken from him should the exigencies of the case, in the discretion of the court, require it. *Quinn v. Halbert*, 57 Vt. 178.

In *Abilene v. Hendricks*, 36 Kan. 196, which was an action against a municipality for personal injuries, there was

(4) *Replacing Names in Box.* — Where persons summoned fail to respond or to answer when called, their names may be replaced in the box; but as to whether this may be done before or after exhaustion of the box the authorities do not agree.¹ It has also been held that it is unnecessary to recall or return to the box the names of jurors of the original panel who were called to participate in the trial of another cause.²

(5) *Who May Draw.* — That the names of the veniremen were called or drawn from the box by an official not designated by

held to be no error in the fact that in impanelling the jury the clerk followed an instruction of the court that in calling the names from the jury list he might omit the names of persons known to him to be residents of the city.

Compelling Drawing from Disqualified Persons. — It is error to order into the box the names of jurors summoned by a disqualified sheriff, and who were not procured through the medium of an ellisor appointed. *State v. Clark*, 121 Mo. 500.

1. Where persons summoned failed to answer when first called, but appeared later on, when their names were put in the box, though the names first placed in the box had not been exhausted, there was held to be no error. *People v. Collins*, 105 Cal. 504.

After calling the names without completing the jury, the court may direct the clerk to replace in the box, and again call, the names of those who failed to answer at first. *State v. Brown*, 12 Minn. 538.

Under a statute directing that the first twelve persons shall be sworn as a jury, and that if any juror be absent at the time of the drawing and calling the ballot containing his name shall be returned to the box containing the undrawn ballots, where an absent juror's name is replaced in the box it is in the discretion of the court to require it to be called a second time, but neither party can require it to be done as a matter of right. *People v. Larned*, 7 N. Y. 445.

Exhaustion of Box Before Proceeding with Second Call. — Where the requirement is that the clerk of the court, or some other indifferent person, by direction of the court, shall, in open court, draw out twelve of the papers or parchments, one after another, and that if any person whose name shall be so drawn shall not appear, or shall be challenged and set aside, then such further number thereof shall be drawn

as shall make up the number of twelve fair and indifferent persons, etc., if a juror does not appear when first called the panel is to be gone through, if necessary, for the purpose of obtaining a full jury, before the clerk shall call for the second time those who were absent on the first call. *People v. Vermilyea*, 7 Cow. (N. Y.) 369.

Failure of Record to Show Recasting of Absentees. — A record which fails to show that the persons whose names are on the venire were called after exhaustion of the panel, and upon an order for tales, is a mere irregularity which is cured by a trial on the merits. *Jewel v. Com.*, 22 Pa. St. 94.

Procurement of Special Veniremen. — Where the regular panel has been called, the names of the special veniremen may be placed in the box and drawn therefrom without calling for or sending for nonattendants whose names appear on the regular panel. *State v. Brown*, 12 Minn. 538.

A Name Omitted from the Box cannot be placed therein if the box is exhausted. *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

2. See *infra*, 5. *Presentation of Jurors.*

Omission to Call Names of Regular Panel Discharged in Another Case. — Where, by order of the court, the clerk omitted the names of the twelve jurors drawn on the regular panel for the reason that they had just been discharged in another case, it was held that in the absence of any objection at the time, or any pretense that a proper jury had not been secured, there was no irregularity of which the unsuccessful party could complain. *Alexander v. Oshkosh*, 33 Wis. 277.

Necessity of Returning Names Drawn to Box. — Although it is provided by statute that when a jury has been sworn the ballots containing their names shall be kept apart from the other ballots until the discharge of the jury, it is not necessary to wait until

statute, or by a person not possessing the statutory qualifications,¹ or improprieties by the officer whose duty it is to draw from the box, will not usually invalidate the proceedings where no prejudice has resulted.²

3. Excusing Jurors — *a. POWER TO EXCUSE* — (1) *Generally.* — It is a general rule that the trial court, in the exercise of its discretion in procuring a jury, has power to excuse a person summoned for services as a juror for any good cause or reason satisfactory to itself, though the reason for relieving or for excusing him may not be sufficient to sustain a challenge.³ This right,

the jury is discharged and the ballots are returned to the box before proceeding to draw another jury from the box for the trial of the next case. *People v. Craig*, 48 Mich. 502.

Discharge of Jury Partially Completed by Talesmen and Resort to Regular Panel. — In *Quinn v. Halbert*, 57 Vt. 178, it appeared that when the court adjourned eleven jurors had been accepted, six of the regular panel and five talesmen; that on the next day, a panel which had been out the day before being then present, the eleven jurors already accepted were discharged and a jury was selected from the regular panel; and it was held that there was a reasonable exercise of discretion by the court. *Quinn v. Halbert*, 57 Vt. 178.

1. Call by Marshal and Not by Clerk. — The fact that the marshal instead of the clerk called the names of the jurors to try the cause is not an available objection, although by statute that duty is cast upon the clerk, the statute in that regard being simply directory. *State v. Holme*, 54 Mo. 153.

Drawing by Persons Not Qualified. — A judgment in a criminal cause should not be arrested because of the unintentional violation of a rule of court, such violation consisting of the drawing from the hat by a boy of a less age than that prescribed by the rule. *State v. White*, 15 S. Car. 381.

Form of Objection. — An objection that the names of the jurors were drawn by the judge, and not by the clerk, as required by law, should be made by challenge to the jury when it is impaneled, and cannot be presented by a motion in arrest or for a new trial. *Hasselmeyer v. State*, 1 Tex. App. 690.

Objection that the names of jurors were not drawn by the clerk, as required by law, but were drawn by the judge, should be made by challenge

to the jury when it is impaneled, and is not available on motion in arrest. *Hasselmeyer v. State*, 1 Tex. App. 690.

2. Where No Abuse or Injury Is Pretended and no objection was made at the time, a mistake of an officer in the mode of drawing jurors in forming the jury is not a ground for setting aside the proceedings. *Cole v. Perry*, 6 Cow. (N. Y.) 584.

Misconduct of Clerk — Absence of Injury. — The failure of the clerk to comply with statutory requirements respecting the drawing of jurors from the box will not require a reversal unless injury has resulted. *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650; *Galveston, etc., R. Co. v. Wessendorf*, (Tex. Civ. App. 1896) 39 S. W. Rep. 132.

3. Alabama. — *Ned v. State*, 7 Port. (Ala.) 189; *Quesenberry v. State*, 3 Stew. & P. (Ala.) 308; *State v. Marshall*, 8 Ala. 302; *Waller v. State*, 40 Ala. 325; *Fariss v. State*, 85 Ala. 1; *Maxwell v. State*, 89 Ala. 150.

California. — *Grady v. Early*, 18 Cal. 109; *People v. Arceo*, 32 Cal. 40; *People v. Collins*, 105 Cal. 504.

Colorado. — *Stratton v. People*, 5 Colo. 276; *Mooney v. People*, 7 Colo. 218; *Hill v. Corcoran*, 15 Colo. 270.

Florida. — *John v. State*, 16 Fla. 554.

Georgia. — *Jesse v. State*, 20 Ga. 164; *Thomas v. State*, 27 Ga. 295; *Fulton County v. Amorous*, 89 Ga. 614.

Kansas. — *State v. Dickson*, 6 Kan. 209; *State v. Miller*, 29 Kan. 43; *State v. Drake*, 33 Kan. 151.

Louisiana. — *State v. Somnier*, 33 La. Ann. 237; *State v. Rountree*, 32 La. Ann. 1145; *State v. Kane*, 32 La. Ann. 999; *State v. Madison*, 47 La. Ann. 30.

Maine. — *State v. Cady*, 80 Me. 413; *Snow v. Weeks*, 75 Me. 105; *Ware v. Ware*, 8 Me. 42.

Massachusetts. — *Com. v. Livermore*, 4 Gray (Mass.) 19.

however, is subject to exceptions, as where the ground upon which the proposed juror is excluded is a cause of challenge which may be waived,¹ or where there is a right to test the com-

Michigan. — *Atlas Min. Co. v. Johnston*, 23 Mich. 36.

Mississippi. — *Lewis v. State*, 9 Smed. & M. (Miss.) 115; *Coleman v. State*, 59 Miss. 484.

Missouri. — *State v. Taylor*, 134 Mo. 109.

Nevada. — *State v. Larkin*, 11 Nev. 314.

New Hampshire. — *Pierce v. State*, 13 N. H. 555; *State v. Bradford*, 57 N. H. 198; *Rowell v. Boston, etc., R. Co.*, 58 N. H. 514.

New Jersey. — *Smith v. Clayton*, 29 N. J. L. 358; *Patterson v. State*, 48 N. J. L. 381.

New York. — *People v. Ferris*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 197; *People v. Packenham*, 115 N. Y. 200.

North Carolina. — *State v. Craton*, 6 Ired. L. (N. Car.) 164; *State v. Arthur*, 2 Dev. L. (N. Car.) 221.

Ohio. — *Stewart v. State*, 1 Ohio St. 68; *Bond v. State*, 23 Ohio St. 349.

Pennsylvania. — *Jewell v. Com.*, 22 Pa. St. 94.

South Carolina. — *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262.

South Dakota. — *State v. La Croix*, 8 S. Dak. 369.

Tennessee. — *Boyd v. State*, 14 Lea (Tenn.) 161.

Utah. — *Anderson v. Wasatch, etc., R. Co.*, 2 Utah 518.

Vermont. — *State v. Ward*, 39 Vt. 230.

Virginia. — *Montague v. Com.*, 10 Gratt. (Va.) 767.

West Virginia. — *State v. Davis*, 31 W. Va. 390.

Wisconsin. — *Sutton v. Fox*, 55 Wis. 531.

United States. — *U. S. v. Cornell*, 2 Mason (U. S.) 91.

The General Doctrine. — In *Montague v. Com.*, 10 Gratt. (Va.) 767, the court said: "It * * * seemeth to the court that in a case of necessity, and to prevent a failure of the ends of justice, it is also competent for the court to excuse or set aside a juror who, although free from any statutory disability, and possessing the legal qualifications of a juror, and standing indifferent between the commonwealth and the accused, is yet disabled, physically or mentally, by disease, domestic

affliction, ignorance of the vernacular tongue, loss of hearing, or other like cause, from properly performing the duties of a juror; and this of its own motion, without the suggestion or consent of either party; but that the power of so doing is to be exerted with due caution and circumspection, and in the exercise of a sound discretion, for the same purposes and upon the same grounds and principles which govern the court in the exercise of its discretion to discharge a jury sworn in a criminal case before they shall have rendered a verdict; the former power being in effect but a corollary from the latter, which has been confirmed by a statutory provision."

Complaint by Accused. — While it is the more regular course for the state to challenge an incompetent juror, yet if the court discharges the juror it is not an error of which the prisoner can complain. *Waller v. State*, 40 Ala. 325.

Discharge of Entire Panel. — Where it is within the power of the court to excuse any or all of the jurors summoned, and to summon others when deemed necessary, it is not ground of challenge to the array that the original panel has been discharged and the panel objected to directed to attend. *People v. Jackson*, 111 N. Y. 362, 6 N. Y. Crim. Rep. 393.

Failure to Object. — The name of a juror temporarily excused may be called and put aside. If there is any exception to that course it must be made at the time to be available. *State v. Belcher*, 13 S. Car. 459.

Power of Summoning Officer. — Where a sheriff or other officer is authorized to select and summon a jury, he cannot, after summoning a person to serve as a juror, discharge him from attendance and summon another in his stead; after the juror is summoned the court only can discharge him. *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47.

1. The court, of its own motion and against the objection of a party who has summoned a juror as a witness, cannot set the juror aside for that reason, it being only a ground of challenge which may be waived. *Bell v. State*, (Ala. 1897) 22 So. Rep. 526.

Exclusion Without Examination. — In

petency of the juror, in which case exclusion without a cause which goes to the juror's competency may afford a good ground of objection,¹ or in cases of a like nature where there may be resultant injury.²

Error Without Prejudice. — However, it may be stated as a general proposition that excuse or rejection for an insufficient reason will not be deemed to have been prejudicial if a trial was had by a duly qualified and impartial jury.³

State v. Williams, 31 S. Car. 238, a new trial was granted because the trial judge, of his own motion and without examination of a proposed juror who had been a witness in a previous trial of a person jointly indicted with the defendant, declared him prejudiced and excluded him.

In *State v. Farrow*, 74 Mo. 531, the court, while not expressly so deciding, intimated that the action of the court below in striking the name of a qualified juror from the list on its own motion might warrant a reversal of the judgment.

1. *Boles v. State*, 13 Smed. & M. (Miss.) 398; *Montague v. Com.*, 10 Gratt. (Va.) 767.

In *Alabama* the court has no power, in a capital case, to discharge persons having the requisite qualifications, summoned and drawn for service on the jury, without the consent and against the express objection of the prisoner. *Phillips v. State*, 68 Ala. 469.

Residence Beyond Prescribed Distance. — Where it is provided that when it appears that a person called to complete the jury resides more than two miles from the court house he may be excused, in the discretion of the court, the court cannot pass over or excuse any competent juror whose name may be drawn unless he resides beyond the prescribed distance. *Ezell v. State*, 102 Ala. 101.

In *Texas*, in advance of the selection of a jury from a special venire, the court has no right to excuse any of the jurors so summoned, and they cannot be excused until they have appeared at the time and place specified in the venire, and until they are called and tested in the order in which their names appear on the venire facias. *Thuston v. State*, 18 Tex. App. 26. And see *Robles v. State*, 5 Tex. App. 346; *Hill v. State*, 10 Tex. App. 618; *Foster v. State*, 8 Tex. App. 249.

Residence Within Municipality. — In an action against a municipal corpora-

tion the erroneous exclusion, against objection, of residents within the municipality who are in no wise incompetent, because of such residence, is reversible error. *Hildreth v. Troy*, 101 N. Y. 234.

Deprivation of Right. — If a juror on a particular panel was improperly rejected or made to stand aside at the instance of the state, and the accused did not have a particular opportunity afforded him to accept or challenge said juror for cause, or peremptorily, if his right in this respect had not been exhausted it is reversible error. *State v. Hensley*, 94 N. Car. 1021.

In *Virginia* the erroneous exercise of the power to excuse a juror for physical or mental disability is a matter of exception by the accused for which a judgment may be reversed. *Montague v. Com.*, 10 Gratt. (Va.) 767.

2. See *infra*, IX. Formation of Trial Jury.

3. *California*. — *People v. Arceo*, 32 Cal. 40.

Colorado. — *Stratton v. People*, 5 Colo. 276.

Kansas. — *State v. Miller*, 29 Kan. 43; *Atchison, etc., R. Co. v. Franklin*, 23 Kan. 74; *Stout v. Hyatt*, 13 Kan. 232; *Atchison, etc., R. Co. v. Franklin*, 23 Kan. 74; *State v. McKinney*, 31 Kan. 570; *State v. Copp*, 34 Kan. 522; *Delaney v. Salina*, 34 Kan. 534; *Abilene v. Hendricks*, 36 Kan. 196.

Massachusetts. — *Com. v. Livermore*, 4 Gray (Mass.) 19.

Michigan. — *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

Nevada. — *State v. Larkin*, 11 Nev. 327.

Tennessee. — *Boyd v. State*, 14 Lea (Tenn.) 161; *Henry v. State*, 4 Humph. (Tenn.) 270; *Norfleet v. State*, 4 Sneed (Tenn.) 340.

United States. — *U. S. v. Cornell*, 2 Mason (U. S.) 91.

General Doctrine Stated. — It is no ground of error for the court to be more cautious and strict in securing an

Duty of Court. — Moreover, it is the duty of the court, upon becoming aware of facts which will disqualify a proposed juror from participating in the trial, to excuse him of its own motion,¹ and though the disqualification or incompetency does not positively appear, if the court is reasonably satisfied from facts adduced, or from its personal knowledge, that the person presented is unfit to discharge the duties of a juror, in the exercise of the discretion thus vested he may be rejected;² and where, through mistake or misapprehension, jurors have been erroneously excused, the error may be corrected and those excused may be restored to the panel.³

impartial jury than the law actually requires, and it may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause, or, in other words, when the refusal to sustain the challenge would not constitute error. So long as an impartial jury is obtained, neither party has a right to complain of this course by the court, especially when no objection was taken by either party to the competency or impartiality of the jury which was obtained. *Atlas Min. Co. v. Johnston*, 23 Mich. 39.

Rejection at Party's Own Request. — A party cannot complain of the action of the court in directing a juror to stand aside at his own invitation. *Bell v. State*, (Ala. 1897) 22 So. Rep. 526.

Prejudice Presumed. — In *Montague v. Com.*, 10 Gratt. (Va.) 767, the court said that it was not necessary that inquiry should be made as to whether injury had been done to the prisoner by improperly setting aside a competent juror, but that the law would intend such prejudice.

1. *U. S. Rolling Stock Co. v. Weir*, 96 Ala. 396; *Doyal v. State*, 70 Ga. 134; *Cohron v. State*, 20 Ga. 752; *Burroughs v. State*, 33 Ga. 403; *Lewis v. State*, 9 Smed. & M. (Miss.) 115; *Williams v. State*, 32 Miss. 389; *McGuire v. State*, 37 Miss. 369; *Spear v. State*, 16 Tex. App. 98; *Mitchell v. State*, 43 Tex. 513; *Montague v. Com.*, 10 Gratt. (Va.) 767.

Contra. — It is not the duty of the court, *ex mero motu*, to set aside an incompetent juror. *Waller v. State*, 40 Ala. 325.

2. *Ellis v. State*, 25 Fla. 702; *Atlas Min. Co. v. Johnston*, 23 Mich. 36.

The General Doctrine. — Where there is any probability that a juror is disqualified, and the court is unable to determine the matter by reason of its

inability to establish the fact constituting such disqualification, it is not required to hazard the regularity of its proceedings by permitting such person to sit as a juror, but may excuse him. *State v. Kelly*, 1 Nev. 226.

Probable Formation of Opinion. — In *Stoner v. State*, 4 Mo. 368, the appellate court refused to interfere with the action of the trial court in excusing a venireman who stated on his *voir dire* that he had formed an opinion from having conversed with the defendant, but that he felt himself then in a state of mind to do justice between the parties.

Impartiality Questionable. — The better practice is to discharge a juror whose impartiality is questionable, though apparently he is qualified. *Dreyer v. State*, 11 Tex. App. 631.

Suspicion of Partiality. — In the exercise of a sound discretion the court may set aside a juror whom it has reasonable ground to suspect will act under some undue influence or prejudice. *McGuire v. State*, 37 Miss. 369.

Moral Unfitness. — The judge may strike from the regular panel the name of a person who he is satisfied is morally unfit. *State v. Lartigue*, 29 La. Ann. 642.

Duty to Exercise Discretion. — Forbearance of the court to discharge a juror to whom no exception is taken, though there is an ascertained cause of challenge against him, is not error where the right of challenge still remains. *State v. Benton*, 2 Dev. & B. L. (N. Car.) 196.

3. *Epps v. State*, 19 Ga. 102.

Recalling Jurors Erroneously Excused. — In *State v. Linebarger*, 12 Mont. 292, an irregularity consisting of inadvertence in excusing jurors because of a misconception of the statute prescribing their qualifications was held to have been cured by revoking the erro-

Depleting Regular Panel.—While the court, by excusing jurors against objections interposed, should not unnecessarily reduce or deplete the panel, so as to preclude a trial by regular jurors,¹ yet, if no proper objection was interposed, the fact that because of such action the jury is composed of others than members of the regular panel is immaterial.²

Presumption—Review of Discretion.—In the absence of any showing to the contrary, it will be presumed that in excusing a juror the court acted on correct principles, and that the excuse was sufficient to warrant its action.³ In any event, the exercise of its discretion will not be revised unless it is clearly apparent that it has been abused.⁴

neous ruling before its entry in the record, recalling the jurors excused, ascertaining that in their absence they had not communicated with any person concerning the case, and offering to allow the defendant his full complement of peremptory challenges, as if the right had not been exercised.

1. *Stratton v. People*, 5 Colo. 276; *Mooney v. People*, 7 Colo. 218.

Allowing Jurors to Go Home Over Sunday.—Where the court excused so many jurors to allow them to spend Sunday at their homes that but ten could be procured for the trial, it was held proper to take two competent and impartial bystanders. *Cotton v. New York, etc., R. Co.*, (Supreme Ct.) 20 N. Y. Supp. 347.

Failure to Demand Jury Trial.—Where the record does not show that the complaining parties were in a position to demand a jury trial, they cannot complain that the court, by excusing some of the regular jury, deprived them of the right to have the cause tried by a jury selected by the jury commissioners. *Doll v. Mundine*, 7 Tex. Civ. App. 96.

Mode of Objection.—If the court, by a general order to the clerk to discharge such jurors as desire to be excused, reduces the panel below the number required for the trial of a cause, it is a good ground of challenge to the array. *Smith v. Clayton*, 29 N. J. L. 357.

Effect of Failure to Object.—If the court, by a general order to the clerk to discharge such jurors as desire to be excused, reduces the panel below the number required for the trial of a cause, and there being no challenge to the array, talesmen are ordered, the verdict will not be set aside because of the irregularity in impaneling the jury. *Smith v. Clayton*, 29 N. J. L. 357.

Power to Complete Panel.—The fact that a depletion of the regular jury may have arisen from too great a liberality on the part of the judge in allowing excuses to those summoned will not affect his authority to issue a special venire to complete the panel. *People v. Hickman*, 113 Cal. 80.

8. *Moseley v. State*, 107 Ala. 74; *Fariss v. State*, 85 Ala. 1; *Maxwell v. State*, 89 Ala. 150.

In the Absence of a Statement of the Grounds on which jurors were excused it will be presumed that they were excused for good and sufficient reasons. *State v. Breaux*, 32 La. Ann. 222.

4. *State v. Ostrander*, 18 Iowa 435; *State v. Creech*, 38 La. Ann. 480; *State v. Farrer*, 35 La. Ann. 315; *State v. Barnes*, 34 La. Ann. 395; *State v. Eloi*, 34 La. Ann. 1195; *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431; *Gran v. Houston*, 45 Neb. 813; *Richards v. State*, 36 Neb. 18; *Omaha, etc., R. Co. v. Cook*, 37 Neb. 435; *Sutton v. Fox*, 55 Wis. 531.

In *Grady v. Early*, 18 Cal. 109, the Supreme Court said that in civil cases it would interfere with great reluctance with the discretion of the court below in excusing a juror when it thought the purposes of justice were to be served by excusing him.

In *Ware v. Ware*, 8 Me. 42, it was said that it seems doubtful whether the discretion of a judge in discharging or excusing jurors or the like can be revised.

Duty of Appellate Court to Judge of Facts.—Notwithstanding that great weight is given to the decision of the trial judge, yet, upon exception, the appellate court must judge of the facts and must ascertain whether the reason for setting aside a juror was good and sufficient. *Montague v. Com.*, 10 Gratt. (Va.) 767.

(2) *Time of Exercising Power* — (a) *Before Completion of Panel*. — The authorities are not harmonious as to the stage of the proceedings at which the court may excuse or reject a juror. That the court may exercise its discretion in this respect after acceptance of a juror,¹ before completion of the panel, or before the person selected has been sworn and charged with the case,² is generally conceded.

(b) *Before Completion of Panel and After Administration of Oath*. — The same may be said of the right to excuse a juror who has been sworn before completion of the panel, though this right is not so generally recognized.³

(c) *After Completion of Panel and Administration of Oath*. — See *infra*, XI. *Discharge of Jurors or Jury*.

1. *Arkansas*. — *Robinson v. State*, 33 Ark. 185.

Louisiana. — *State v. Hobgood*, 46 La. Ann. 855; *State v. Costello*, 11 La. Ann. 283; *State v. Diskin*, 34 La. Ann. 919; *State v. Moncla*, 39 La. Ann. 868; *State v. Nash*, 46 La. Ann. 194; *State v. Johnson*, 48 La. Ann. 437.

Michigan. — *Atlas Min. Co. v. Johnston*, 23 Mich. 36; *People v. Carrier*, 46 Mich. 442.

Mississippi. — *Lewis v. State*, 9 Smed. & M. (Miss.) 115.

New York. — *People v. Damon*, 13 Wend. (N. Y.) 354.

North Carolina. — *State v. Boon*, 80 N. Car. 461.

Tennessee. — *Boyd v. State*, 14 Lea (Tenn.) 161; *Lewis v. State*, 3 Head (Tenn.) 127; *Fletcher v. State*, 6 Humph. (Tenn.) 249.

Texas. — *Drake v. State*, 5 Tex. App. 649; *Horbach v. State*, 43 Tex. 260.

Contra. — *Norfleet v. State*, 4 Sneed (Tenn.) 340.

2. *Georgia*. — *Jesse v. State*, 20 Ga. 164.

Kansas. — *Stout v. Hyatt*, 13 Kan. 241.

Massachusetts. — *Com. v. Livermore*, 4 Gray (Mass.) 19.

Mississippi. — *McGuire v. State*, 37 Miss. 376.

Nevada. — *State v. Kelly*, 1 Nev. 225; *State v. Larkin*, 11 Nev. 314.

New Hampshire. — *Pierce v. State*, 13 N. H. 554.

Ohio. — *Stewart v. State*, 1 Ohio St. 66.

Tennessee. — *Hines v. State*, 8 Humph. (Tenn.) 597.

United States. — *U. S. v. Cornell*, 2 Mason (U. S.) 91.

3. *California*. — *People v. Ward*, 105 Cal. 335.

Florida. — *Metzger v. State*, 18 Fla. 481.

Georgia. — *Hanvey v. State*, 68 Ga. 612.

Illinois. — *Ochs v. People*, 124 Ill. 399.

Mississippi. — *Gilliam v. Brown*, 43 Miss. 641; *Williams v. State*, 32 Miss. 389; *McGuire v. State*, 37 Miss. 376.

Missouri. — *State v. Baber*, 74 Mo. 293.

Texas. — *Rippey v. State*, 29 Tex. App. 37.

Statutory Reasons. — In the *District of Columbia* a juror may be excused for statutory reasons at any time before the jury is impaneled and sworn. *U. S. v. Heath*, 20 D. C. 272.

Transfer to Grand Jury. — The presiding judge may properly discharge a person from the traverse jury after being summoned and sworn thereon, and may place him upon the grand jury for the term. *Sims v. State*, 51 Ga. 495.

Illness of Juror. — In *Ellison v. State*, 12 Tex. App. 557, which was a capital case, after eleven jurors had been selected and sworn one of the jurors complained of feeling unwell, and the court, without the consent of the defendant, discharged the suffering juror and proceeded to complete the panel. The defendant excepted to this action, and it was held that the discharge of the juror was unauthorized.

Failure to Pass on Objection. — After a juror has been sworn, and before completion of the jury, it is error for the judge, without passing on the objections raised to the juror, to stand him aside on motion of the state and to proceed with the formation of the jury. *Mathis v. State*, 31 Fla. 291.

b. GROUNDS FOR EXCUSING JURORS — (1) Lack of Intelligence. — The recognized grounds upon which proposed jurors may be excused or for which they may be rejected, whether statutory, such as will justify the action of the court in its efforts to afford a fair and impartial trial by jury, or those which are in the nature of a personal privilege, are quite numerous. Thus, lack of sufficient understanding or intelligence will authorize the court to reject a person summoned for jury duty.¹

(2) Ignorance of English Language. — A person presented as a juror may be excluded upon the ground that his knowledge of the English language is so limited and imperfect as to make it probable that he could not intelligently comprehend the proceedings.²

(3) Alienage. — It is proper for the court to excuse from the jury a person disqualified because of noncitizenship.³

(4) Unwillingness to Convict. — Unwillingness to convict on circumstantial evidence, or to convict of a crime punishable by death because of conscientious scruples in that respect, is a good ground for rejection.⁴

1. *State v. Rountree*, 32 La. Ann. 1145.

2. *Long v. State*, 86 Ala. 36; *State v. Ring*, 29 Minn. 78; *Sutton v. Fox*, 55 Wis. 531.

Province of Court. — Whether or not a juror can read, write, or understand the English language, is a question of fact for the determination of the trial judge. *State v. Guidry*, 28 La. Ann. 630.

It is for the court to say, under the circumstances existing at the time, whether it is proper that a party ignorant of the language should be excused. If there are parties summoned as jurors, speaking two or more different languages, who cannot communicate with each other, it is obviously improper that they should sit together upon the same jury, for there would be no means by which they could communicate with each other in the jury room. *People v. Arceo*, 32 Cal. 40.

Exhaustion of Peremptory Challenges. — In *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560, after exhaustion of the plaintiff's peremptory challenges, one of the jurors informed the court that he did not think he had a sufficient understanding of the English language to qualify him to sit as a juror, and requested to be excused; against the plaintiff's objection he was discharged and another selected in his stead.

3. *Babcock v. People*, 13 Colo. 515.

Sufficiency of Juror's Statement. — In

State v. Larkin, 11 Nev. 327, there was held to be no error on the part of the court in excusing a juror upon his sworn statement that he was not a citizen of the United States.

4. *Alabama.* — *Tatum v. State*, 82 Ala. 5; *Jackson v. State*, 74 Ala. 26; *Garrett v. State*, 76 Ala. 18.

Florida. — *Griffin v. State*, 90 Ala. 596; *Olive v. State*, 34 Fla. 205.

Louisiana. — *State v. Frier*, 45 La. Ann. 1434; *State v. Shields*, 33 La. Ann. 994; *State v. Barker*, 46 La. Ann. 798.

Mississippi. — *Coleman v. State*, 59 Miss. 484; *Cooper v. State*, 59 Miss. 267; *Lewis v. State*, 9 Smed. & M. (Miss.) 115; *Jones v. State*, 57 Miss. 684.

Missouri. — *State v. David*, 131 Mo. 380; *State v. Young*, 119 Mo. 495.

Texas. — *Gonzales v. State*, 31 Tex. Crim. Rep. 508.

Inquiries Allowable. — In *Russell v. State*, 53 Miss. 367, it was held that the court may of its own motion, without further inquiry, set aside as incompetent a person called as a juror who declines because he has conscientious scruples against capital punishment. But in *Smith v. State*, 55 Miss. 410, the court said that it was not disposed to carry the doctrine further, and reversed a conviction on trial of an indictment for murder because the trial court declared to be incompetent and ordered to stand aside two special

(5) *Relationship*. — The relationship of the proposed juror to a party, or to the accused, or the like relationship of the members of his family, will justify exclusion.¹

(6) *Illness*. — A well-recognized ground for relieving a juror from service is the illness of himself² or of members of his family who may require his personal attention,³ the sufficiency of the proof of illness being a matter largely, though not entirely, addressed to the discretion of the trial court.⁴

veniremen who, when asked if they had conscientious scruples against the infliction of the death penalty, stated that they "would not like for a man to be hung," and refused to allow counsel for the accused to question them further touching their scruples.

1. *Relationship to Party*. — Hartford Bank v. Hart, 3 Day (Conn.) 491; Buddee v. Spangler, 12 Colo. 216.

Relationship to Accused. — A juror who is related to the accused may be set aside before the beginning of the trial. State v. Hill, 46 La. Ann. 736.

Relationship to Deceased and to Accused. — In State v. Boon, 80 N. Car. 461, there was held no error in standing aside a juror related to both the prisoner and the deceased, after he had been tendered and accepted by the prisoner, but before he was sworn.

Relationship to Party. — It is a fair exercise of discretion to discharge a venireman whose son-in-law is related to the other party, and who has discussed the case with the jury, on a challenge by one of the parties, where there is nothing to show that the bystander selected in his place was not acceptable, nor a good juror. Geiger v. Payne, (Iowa 1896) 69 N. W. Rep. 554.

Relationship to Accused of Wife of Juror. — In State v. Hobgood, 46 La. Ann. 855, there was held to be no error in discharging a juror who had been accepted and sworn, but before completion of the panel, for the reason that his wife was related to the accused.

Relationship to Other Person Indicted for Same Offense. — In endeavoring to procure an impartial jury, the court may set aside jurors related to another person indicted for the same offense, or who are in sympathy with the accused. Smith v. State, 61 Miss. 754; Smith v. State, 55 Miss. 513; McGuire v. State, 37 Miss. 369.

Impeachment of Brother of Juror, Who Is a Witness. — After the impaneling of the jury in a criminal case, a statement

by counsel for the defendant that they would impeach the character of the brother of one of the jurors, who was a witness for the state, may afford a reason for discharging the juror in question. State v. Christian, 30 La. Ann. 367.

2. State v. Ostrander, 18 Iowa 435; State v. Madison, 47 La. Ann. 30; State v. Johnson, 48 La. Ann. 437; State v. Baber, 74 Mo. 293.

Absence Because of Illness. — If upon a call of the list it is made to appear satisfactorily to the court that a venireman whose name is called is absent by reason of sickness or other unavoidable cause, the court may excuse the absence. Thompson v. State, 19 Tex. App. 593; Thuston v. State, 18 Tex. App. 26.

Presentation of Excuse by Telegram.

— The trial court is justified in excusing a juror regularly impaneled upon receipt of a telegram from him stating his illness and consequent inability to appear, where no effort is made to disprove the facts stated in the telegram. Houston City St. R. Co. v. Ross, (Tex. Civ. App. 1894) 28 S. W. Rep. 254.

Juror Sworn for Precaution. — The fact that in a felony case the court swore seven jurors as a matter of precaution will not preclude it from excusing one of them because of sickness before the jury is finally completed. Rippey v. State, 29 Tex. App. 37.

Necessity of Prisoner's Consent. — After selection, but before the completion of the panel, a person selected as a juror may be permitted to stand aside on his own application, for physical inability to sit, without objection from either party, but also without the express consent of the prisoner. Fletcher v. State, 6 Humph. (Tenn.) 249.

3. Parsons v. State, 22 Ala. 50; State v. Ostrander, 18 Iowa 435.

4. *Physician's Certificate*. — There is no error in discharging a juror who has been accepted and sworn, and who, before the completion of the

(7) *Deafness*. — Likewise a venireman may be excused because of such infirmity of hearing as will or may preclude him from understanding the proceedings.¹

(8) *Intoxication*. — Intoxication of a juror will justify the court in dispensing with his services.²

(9) *Public Officers*. — By statute, in most of the states, certain public officers are entitled to be excused on making a proper presentation of the facts, but irrespective of legislation on this subject, officials whose duties are of such a nature as to require their personal presence may be excused, in the discretion of the court.³

panel, presents a physician's certificate as to his illness, especially where counsel submit the question of the juror's condition to the decision of the judge. *Hanvey v. State*, 68 Ga. 612.

Necessity of Certificate. — When, on the trial of a felony, several of the jury have been selected and one of them becomes sick, it is not error to excuse him and then proceed regularly to complete the panel to the number of twelve; and this the court may do without summoning a physician to determine that the juror is sick. *Ozburn v. State*, 87 Ga. 173.

Proof by Layman. — The court, during the trial of the cause, may discharge a juror upon the evidence of a witness, who is not a physician, that the juror is sick and unable further to attend as a juror. *Shawneetown v. Mason*, 82 Ill. 337.

Juror's Unsworn Statement. — It is error to discharge a juror on his own statement as to his sickness, and without any sworn statement or any evidence of a physician as to his condition. *Rulo v. State*, 19 Ind. 208, a capital case in which the alleged sickness consisted of neuralgia resulting from a broken tooth.

Illness Apparent. — After a juror has been examined, found competent, and been accepted, if he becomes ill in the interim between the adjournment of the court and the completion of the panel, on the fact of the illness being made apparent to the court he may be discharged, and his place supplied by another juror. *State v. Baber*, 74 Mo. 293.

Personal Examination by Court. — There is no error in excusing impaneled jurors who are personally examined by the court and present certificates of physicians touching their inability to sit in the cause. *Houston City St. R.*

Co. v. Ross, (Tex. Civ. App. 1894) 28 S. W. Rep. 254.

Requiring Juror to Serve. — In *U. S. v. Porter*, 2 Dall. (U. S.) 345, two jurors who were called alleged sickness as an excuse for not serving and were set apart. But the whole panel being exhausted without procuring a jury, and the jurors persevering in their excuses, counsel for the prisoner retracted his challenge of another juror, who was thereupon qualified by order of the court.

1. *Mitchell v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 367.

Power of Court. — Though neither deafness nor sickness is a statutory disqualification, the court was held justified in discharging a juror who was deaf without consulting the prisoner. *Jesse v. State*, 20 Ga. 164.

2. *Bullard v. Spoor*, 2 Cow. (N. Y.) 431; *Torrent v. Yager*, 52 Mich. 506.

That a juror who was set aside by a justice for intoxication was, in fact, intoxicated, is conceded by the failure of either party to object. *Bullard v. Spoor*, 2 Cow. (N. Y.) 431.

3. **Who Entitled to Be Excused.** — In *Ex p. Piper*, 2 Browne (Pa.) 59, several persons summoned as jurors having applied to be excused because of the situations and offices which they held, the court declared that whenever the office or situation was of a public nature, and the holder had no power to act by deputy, he was entitled to be excused, but otherwise, if the trust was of a private nature or the applicant was empowered to act by deputy.

A Policeman on Active Duty is within a statute allowing the court to excuse, for reasonable or proper cause, persons summoned for jury duty. *Pierson v. State*, 99 Ala. 149.

Election Officers. — There is no error in excusing jurors for the reason that

(10) *Exemptions.* — Of a somewhat similar nature is the right of persons exempt by law to be relieved, though this is a privilege which, being considered personal in its character, with the possible exception of exemption for over age, may be waived.¹

(11) *Miscellaneous.* — As before stated, the power thus vested will authorize the trial judge to excuse jurors for causes other than those as to which express authority is conferred by statute,² and, in addition to the grounds heretofore specified, there are a variety of grounds, statutory and otherwise, which will authorize the court to act. Thus a juror who has a cause at issue which may be tried at the same term may be excused,³ likewise persons who

they are election officers whose duty it is to meet the next day and make out the registry list. *Aaronson v. State*, 56 N. J. L. 9.

Postmaster — Failure to Test Validity of Excuse. — If a person summoned is excused in his absence because of a suggestion that he is postmaster, and the defendant fails to test the *bona fides* of the excuse by applying for an attachment, he is precluded from complaining thereafter. *Kennedy v. State*, 19 Tex. App. 618.

1. *Simon v. State*, 108 Ala. 27; *Chuverius v. Com.*, 81 Va. 787.

Privilege Personal. — Statutes exempting persons over a prescribed age from jury duty, and providing that such persons shall be excused when returned as jurors, do not necessarily disqualify such persons, but the right to claim exemption is personal to the juror. *People v. Rawn*, 90 Mich. 377.

The exemption of a justice of the peace is a personal privilege, and not good ground of challenge for cause. *People v. Lange*, 90 Mich. 454.

Waiver of Privilege — Subsequent Discharge. — A person who had been objected to on account of his exemption as a school commissioner from liability to serve as a juror waived his privilege and was sworn. After the panel had been formed, on being asked a question by the defendant, he stated that he did not like to serve, as he felt interested in the case, and that he did not know the nature of the case when he was objected to. It was held that the discharge of the juror and the swearing of another in his place were proper. *Edwards v. Farrar*, 2 La. Ann. 307.

Statement of Exemption. — Where, by statute, persons exempted from jury duty are entitled to their discharge on claiming and proving the exemption, the court has no authority to discharge

a person regularly summoned upon his merely stating that he is within the class of persons exempted. *Phillips v. State*, 68 Ala. 469.

Failure to Present Excuse. — In *Doyal v. State*, 70 Ga. 134, it appeared that a juror exempt by reason of having reached the age limit failed to ask to be excused when an inquiry was first made as to whether or not any of the persons summoned had excuses to offer, and there was held to be no error in thereafter excusing him at his own request.

Examination as to Exemption. — A person claiming an exemption may be examined on his *voir dire* as to the facts constituting his claim. *King v. State*, 90 Ala. 612.

Excuse of Person Not Exempt. — That one not legally exempt was excused by the judge will not vitiate the verdict, although the accused might, at the time, have exhausted his right of peremptory challenge. *State v. Hamilton*, 35 La. Ann. 1043.

Consent to Disqualified Juror Serving. — Parties cannot consent that a juror disqualified by over age may sit in the case. *Sutton v. Petty*, 5 N. J. L. 581.

Showing Exemption in Former Case. — The court has no power to excuse special veniremen who have failed to respond to the summons because in a prior cause in which they were summoned they showed and established a claim to exemption, and gave notice that they would claim it in the case in question. *Robles v. State*, 5 Tex. App. 346.

2. *State v. Marshall*, 8 Ala. 302; *Fulton County v. Amorous*, 89 Ga. 614; *Jesse v. State*, 20 Ga. 164; *Sutton v. Fox*, 55 Wis. 531.

3. **Cause at Same Term.** — A juror who has a cause at issue which he expects will be tried at the same term may be

may be actually or possibly biased or prejudiced,¹ those whose names appear on more than one panel of jurors summoned,² and, generally, jurors may be rejected or excused for various other causes and grounds which are referred to in the notes.³

excused, and if not excused may be challenged. *Claggett's Case*, 2 Cranch (C. C.) 247.

Cause of Same Character. — In *Shobe v. Bell*, 1 Rand. (Va.) 39, an action for slander, a juror wished to withdraw because he himself had a similar suit pending in the same court, and in which the slander was the same, but counsel refusing to consent to the withdrawal the trial proceeded to verdict. It was held that a new trial was properly refused.

Witness in Next Case. — In *People v. Carrier*, 46 Mich. 442, a juror was excused for the reason that he was to be a witness in the next case to be tried.

1. See *supra*, IX. 3. b. (5) *Relationship*.

Possible Prejudice. — In his discretion, the presiding judge may excuse from service jurors from a particular locality, on the ground that the inhabitants of that locality may have some interest in the result of the suit, or that the proposed jurors may have some bias therein. *Snow v. Weeks*, 75 Me. 105.

Jailer in Charge of Accused. — It is eminently proper that the court should set aside a jailer who has charge of the accused, and who has been summoned. *Hale v. State*, 72 Miss. 140.

Discharge of Other Jurors Because of Possible Contamination. — Where, after accepting a number of jurymen, but before completion of the panel, the court discharged two of them on proof of their having expressed opinions as to the guilt of the accused prior to their acceptance, it was held that the court properly refused to discharge the other jurors, against whom no complaint had been made, on the ground that they had been associated with the objectionable jurors for a day and a night and were tainted by the influence of their opinions, there being no evidence of that fact, and the court having again interrogated them as to their qualifications. *Ellis v. State*, 92 Tenn. 85. And see *Taylor v. State*, 11 Lea (Tenn.) 720.

Bias. — In *Lawlor v. Linforth*, 72 Cal. 205, in answer to an inquiry, by a juror who had been impaneled, as to the nature of the action, he was informed that it was for rent, whereupon

he stated that he was hostile to all landlords, and it was held that the court properly dismissed him from the panel.

Indictment for Similar Offense. — The judge may set aside a juror who has been accepted by both sides upon discovering that he is under indictment for an offense similar to the one to be tried, though this fact, under the statute, constitutes no ground of challenge. *McGuire v. State*, 37 Miss. 369.

Expression of Design to Convict. — In *Mitchell v. State*, 43 Tex. 513, the district attorney was permitted to withdraw his acceptance of a juror and to stand him aside on a peremptory challenge because of the expression by the juror of a design to get on the jury in order to convict the defendant and impose on him the death penalty.

2. Regular Jurors on Special Venire. — Of its own motion, and for reasons deemed sufficient by it, the court may excuse from further attendance jurors summoned on the regular panel whose names are on the special venire served. *Moseley v. State*, 107 Ala. 74. See also *Fariss v. State*, 85 Ala. 1; *Maxwell v. State*, 89 Ala. 150.

A Special Juror may be stricken from the panel of traverse jurors. *Cronan v. Roberts*, 65 Ga. 678; *Maddox v. Cunningham*, 68 Ga. 431.

3. Juror Summoned by Mistake. — Under an agreement of counsel that the court might name the persons to be summoned in a capital case, and that residents of specified townships should not be named, by mistake one resident within the designated locality was named. There was held to be no error in setting the juror aside, although on his examination no personal disqualification was apparent. *State v. McKinney*, 31 Kan. 570.

Misnomer. — Where a mistake has been made in the name of a juror, the proper practice is to have him stand aside. *Swofford v. State*, 3 Tex. App. 76; *U. S. v. Wilson*, 1 Baldw. (U. S.) 83.

Improper Conduct. — Though the jury has been completed, the court may discharge a member thereof for improper conduct after his acceptance, consisting of motions of the head and other sig-

c. TIME OF PRESENTING EXCUSES. — In the absence of provisions of law to the contrary, the proper time when jurors should present their excuses to the court for the exercise of its discretion is at the time the cause is called for trial, or at the time the jurors are presented;¹ and though it has been held that absent jurors

nificant actions, the evident purpose of which was to indicate to a relative of the prisoner what jurors to accept or reject. *Lewis v. State*, 3 Head (Tenn.) 127.

Reckless Disregard of Duty. — Where a juror who had been accepted failed to appear at the opening of the court on the next day, and after search was found playing pool in a hotel, it was held that the court properly excused him and filled his place with another juror, since the conduct of the juror showed such a reckless disregard of duty as would make it evident that he was unfit to serve. *People v. Barker*, 60 Mich. 277.

Minority. — In *Hines v. State*, 8 Humph. (Tenn.) 598, after a juror had qualified himself as far as he was inquired of, and had been pronounced by the court a good and lawful juror, accepted by both parties, and ordered into the box, he informed the clerk, before taking his seat, that he was not twenty-one years of age, whereupon the court ordered him to stand aside, and it was held that, the juror not having been sworn, the court could discharge him and select any other juror in his place.

Juror Confined in Jail. — Where, in making up the jury, the name of a venireman who, since he was summoned, was convicted of assault, and who is in confinement, is drawn, the defendant has a right to have him presented, and the court, of its own motion, cannot discharge him. *Boggs v. State*, 45 Ala. 30.

Placing Juror on Grand Jury. — In *Sims v. State*, 51 Ga. 497, the presiding judge discharged a juror who had been summoned, for the purpose of placing him on the grand jury.

Member of Grand Jury Which Found Indictment. — Where, after a juror had been impaneled, pronounced qualified, and accepted, he stated to the court that he remembered the fact that he had been on the grand jury which rendered the indictment, it was held that in the absence of any objection on the part of the jury the court properly discharged the juror and substituted an-

other in his place, with whom the trial proceeded. *Roberts v. State*, 72 Miss. 728.

Consent of Parties. — During the formation of the jury and before its completion, there is no error in discharging jurors already selected with the consent of the prosecuting attorney and the prisoner. *Nolen v. State*, 2 Head (Tenn.) 520.

Re-examination by Court. — In *Smith v. State*, 55 Miss. 513, the court refused to disturb the verdict because, after examining and pronouncing competent a juror accepted by the defendant, the trial court re-examined him and, ascertaining that he was a neighbor of the defendant, had heard the matter much discussed, and that he was under strong personal as well as pecuniary obligations to the accused and to others indicted for the same offense, ordered the juror to stand aside.

Opinion as to Constitutionality of Statute. — A juror may be excluded because of his opinion that a statute under which conviction is sought is unconstitutional. *Com. v. Austin*, 7 Gray (Mass.) 51.

Refusal to Take Unconstitutional Test Oath. — In *Klinger v. Missouri*, 13 Wall. (U. S.) 257, a juror in a state court refused to take an unconstitutional test oath on the ground that he still sympathized with the late rebellion, and was discharged by the court. It was held that his present disloyalty was sufficient to justify his discharge, independent of his refusal to take the test oath, and as it did not appear that he was discharged because of such refusal, the Supreme Court of the United States held that it had no jurisdiction of the case, upon the ground that the court had erred in excluding and discharging the juror against the objections and consent of the defendant, for no other reason than that the juror declined to take the oath in question. See *State v. Klinger*, 43 Mo. 127.

1. In *Sylvester v. State*, 71 Ala. 17, the court said: "Without deciding it to be error to excuse a juror from service before a capital felony is regularly called for trial, when he is shown to be

who are able to attend may be excused, and the party thus be deprived of the opportunity of testing the validity of the excuse, the practice does not appear to be commendable.¹

4. Talesmen and Additional Jurors — a. GENERALLY. — Both at common law and under statutes, if a full jury does not appear, or is reduced by challenge or otherwise, the court, of its own motion, or on the application of either party, may command the service of as many efficient persons as will complete the jury, the persons thus procured being termed talesmen, additional jurors, special veniremen, etc.² The term "talesman" is more com-

exempt by statute, we are of opinion that the safer practice is not to excuse any juror in advance of the trial until he claims the privilege of such exemption on his name being regularly drawn." See *Phillips v. State*, 68 Ala. 469; *Shelton v. State*, 73 Ala. 5; and also *Floyd v. State*, 55 Ala. 61, and *Jackson v. State*, 77 Ala. 18, wherein there was held to be no error in this practice, and the doctrine of which cases was followed in *Fariss v. State*, 85 Ala. 1, wherein the names of regular jurors were called at the time of the formation of the jury. The court announced that they had been excused from attendance for sufficient reason, the first day of the term, and there was held to be no error, although the discharge was without the knowledge of the defendant. *Overruling Parsons v. State*, 22 Ala. 50. But see *Maxwell v. State*, 89 Ala. 150, wherein it was held that a special act relative to juries in a certain county impliedly authorized the discharge of jurors before the call of the cause for which they were impaneled.

Special Veniremen cannot be excused for cause or exemption, nor can they be challenged until their names are called. *Robles v. State*, 5 Tex. App. 346.

1. Excusing Absent Venireman. — Where a court exercises its authority to excuse absent jurors without consent of the parties or over their objection, it should do so only upon the most satisfactory evidence of unavoidable necessity, and even then a defendant may be entitled to have an attachment issued for the purpose of verifying or disproving the truth of the ground of excuse. *Thompson v. State*, 19 Tex. App. 593; *Thuston v. State*, 18 Tex. App. 26.

Exemption Established in Former Case. — The court has no power to excuse

special veniremen who have failed to respond to the summons because in a prior cause in which they were summoned they showed and established a claim to exemption, and gave notice that they would claim it in the case in question. *Robles v. State*, 5 Tex. App. 346.

Presentation of Excuse Outside of Court-house. — Since the judge alone is to receive excuses for not serving on the jury, there is no irregularity in excusing a juror who has made known his excuse to the judge outside the court-house. *Vaughan v. State*, 58 Ark. 353.

Excusing Postmaster. — Where an absent venireman is excused on information of the sheriff that he is a postmaster, complaint cannot be made when no application was made for an attachment to test the *bona fides* of the excuse. *Kennedy v. State*, 19 Tex. App. 618.

Ignorance of Accused or Counsel. — Where it is provided that when a juror who resides more than two miles from the court-house is drawn he may be relieved from attendance, in the discretion of the presiding judge, there is no error on the part of the court in excusing jurors who are within the act, in open court, without special information to the defendant or his counsel, who were presumably present, unless there is a request for the names of the jurors so excused, followed by a proposal to test the fact of their residence. *Steele v. State*, 83 Ala. 20.

2. 3 Black. Com. 364; 5 Bac. Abr., tit. Juries; 1 Chitty Crim. Law 518; *Nesbit v. People*, 19 Colo. 441; *O'Connor v. State*, 9 Fla. 225; *Shields v. Niagara Sav. Bank*, 3 Hun (N. Y.) 477; *Com. v. Eaton*, 8 Phila. (Pa.) 428.

Definition. — "If, when a jury has been summoned, a sufficient number of jurors do not appear, or if by reason of challenges or exemptions a sufficient number do not remain to make up the

monly applied to persons summoned for a particular cause, but it is broad enough to include those summoned to supply a deficiency in the regular panel.¹

b. POWER TO PROCURE — (1) *Incidental Power*. — The power to complete a jury sufficient in number is one which is inherent in the court, though now greatly aided by statute, and in the absence of express or implied inhibition can be exercised whenever the exigencies of the situation demand it.²

(2) *Statutory Enlargement of Power*. — Irrespective of the common-law mode of procuring jurors, by legislation in the several states additional jurors may be procured by means of a special venire or similar process.³ This power is one which the

proper number, either party may pray a tales, that is, ask the court to make up the deficiency. A *tales* (Latin = 'such') is a supply of such men as were summoned upon the first panel. For this purpose a writ of *decem tales, octo tales*, used to be issued to the sheriff; but by Stat. 6 Geo. IV., c. 50, § 37, the judge is empowered to award a *tales de circumstantibus*, that is, to command the sheriff to return so many other men duly qualified as shall be present or can be found, to be taken first from those summoned on the common jury panel, if the deficiency is of special jurors, and if there are not enough common jurors, then from any persons who are present in court or can be found. The jurors so added are called talesmen." Sweet's Law Dict. 803.

Criminal Cases. — A tales is allowed in criminal as well as in civil cases. *State v. Williams*, 2 Hill L. (S. Car.) 381.

Capital Cases. — Under the provisions of the statute of 35 Henry VIII., c. 6, a *tales de circumstantibus* might be awarded in capital cases. *Burk v. State*, 2 Har. & J. (Md.) 426.

1. *Nesbit v. People*, 19 Colo. 441; *Shields v. Niagara Sav. Bank*, 3 Hun (N. Y.) 477.

A talesman cannot sit in any cause except the one for which he is returned. *Amherst v. Hadley*, 1 Pick. (Mass.) 38.

Talesmen are only summoned to serve on the trial of a particular case, and their obligation to attend ends with the trial. *People v. Mallon*, 3 Lans. (N. Y.) 224.

In Maine, where two juries are drawn from the panel, if at any time during the term there are no supernumeraries present, and there is a vacancy on either panel, it may be filled by causing

talesmen to be returned instead of transferring jurors from either of the regular panels to the other, but a juror can be thus returned from the bystanders only for some particular case then to be tried, for which alone he should be sworn, and if the occasion for a talesman recurs, the same course should be followed. *Wallace v. Columbia*, 48 Me. 436.

2. See *Settle v. Batie*, 1 Iowa 141; *State v. Pruett*, 49 La. Ann. 283; *Barnes v. State*, 60 Miss. 355.

Justice of the Peace. — The power to award tales is incident to the powers of a justice of the peace. *Zeely v. Vansen*, 2 Johns. (N. Y.) 386.

On the Trial of Mere Misdemeanors and Felonies, other than those capital, vacancies may be filled by summoning other regular jurors, or by calling talesmen; and the exercise of discretion in this connection is not subject to review. *Smith v. State*, 55 Ala. 1.

Summoning Second Jury. — Where a statute clearly contemplates that there shall be but one regular jury at each term, there is no authority for summoning a second jury, though talesmen may be summoned. *Dean v. State*, 100 Ala. 102.

Authority of Sheriff. — A sheriff can summon talesmen only by authority of the court. *Ayers v. Metcalf*, 39 Ill. 307.

See *infra*, IX. 4. *g. Number of Tales Jurors*.

3. *Vacancies Must Be Filled* in the manner prescribed by statute. *Bach v. State*, 38 Ohio St. 664.

Discretion to Issue Special Venire. — By the *Indiana Revised Statutes of 1881*, the trial court has authority to issue a special venire, and in that behalf is vested with a broad discretion. *Wood v. State*, 92 Ind. 269; *Merrick v. State*, 63 Ind. 327.

court may exercise of its own motion,¹ and when a demand for a special venire is necessary, if no demand is made the regular jury may be resorted to.²

(3) *Extent of Authority*—(a) *Generally*.—The extent to which talesmen or additional jurors may be resorted to is practically unlimited. It is sufficient to say that they may be awarded until a full and complete jury is obtained.³

(b) *To Complete Jury*.—Formerly there was no right to tales jurors

Though a court may be vested with authority to issue a special venire for additional jurors, it is not obliged to issue the writ unless the nature and extent of the business in court warrants it. *State v. Doty*, 1 Pin. (Wis.) 396.

Abuse of Discretion.—To authorize interference with the action of the court in ordering a special venire, or to reverse a judgment because of such action, the record must show very clearly that there was such an abuse of discretion as probably deprived the appellant of his constitutional right to a trial by an impartial jury. *Pierce v. State*, 67 Ind. 354; *Myers v. Moore*, 3 Ind. App. 226. And see also *Winsett v. State*, 57 Ind. 26; *Evarts v. State*, 48 Ind. 422; *Heyl v. State*, 109 Ind. 589.

Additional Jurors.—In *Louisiana*, and by Act No. 44 of 1877, the district judge had discretionary power to order the drawing of additional jurors. *State v. West*, 35 La. Ann. 28.

Legislative Authority to Confer Right to Additional Jurors.—A statute authorizing a trial judge, whenever he deems it proper, to require the jury commissioner to select additional jurors for service, either as regular jurors or as talesmen, etc., is a proper exercise of legislative authority. *State v. Thibodaux*, 49 La. Ann. 15; *State v. Wright*, 41 La. Ann. 600.

Duty of Resorting to Statutory Mode.—Where the mode of filing an incomplete panel is prescribed by statute, resort should be had to the statutory mode and not to the common-law mode. *Lincoln v. Stowell*, 73 Ill. 246. And see *Rockford Ins. Co. v. Nelson*, 75 Ill. 548.

Under Illinois Criminal Code.—Under the Illinois Act of 1872, it was held that the fact that the Circuit Court caused the panel to be filled by the sheriff instead of by the clerk drawing from a list selected by the county board, though a good ground of challenge in a civil case, had no applica-

tion to a criminal cause, because by section 178 of the Criminal Code of 1845 the court might fill the panel by summoning talesmen *instantly*. *Gropp v. People*, 67 Ill. 154.

1. A statute making it the duty of the judge to order the drawing of additional jurors when enough are not present for the business of the court authorizes him to direct the drawing of his own motion. *People v. Considine*, 105 Mich. 149.

2. *Jefferson v. State*, 52 Miss. 767.

3. *Territory v. Clanton*, (Arizona 1889) 20 Pac. Rep. 94; *Turner v. State*, 70 Ga. 765.

The Award of Talesmen Must Be Repeated until the legal number of twelve is completed, the subsequent tales being always for a less number than the former. *Burk v. State*, 2 Har. & J. (Md.) 426.

Discretion of Court.—The court is required to award tales until a jury is obtained, but though the prisoner has that right, and the court is thus required, yet that right and that requisition must yield to circumstances over which the court must always be the judge. *State v. Aaron*, 4 N. J. L. 268.

Successive Drawings.—When the panel of the venire is exhausted and the jury not formed, resort must be had to successive drawings from the tales box; each tales juror, as drawn, must be called; if he appears he must be presented for challenge or acceptance; if he does not appear when called another is to be drawn and presented in like manner, and so on until the jury is completed. *State v. Williams*, 2 Hill L. (S. Car.) 381.

General and Special Statutes.—In *Gaffney v. People*, 50 N. Y. 416, it was held that for the trial of an indictment in the Superior Court of Buffalo, in summoning talesmen the court was not limited to the method prescribed by the act creating the court, but might procure talesmen in accordance with the provisions of a general statute.

except to complete a jury from the original panel, and it was necessary that there should be at least one member thereof before a trial jury could be formed by a resort to talesmen.¹

(c) **To Form New Jury.** — This doctrine, though it has found support, is now believed to have been generally repudiated by modifications of the common law, and at present the power to procure talesmen will not depend upon the fact of the absence or presence of one or more members of the regular venire.²

(d) **Special or Struck Juries.** — In addition to the right to complete the common or ordinary trial jury, a like right exists to complete, in the same way, special or struck juries, and foreign juries.³

c. **CONDITIONS WHICH WILL AUTHORIZE** — (1) **No Regular Panel in Attendance.** — The conditions which will authorize the procurement of talesmen or additional jurors are various. Thus it has been held that when no regular panel has been drawn or summoned, or is in attendance, the court may direct the procurement of sufficient jurors to transact its business.⁴

1. **Former Doctrine.** — In *Fuller v. State*, 1 Blackf. (Ind.) 63, it is said: "The true doctrine on the subject we believe to be this: where none of the jury summoned upon the first panel appear, a new venire ought to issue; but if one of the jurors only attend the court in obedience to the first summons, and he be challenged and rejected, there may be twelve talesmen sworn to determine the issue."

If there be no member of the regular panel present, the court, of its own motion, cannot organize a jury save in a case provided by statute, but so long as there is a single number of the regular venire in attendance, he may be utilized as the basis for the formation of a new jury, and the power to do this will not be defeated by challenging or excusing such juror, but the court, having acquired jurisdiction, may proceed to organize the jury though such juror form no part of it. 1 Chitty Crim. Law 518; Bac. Abr., tit. Juries, (C) (D); *Rogers v. State*, 33 Ind. 543; *Bradley v. Bradley*, 45 Ind. 67; *Fuller v. State*, 1 Blackf. (Ind.) 63; *Emerick v. Sloan*, 18 Iowa 139; *Barnes v. State*, 60 Miss. 355; *Williams v. Com.*, 91 Pa. St. 493.

2. See *infra*, IX. 4. c. **Conditions Which Will Authorize.**

No Regular Jury in Attendance. — Where there is no intimation or charge of bad faith, the court has the power, whenever the necessity arises and there is no regular jury in attendance, to impanel a jury to try a case which has been properly set and is ready for

trial to a jury. *Bennett v. Tintic Iron Co.*, 9 Utah 291. See also *Mackey v. People*, 2 Colo. 13; *Stone v. People*, 3 Ill. 335; *Hunt v. Scobie*, 6 B. Mon. (Ky.) 469; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *Reed v. State*, 15 Ohio 217.

3. **Minnesota.** — *Branch v. Dawson*, 36 Minn. 193.

Missouri. — *Barr v. Kansas City*, 121 Mo. 22.

New Jersey. — *Den v. Evalul*, 1 N. J. L. 328.

New York. — *People v. Tweed*, 50 How. Pr. (N. Y. Supreme Ct.) 262.

Ohio. — *Hulse v. State*, 35 Ohio St. 421.

Pennsylvania. — *Anonymous*, 2 Dall. (Pa.) 382; *Carter v. Ramsey*, 1 Del. Co. Rep. (Pa.) 423; *Hubley v. White*, 2 Yeates (Pa.) 133; *Atlee v. Shaw*, 4 Yeates (Pa.) 236.

England. — *Snook v. Southwood, R. & M.* 429, 21 E. C. L. 482; *Rex v. Hill*, 1 C. & P. 667, 11 E. C. L. 521; *Rex v. Tipping*, 1 C. & P. 668, 11 E. C. L. 521; *Rex v. Hunt*, 4 B. & Ald. 430, 6 E. C. L. 547; *Rex v. Perry*, 5 T. R. 453; *Buron v. Denman*, 1 Exch. 769; *Atty.-Gen. v. Parsons*, 2 M. & W. 23; *Sparrow v. Turner*, 2 Wils. 366.

Compare *British Museum v. White*, 3 C. & P. 289, 14 E. C. L. 310, wherein it was held that talesmen to complete a special jury could not be had on the application of one party unless the other party consented.

4. *Leahy v. Southern Pac. R. Co.*, 65 Cal. 150; *People v. Stuart*, 4 Cal. 218; *People v. Vance*, 21 Cal. 403; *People*

(2) *Deficient Panel.* — Where the panel is deficient because of the failure of the veniremen to respond to the summons, or because of its depletion, in attempting to form a jury,¹ by legiti-

v. Williams, 43 Cal. 344; *Heyl v. State*, 109 Ind. 589; *State v. Maben*, 45 Minn. 56.

In *McGunnegle v. State*, 6 Mo. 367, the judge who delivered the opinion stated as his individual opinion that "in the absence of all law as to the means of the obtaining juries, the business of the Circuit Court would cease till the law-making power should redress the evil."

Where Jury Lists Have Been Destroyed by Fire, the court has authority to order that a venire issue to the sheriff, commanding him to summon a new panel from the body of the county, where by statute such a venire may issue when jurors have been illegally elected or drawn. *State v. Arthur*, 39 Iowa 631.

In Georgia, under the Constitution of 1868 and the Act of 1869, the names were placed in the same box and drawn therefrom indiscriminately to serve either as grand or petit jurors, the latter of whom were to try all civil causes, unless the judge, in his discretion, should call for a special jury, to be chosen from the grand jury, so that the judges might send the parties litigant before the petit or grand juries. No provision, however, was made by which a jury could be procured when one or the other should fail. *Hamlin v. Fletcher*, 64 Ga. 549.

Under the Indiana Statute of 1881 (§ 1396), where no regular panel of jurors was drawn or returned for the term at which the trial was to take place, if the business of the court so required it might summon a jury from the bystanders or from the citizens of the county. *Heyl v. State*, 109 Ind. 589.

Under the Oklahoma Statutes, when there is no regular panel of jurors in attendance in the District Court, or in the Probate Court in a cause wherein it has concurrent jurisdiction, an open venire may issue. *Chandler v. Colcord*, 1 Okla. 260.

In Texas, under a statutory provision that a special venire shall be selected from the persons selected by the commissioners for the term at which the venire is required, when the venire is exhausted the court may direct a special panel from the body of the county, or from talesmen, only where the com-

missioners have failed to select jurors for the term, or when there are not enough of them present to serve for the term. *Weaver v. State*, 19 Tex. App. 547.

Effect of Stipulating that No Proper Jury Is in Attendance. — In *Blemer v. People*, 76 Ill. 265, it was stipulated that there was no jury in attendance summoned as required by law, and that twelve of the panel had heard the evidence adduced on a previous partial trial, and it was held that as the stipulation conceded the existence of the contingency contemplated by statute, a special venire was properly ordered.

Return of First Venire Before Issue of Second. — Although the first venire has not been returned, the justice may issue another. *Sebring v. Wheedon*, 8 Johns. (N. Y.) 460; *Blanchard v. Richly*, 7 Johns. (N. Y.) 198.

1. *Kansas City, etc., R. Co. v. Smith*, 90 Ala. 25; *Gropp v. People*, 67 Ill. 154; *Bradley v. Bradley*, 45 Ind. 67; *Trembly v. State*, 20 Kan. 116; *State v. Ferray*, 22 La. Ann. 424; *State v. Aaron*, 4 N. J. L. 268; *Patterson v. State*, 48 N. J. L. 381.

Failure of Regular Jurors to Respond. — Although it is irregular to complete a jury by persons summoned by the sheriff in place of regular jurors who fail to answer to their names, the irregularity will not invalidate the formation of the jury in that mode. *Mueller v. Rebhan*, 94 Ill. 142.

Disqualification of Jurors for Nonresidence. — Deficiencies in a panel because some of the veniremen are residents of a new county which was erected out of the county wherein the court is sitting after they were summoned may be supplied under a statute providing that if for any reason the panel of jurors should not be filled at the opening of the court, or at any time during that term, additional persons might be summoned, etc. *Wykoff v. Loeber*, 5 Mont. 535.

Under the Nebraska Code of Civil Procedure, § 668, *g*, in a county of seventy thousand inhabitants or more, in which a felony cause is pending, the judge, if satisfied that a jury cannot be secured from the regular panel, may direct the summoning and drawing of a special panel from which to select a jury.

mate and proper excuses,¹ or because of the engagement of members of the panel in the consideration of another cause,² or where

Davis v. State, (Neb. 1897) 70 N. W. Rep. 984.

Depletion of Panel by Challenge—Resort to Bystanders.—Under c. 6 of the Penal Code (74 Ohio Laws, 344), the right to draw from the box to make up the number of a panel exists only where there is a deficiency in the panel arising from the absence or incompetency of jurors, but when the panel is depleted by reason of challenges talesmen should be taken from the bystanders. Moorehead v. State, 34 Ohio St. 212.

Under the Kansas Statute relating to the selection, summoning, and service of jurors in counties having over 30,000 inhabitants (c. 166, Laws 1887), the court may, as in like cases in other counties, complete a jury panel from among the bystanders when there shall not be regular jurors enough present for service. State v. Geary, 58 Kan 502.

By the New Jersey Act relative to the Supreme and Circuit Courts, it was early held that if, by reason of challenges, or the default of jurors, or otherwise, a sufficient number of jurors on the original panel could not be had to try the issue or cause, the Courts of Oyer and Terminer and General Jail Delivery were authorized and required to award a *tales de circumstantibus* of persons qualified according to law to be joined to the other jurors till the whole number of twelve was procured. State v. Aaron, 4 N. J. L. 263.

Absentees Coming In Before Completion of Jury.—Where it is provided that if a jury is not made up of jurors who appear after summons the court shall draw a sufficient number of names to complete the jury, the failure to complete a jury from those summoned and who appear before drawing from the jury box is error. Ezell v. State, 102 Ala. 101.

1. Trembley v. State, 20 Kan. 117.

Where both juries for the week are out, the court may impanel a third jury of the members of the regular panel who had been temporarily excused without challenge, and by filling up the new jury with talesmen summoned from the bystanders. Barnes v. State, 60 Miss. 355.

Failure to Request Continuance.—In Emerick v. Sloan, 18 Iowa 139, it ap-

peared that the cause was called for trial by the regular panel of jurors, but one had been discharged, and the plaintiff demanded a jury trial with a regular jury, but did not ask for a continuance, whereupon the court ordered the sheriff to fill up the panel with talesmen and to obtain a jury composed of the jurors on the regular panel and eleven talesmen, and it was held that the procurement of the requisite number of jurors was such a matter of sound discretion that the court would not interfere, there appearing no abuse of discretion or prejudice resulting to the party complaining. See also Claussen v. La Franz, 1 Iowa 226; Settle v. Batie, 1 Iowa 141.

2. U. S. v. Bowen, 3 MacArthur (D. C.) 64; Brown v. Autrey, 78 Ga. 753; Bradley v. Bradley, 45 Ind. 67; People v. Craig, 48 Mich. 502; Evans v. Voght, 8 Mo. App. 575.

Under the Montana Statute (March 14, 1889), providing that if during the trial it shall become necessary to summon additional jurors they may be drawn and summoned by an open venire, the absence of jurors deliberating in another case presents a cause in which such venire may issue. O'Donnell v. Bennett, 12 Mont. 242, *distinguishing* Dupont v. McAdow, 6 Mont. 227, decided under a former statute.

In Indiana, where by statute the court is empowered, when the business thereof requires it, to order the impaneling of a special jury, if the regular jury is out deliberating in another case the court may impanel a special jury. Winsett v. State, 57 Ind. 26; Evarts v. State, 48 Ind. 422, *distinguishing* Rogers v. State, 33 Ind. 543.

Such a jury may be impaneled although, pending the impaneling of a jury from the special venire, the regular jury is discharged from consideration of the case in which it sat. Myers v. Moore, 3 Ind. App. 226.

Return of Absentees Pending Formation of Jury.—The requirements of the jury law of this state contemplate the trial of causes by the jurors on the regular venire as long as any of them can be secured or obtained, and they consider talesmen simply in the light of substitutes for the jurors of the regular venire, who are to be called or used only when regular jurors are not to be

a sufficient number have not been summoned legally, though legally drawn, talesmen or additional jurors may be ordered.¹ It seems, also, that the seat of a juror who has been accepted, but who fails to appear when the cause is ready for trial, may be filled by a talesman, and that no objection will lie unless prejudice has resulted, as where the complaining party has exhausted his peremptory challenges.²

(3) *Exhaustion of Panel.* — Where the panel in attendance has become exhausted, so that a jury cannot be made up therefrom, a proper case is presented for bringing in talesmen, additional jurors, or the like.³ It has been held that the necessity for sum-

had. Hence, in a case in which a list of talesmen has been summoned under the orders of the court because the regular venire has been exhausted, and it appears that, while proceeding with the list of talesmen, a jury previously engaged on a case reports and is discharged, it then becomes the duty of the trial judge to resume the call under the regular venire, until that be exhausted, before continuing to form a jury from talesmen. *State v. Creech*, 38 La. Ann. 480.

Where talesmen were summoned to complete a jury, a list furnished, and an examination touching their qualifications gone into, but before striking a regular jury came in, there was held to be no error in refusing the defendant's motion to set aside the talesmen and take the regular jury. *Prince v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 582.

1. *People v. Devine*, 46 Cal. 46.

2. *The Fact that a Jurymen Found Competent Was Missing* when wanted to complete the jury, and that the court completed it by a talesman, is not ground for reversal. *Byers v. State*, 105 Ala. 31.

Exhaustion of Peremptory Challenge. — In *Moore v. Dunn*, (Tex. Civ. App. 1897) 41 S. W. Rep. 530, upon administration of the oath it was discovered that one of the jurors who had been selected was not present, and there was held to be no error in completing the jury with a talesman, over the objection of the unsuccessful party, who had exhausted his peremptory challenges, instead of postponing the case to procure the attendance of the absentee. In this case the court intimated that, in view of the exhaustion of the peremptory challenges, the proper course would have been to demand a reselection of the jury.

3. *Illinois.* — *Stone v. People*, 3 Ill. 326.

Kentucky. — *McClermand v. Com.*, (Ky. 1889) 12 S. W. Rep. 148.

Louisiana. — *State v. Caulfield*, 23 La. Ann. 148; *State v. Gallagher*, 26 La. Ann. 46; *State v. Desmouchet*, 32 La. Ann. 1241; *State v. Revells*, 35 La. Ann. 302.

Minnesota. — *State v. Brown*, 12 Minn. 538.

Mississippi. — *Fortenberry v. State*, 55 Miss. 403.

Missouri. — *Kirkwood v. Autenreith*, 11 Mo. App. 515.

Nebraska. — *Dodge v. People*, 4 Neb. 220.

New York. — *People v. Mallon*, 3 Lans. (N. Y.) 224; *Ruloff's Case*, 11 Abb. Pr. N. S. (N. Y. Oyer & T. Ct.) 245.

North Carolina. — *State v. Stanton*, 118 N. Car. 1182; *State v. Brogden*, 111 N. Car. 656.

Pennsylvania. — *Hartzell v. Com.*, 40 Pa. St. 462; *Brown v. Com.*, 76 Pa. St. 319.

Texas. — *Brotherton v. State*, 30 Tex. App. 369; *Weathersby v. State*, 29 Tex. App. 278.

Virginia. — *Curtis v. Com.*, 87 Va. 589.

Wisconsin. — *Olson v. Solveson*, 71 Wis. 663.

The "Panel" Includes Within Its Definition the jurors returned on the special venire to fill a deficiency, after the regular panel has become exhausted. *People v. Coyodo*, 40 Cal. 586. See also *U. S. v. Cornell*, 2 Mason (U. S.) 91.

Right to Have Absentees Called. — Where the regular venire has been exhausted without completing the jury, it is the duty of the judge, if the accused shall so request, to order the sheriff to call the absent members of

moning talesmen should be avoided if possible,¹ and, with certain exceptions hereinafter referred to, it has also been held that each venire should be completely perused and exhausted before recourse can be had to another issued because of such exhaustion, or before resorting to talesmen,² though the decisions on the

the regular panel at the court-house door before the summoning of talesmen to complete the jury. *State v. Ross*, 30 La. Ann. 1154.

Oklahoma — Probate Courts.—The provisions of the Oklahoma Code of Civil Procedure respecting the manner of procuring juries for the District Court when the regular panel is exhausted, *i. e.*, by summoning a special jury, are applicable to the Probate Court in a cause wherein that court has concurrent jurisdiction with the District Court. *Chandler v. Colcord*, 1 Okla. 260.

In *South Carolina*, under the General Statutes, where the entire panel is exhausted without securing a single juror, it is error to postpone a trial to another term, but a jury should be procured by issuing a new venire. *State v. Briggs*, 27 S. Car. 81.

Erroneous Supposition of Exhaustion.—In *State v. Anderson*, 26 S. Car. 599, it appeared that in consequence of a mistake in supposing that the regular panel had been exhausted an order was made directing a drawing from the tales box; that after the drawing of one name therefrom the mistake was discovered; that after the remaining juror on the regular panel was presented and objected to, and after the tales juror had been required to stand aside, the court revoked its former order and directed a new drawing from the tales box. There was held to be no irregularity of which complaint could be made.

Right to Regular Panel for Week.—Where, on exhaustion of a special venire, the court may order the sheriff to summons persons from the body of the county, it cannot be demanded "as a right" that when such a venire has become exhausted the regular panel for the week shall be placed in the box. *Thompson v. State*, 33 Tex. Crim. Rep. 217.

Presumption as to Procurement of Additional Jurors.—Where a bill of exceptions reciting that but ten names were drawn from a box containing twenty-four, and that the court then directed the sheriff to summon two other jurors

to complete the panel, who, being accepted by the state and the prisoner's challenges being exhausted, completed the panel, it was presumed by the reviewing court that the two additional jurors were either drawn from the remaining names in the box or that they were summoned as talesmen, and that in either event the jury was properly impaneled. *Burfey v. State*, 3 Tex. App. 519. See also *Speiden v. State*, 3 Tex. App. 156.

Exhaustion of Jury Box.—For the purpose of directing a new venire the court may assume that the officers discharged the duties imposed on them by law in exhausting the jury box. *Story v. State*, 68 Miss. 609.

1. *Lambertson v. People*, 5 Park Cr. Rep. (N. Y. Supreme Ct.) 200.

Impairment of Right to Regular Jury.—Where the irregular action of the court compels a resort to talesmen, the right which the accused may have because of service of a list of the regular panel upon him is thereby impaired. *Stratton v. People*, 5 Colo. 276. And see *Atkins v. State*, 16 Ark. 581.

2. *Barker v. Bell*, 49 Ala. 284; *Stratton v. People*, 5 Colo. 276; *Collins v. State*, 31 Fla. 574; *People v. Dunn*, 1 Idaho 74; *Soniat v. Supple*, 48 La. Ann. 296.

Resort to Special Venire — Necessity of Calling Regular Jury.—It is not necessary to call in the regular panel for the week before resorting to a special venire. *Deon v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 266. And see *Weathersby v. State*, 29 Tex. App. 278; *Thompson v. State*, 33 Tex. Crim. Rep. 217.

In *Wilson v. State*, 42 Ind. 224, a statute authorizing the impaneling of a special jury whenever the necessity therefor should be found to exist was held to confer no authority to impanel such a jury where a jury could be made up from the regular panel.

Ordering a venire for additional jurors before exhaustion of the regular panel is irregular, but will not constitute prejudicial error where none of the additional veniremen were drawn as trial jurors until the original panel was

question are by no means uniform.¹

Accepting and Rejecting Jurors. — In some jurisdictions it is necessary that the regular jurors present and not engaged in jury duty shall be presented for acceptance or rejection before talesmen are resorted to.²

(4) **Probable Exhaustion.** — Where, from the prominence of a case, or from newspaper reports or otherwise, there is reason to believe that there will be difficulty in procuring a jury from the regular panel, in anticipation of probable exhaustion talesmen or additional jurors may be ordered or summoned in advance.³

entirely exhausted. *Blanton v. State*, 1 Wash. 265.

It is not incumbent on the court to order the sheriff to summon a juror in the place of one excused before exhaustion of the panel. *Martin v. State*, 16 Ohio 364.

Until a special venire has been exhausted or discharged with the assent of the accused, the trial court has no power to order the issuance and execution of another venire. *Hall v. State*, 28 Tex. App. 146, following *Sharpe v. State*, 17 Tex. App. 487.

Alleged error in ordering talesmen before exhaustion of the regular panel will not be considered on appeal unless the objections are incorporated in a bill of exceptions, which must be precise and explicit, and not sought to be aided by inferences. *State v. Red*, 32 La. Ann. 819.

Exhaustion of Tales Jurors. — When two talesmen are summoned from whom to supply the place of a rejected juror, both should be drawn before summoning others. *Barker v. Bell*, 49 Ala. 284.

What Constitutes Exhaustion. — Where the court presents to the defendant all the unoccupied jurors of the regular panel, it should be regarded as exhausted so as to authorize the summoning of bystanders. *McClelland v. Com.*, (Ky. 1889) 12 S. W. Rep. 148.

1. **Jurors May Be Summoned** by special venire without exhausting all the names on the regular list. *People v. Durrant*, 116 Cal. 179, citing *Levy v. Wilson*, 69 Cal. 111; *People v. Vincent*, 95 Cal. 425.

The court may direct its officers to bring in additional jurors or an entire new panel as the dispatch of business demands. *State v. Gleason*, 88 Mo. 582.

An additional panel may be ordered at any time if the ballots have been de-

posited, and it is unnecessary that the first panel should be exhausted. *Foster's Case*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 372, note.

Under the Indiana Revised Statutes of 1876, p. 13, § 3 (Act of March 7, 1873), a special jury could be impaneled whenever required by the business of the court, notwithstanding objection. *Merrick v. State*, 63 Ind. 327.

2. *State v. Atkinson*, 29 La. Ann. 543. In *Rogers v. State*, 33 Ind. 543, it was held that a statute providing that "when a jury trial is demanded the sheriff shall call a jury in the manner prescribed by law, or as directed by the court," did not authorize the court to direct the calling of a jury of bystanders, against the consent of the defendant, when there was a regular panel of jurors in attendance.

3. *Arkansas*. — *Mabry v. State*, 50 Ark. 492.

Florida. — *O'Connor v. State*, 9 Fla. 215; *Lambright v. State*, 34 Fla. 564.

Georgia. — *Cruce v. State*, 59 Ga. 83.

Louisiana. — *State v. Moncla*, 39 La. Ann. 868; *State v. Green*, 43 La. Ann. 402.

New Jersey. — *Patterson v. State*, 48 N. J. L. 381.

New York. — *People v. Colt*, 3 Hill (N. Y.) 432.

Actual Calling in Box. — There is no prejudice in summoning talesmen in advance provided they are not actually called into the box to the exclusion of the jurors composing the regular panel. *Nesbit v. People*, 19 Colo. 441.

Directions for Jurors as Part of Trial. — The making of an order directing the sheriff to have talesmen in attendance in view of a possible exhaustion of the regular panel is no part of the trial, and hence does not require the attendance of two judges. *State v. Allen*, 47 Conn. 121.

(5) *Quashal of Venire*. — Where the array is challenged, and upon the challenge the panel is quashed, a new jury may be procured by the exercise of the power to procure substitutes for the regular jurors.¹

(6) *Discharge of Jurors*. — Where, because of disagreement, or for any cause, the regular jurors have been discharged, so that no jury is in attendance, the trial court may, in its discretion, procure a jury for the transaction of its business.²

Ascertainment of Necessity for Summoning in Advance. — In directing a sheriff to have talesmen in attendance in view of a possible exhaustion of the regular panel, the information upon which the court acts may be obtained from the prosecuting officer without consultation with the counsel for the accused. *State v. Allen*, 47 Conn. 121.

Independent Action by Sheriff. — It is competent for a sheriff, of his own motion, in anticipation of a trial in which there will probably be a deficiency of jurors summoned for the term, to procure the attendance of persons qualified to act as such at the time when the jury is impaneled, or for the court, under such circumstances, to suggest to the sheriff, in advance of the trial, that he have such persons in attendance. *State v. Allen*, 47 Conn. 121.

Several Cases On for Term. — In *Bird v. State*, 14 Ga. 43, it was held no error that, there being several capital cases on the docket on the first day of the term, the court directed the sheriff to summon a large number of persons to be in attendance for the purpose of expediting the business of the court.

The Indiana Act of March 7, 1873, authorizing the impaneling of a special jury whenever the business of the court requires it, conferred authority to impanel such a jury only when the regular panel was engaged or had been discharged, and not before the day fixed for the trial of causes. *Wilson v. State*, 42 Ind. 224.

Discharge of Jurors Summoned in Advance. — The discretion vested in a judge to draw additional jurors for the purpose of providing for a deficit in the regular panel confers a corresponding discretion to discharge the jurors so drawn when, from subsequent events and from the state of the docket, it appears that the service of such additional jurors will not be necessary. *State v. West*, 35 La. Ann. 28.

1. *Dayton v. Warren*, 10 Minn. 233; *Purvis v. State*, 71 Miss. 706.

Prejudice of Summoning Officer. —

Where a challenge to the array is sustained because of the default and prejudice of the sheriff in drawing the jury in a case in which he was interested, the court may appoint a suitable person and summon a jury from the bystanders, under provisions of the Act of 1889, c. 441. *Boyer v. Teague*, 106 N. Car. 576.

Failure to Draw from Prescribed Class.

— In *Kansas*, where a challenge to the array is sustained because of the failure to select and draw from a class or list prescribed by statute, the court may direct the procurement of a jury for the transaction of its business. *State v. Skinner*, 34 Kan. 258.

Effect of Challenge by State. — Where, in a criminal cause, the statute empowers the court to order jurors to be summoned from the bystanders if a challenge to the array by the defendant is sustained, sustaining a like challenge by the state will not authorize a similar method of procuring a jury. *Williams v. Com.*, 91 Pa. St. 493.

Complaint by Challenging Party. — A defendant who has succeeded in quashing a panel on the ground of illegality cannot complain of an order for a special venire which was based on such alleged illegality. *Russell v. State*, 53 Miss. 367.

2. *State v. Windsor*, 5 Harr. (Del.) 512; *Woolfolk v. State*, 85 Ga. 69; *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69; *Pierce v. State*, 67 Ind. 354; *State v. Laughlin*, 73 Iowa 351; *State v. Guidry*, 28 La. Ann. 630; *State v. McCartey*, 17 Minn. 76; *Steele v. Maloney*, 1 Minn. 347; *Davis v. State*, (Neb. 1897) 70 N. W. Rep. 984; *Barney v. State*, 49 Neb. 515; *Reed v. State*, 15 Ohio 217; *Mosseau v. Veeder*, 2 Oregon 113; *Cole v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 573; *Bennitt v. Tintic Iron Co.*, 9 Utah 291. See *infra*, XI. *Discharge of Jurors or Jury*.

In *Idaho*, under section 3961 of the Revised Statutes, the court, for good cause,

(7) *Miscellaneous*. — The many reasons or causes which will authorize the procurement of tales or additional jurors cannot be here set out at length, but undoubtedly, in the majority of the states, the matter is largely, if not wholly, governed by statutes.¹

(8) *Presumption of Existence of Conditions*. — It will be presumed, in the absence of any showing to the contrary, that conditions existed which authorized the court to direct the summoning of talesmen, or to issue a special venire.²

may discharge regularly drawn and summoned jurors and order an open venire for jurors to try causes at the term for which jurors were regularly drawn. *Simmons v. Cunningham*, (Idaho 1895) 39 Pac. Rep. 1109.

Illinois. — Under the statute (Laws of 1874) providing that if, during the term of the court, the panel of the jurors shall not be full, the clerk may draw such a number of jurors as may be directed by the court for the purposes of filling the panel, which jurors shall be summoned by the sheriff, if the court discharges the entire panel it is error to order a venire to issue directing the sheriff to summon fifty jurors from the body of the county. *Borrelli v. People*, 164 Ill. 549.

Disagreement of Jury — Continuance. — In *Indiana* it is held that the defendant in a criminal cause is not entitled to a continuance to the next term if the regular panel fails to agree, but the court may order that a special jury be impaneled at once. *Pierce v. State*, 67 Ind. 354.

Under the Kentucky Acts of 1836 and 1838, the Circuit Court had power, in its discretion, to have juries summoned and impaneled to try causes after the discharge of the regular jury, provided there was no wanton departure from the regular mode contemplated by statute. *Hunt v. Scobie*, 6 B. Mon. (Ky.) 469.

Continuance. — A party cannot object that a special venire was issued where it appears that when granted a postponement at his request, and in the absence of his counsel, he was informed that a special venire would be ordered if the regular jury was discharged that day, and it did not appear that the jury which served was in anywise objectionable or that the proceedings were unfair. *Bennett v. Tintic Iron Co.*, 9 Utah 291.

Order Ex Mero Motu. — In *Thompson v. Territory*, 1 Wash. Ter. 547, there was held to be no error in disallowing

a challenge to the array when it appeared that, the regular panel having been discharged for the term, and, consequently, no jurors being in attendance, the court, of its own motion, ordered the sheriff to summon a designated number of persons as jurors.

Discharge by Consent. — A party who waives a jury, thereby consenting to its discharge, and thereafter demands a trial by jury, will not be allowed to question the action of the court in calling bystanders to try the cause. *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69.

1. In *Texas*, under a statutory provision that when, from any cause, there is a failure to select a jury from those summoned on a special venire the sheriff may be ordered to summon any number of persons, etc., for the formation of the jury, etc., the court need not call the jury for the week and attempt to complete the jury from their number, but may direct the sheriff to summon talesmen from the body of the county, and from the talesmen so summoned fill up the panel. *Weathersby v. State*, 29 Tex. App. 278, *overruling Cahn v. State*, 27 Tex. App. 709; *Weaver v. State*, 19 Tex. App. 547.

Possible Prejudice Because of Hearing Objections. — There is no force in a contention that a jury should be drawn from a new venire because possibly the jurors chosen might have been prejudiced because of technical objections by reason of which the justice had caused the original jury to leave the box. *Bloomington v. Adler*, 7 Misc. Rep. (N. Y. C. Pl.) 182.

Additional Jurors for Extended Terms. — In *Louisiana*, when a district judge finds it necessary to prolong the term of his court in order to transact criminal business, he may, in his discretion, order the jury commissioners to draw an additional jury to serve during the extended term. *State v. Wright*, 41 La. Ann. 600.

2. *Fanning v. People*, 10 Ill. App. 70.

Bystanders. — In the absence of a con-

d. SOURCES OF PROCUREMENT — (1) From Lists, Boxes, etc.—The sources from whence talesmen or additional jurors may be procured are sometimes prescribed by statute, as where special lists or boxes of tales jurors are required to be made up, or where recourse is had to the names drawn and selected as in the case of regular jurors,¹ or upon a requisition on jury commissioners or like officers.²

trary showing it will be presumed that circumstances existed which warranted the court in directing jurors to be taken from the bystanders. *Heyl v. State*, 109 Ind. 589.

Where a Special Venire Has Been Ordered it will be presumed that the contingency existed which authorized the order. *People v. Madison County*, 23 Ill. App. 386.

1. Drawing from Box.—Where, by statute, it is provided that when, in a territorial court, by reason of challenges or other cause the regular panel becomes exhausted, the court may direct the sheriff to summon from the body of the county, and not from the bystanders, so many qualified persons as may be necessary to complete the jury, a deficiency in the panel may be supplied by drawing names from the box furnished by the county commissioner. *Territory v. Reed*, 5 Mont. 92.

Necessity of Names in Box.—Tales jurors need only be legally qualified; it is unnecessary that their names should be in the jury box. *McGuffie v. State*, 17 Ga. 497.

Necessity of Compliance with Statute.—Where it is required by statute that vacancies in the regular panel be filled from the bystanders, or, if demanded by the accused, by a special venire, containing names selected by the presiding judge, it is error on the part of the court to order, against objection, a panel filled by persons whose names were drawn from the box. *Bach v. State*, 38 Ohio St. 664.

Using Grand Jury Box.—It is not erroneous to draw talesmen from the grand jury box where, by statute, such drawing may be from the jury boxes of the county. *Woolfolk v. State*, 85 Ga. 69.

Resort to List.—If the sheriff is restricted in the matter of summoning talesmen he may take names from the list in alphabetical order, confining the selection first to names beginning with the same letter. *Cox v. State*, 64 Ga. 375.

Resort to General Body of Jurors.—

Under a statute requiring jurors for the trial of criminal cases in a municipal court to be taken from the regular panel selected in that court, when there is no such jury in actual attendance on the court, or the jury has been excused, a special venire from the general body of those liable to jury duty is not justified. *State v. Maben*, 45 Minn. 56.

An Irregularity in Drawing Talesmen is immaterial if they were drawn fortuitously or by chance. *State v. Walsh*, 44 La. Ann. 1122.

2. Resort to Jury Commission.—Section 7 of *Louisiana Act No. 44* of 1877 imposes no duty on the district judge to require the jury commission to draw additional jurors as talesmen, but simply authorizes him to do so "when-ever" he "thinks proper," and his refusal to make such an order is not reviewable. *State v. Foreman*, 45 La. Ann. 1047. And see *State v. Chambers*, 45 La. Ann. 36.

Bystanders cannot be imposed on a party who has a statutory right to draw a jury from a reserved force of jurors previously accepted by jury commissioners. *Dupont v. McAdow*, 6 Mont. 226.

It is no objection to a tales juror that his name does not appear on the jury list as made out by the county commissioners, and a challenge for that cause is properly overruled. *Lee v. Lee*, 71 N. Car. 139.

The *Washington Session Laws* of 1895, § 3, p. 140, which authorize each judge of the Superior Court to direct a panel to be drawn from the last jury list, certified by the clerk of the county commissioners whenever he may deem it necessary, and providing for an open venire in certain contingencies, is not inconsistent with, nor did it repeal, section 339 of the code, providing for the summoning of talesmen where the panel becomes exhausted before the completion of the jury. Both provisions may stand together as coexisting

(2) *From Body of County.* — Jurors may be procured from the county at large by means of an open venire.¹

(3) *From Bystanders.* — The original mode required talesmen to be taken from the bystanders, which is the more common and usual way, and unless other modes are pointed out, the court, by virtue of its general powers, may pursue that method to supply deficiencies.²

laws, and where the regular panel has become exhausted the court may order the drawing and summoning of another panel of twenty-four men from the jury list certified by the clerk in question. *State v. Cushing*, 17 Wash. 544.

The Colorado Statute (Laws of 1891, pp. 250, 251, amendatory of chapter 61 of the General Statutes) providing that when a new panel of jurors shall become necessary they may be drawn from the list certified by the commissioners has no application to summoning talesmen, and the court, in its discretion, may cause talesmen to be procured from the certified list, from the bystanders, or by open venire. *Nesbit v. People*, 19 Colo. 441.

1. *Colorado.* — *Nesbit v. People*, 19 Colo. 441.

Connecticut. — *State v. Allen*, 47 Conn. 121.

Florida. — *O'Connor v. State*, 9 Fla. 215; *Gladden v. State*, 13 Fla. 624.

Georgia. — *Bird v. State*, 14 Ga. 43.

Indiana. — *Bradley v. Bradley*, 45 Ind. 67.

Iowa. — *State v. Arthur*, 39 Iowa 631.

Montana. — *Territory v. Reed*, 5 Mont. 92.

Nevada. — *State v. Angelo*, 18 Nev. 425.

New Jersey. — *Patterson v. State*, 48 N. J. L. 381.

United States. — *U. S. v. Loughery*, 13 Blatchf. (U. S.) 267.

England. — *Rex v. Dolby*, 2 B. & C. 104, 9 E. C. L. 43.

In California, after the venire drawn from the regular jurors has been exhausted, the court may order additional jurors to be summoned from the county at large, and unless there has been a gross abuse of discretion the reviewing court will not interfere. *People v. Sehorn*, 116 Cal. 503 [citing *People v. Davis*, 47 Cal. 95; *People v. Devine*, 46 Cal. 47; *Levy v. Wilson*, 69 Cal. 111; *People v. Vincent*, 95 Cal. 427; *People v. Leonard*, 106 Cal. 318; *People v. Durrant*, 116 Cal. 179; *Leahy v. Southern Pac. R. Co.*, 65 Cal. 150]. Though sometimes the drawing of the

entire jury from the box will be more consistent with the correct administration of justice. *Levy v. Wilson*, 69 Cal. 111.

Exclusion of Bystanders. — Where the court directs that persons be summoned from the county at large by a special venire, and not from the bystanders, it is discretionary to reject those who have been in attendance upon the court, as "bystanders," and as not included in the term "from the county at large." *Savage v. State*, 18 Fla. 909.

Failure to Complete by Bystanders. — If the jury cannot be completed by summoning bystanders, recourse may be had to other persons not within the presence of the court. *State v. Gallagher*, 26 La. Ann. 46; *State v. Bunker*, 14 La. Ann. 465.

Under the Michigan Jury Act of 1877 (Act 125 of 1877) there is provision for ordering talesmen to be drawn from a single township where the emergencies of the term do not leave time for summoning them from the county at large; but a jury drawn three weeks before trial for a particular case of homicide is illegal if taken from only part of the townships in the county, and those not adjoining the county seat nor including the locality of the offense. *People v. Hall*, 48 Mich. 482.

Summoning Bystander After Adjournment from Body of County. — In *State v. Brown*, 7 Oregon 186, a juror, present as a bystander at the session in a criminal case, immediately after adjournment was summoned on a venire to the county, and it was held that after adjournment he was not a bystander, but was of the body of the county.

Legislative Authority. — It is within the province of the legislature to make provision for summoning jurors from bystanders or from the county at large to supply a deficiency of jurors. *Gardiner v. People*, 6 Park Cr. Rep. (N. Y. Supreme Ct.) 155.

2. *Bac. Abr.*, tit. Juries.

Colorado. — *Nesbit v. People*, 19 Colo. 441.

c. ELIGIBILITY.—So long as a talesman procured is competent, fair, and impartial, and is not put upon a party by any wrongful conduct on the part of the summoning officer, there is no ground of complaint. Thus grand jurors are competent

Connecticut.—*State v. Allen*, 47 Conn. 121.

Florida.—*O'Connor v. State*, 9 Fla. 215; *Gladden v. State*, 13 Fla. 624; *Green v. State*, 17 Fla. 670.

Georgia.—*Western, etc., R. Co. v. Steadly*, 65 Ga. 263.

Indiana.—*Bradley v. Bradley*, 45 Ind. 67; *Deig v. Morehead*, 110 Ind. 451; *Logansport v. Dykeman*, 116 Ind. 15; *Keyes v. State*, 122 Ind. 527 [following *Heyl v. State*, 109 Ind. 589].

Iowa.—*Brenter v. Chicago, etc., R. Co.*, 68 Iowa 530; *State v. Harris*, 64 Iowa 289; *Buford v. McGetchie*, 60 Iowa 298; *State v. Laughlin*, 73 Iowa 351; *State v. Rockwell*, 82 Iowa 429.

Louisiana.—*State v. Alphonse*, 34 La. Ann. 9.

Maryland.—*Edelen v. Gough*, 8 Gill (Md.) 89.

Pennsylvania.—*Mullin's Appeal*, (Pa. 1886) 5 Atl. Rep. 738.

South Carolina.—*State v. Anderson*, 26 S. Car. 599.

Washington.—*State v. Holmes*, 12 Wash. 170.

United States.—*U. S. v. Loughery*, 13 Blatchf. (U. S.) 267.

Who Are Bystanders.—Persons present in court are bystanders within a statutory provision relative to the completion of a jury, after exhaustion of the panel, by taking jurors from the bystanders, no matter how long they have been present, or how they happened to be present, provided no fraud or collusion or improper action is suggested. *U. S. v. Loughery*, 13 Blatchf. (U. S.) 267.

In *Phillips v. Gratz*, 2 P. & W. (Pa.) 412, 23 Am. Dec. 33, it was held that only persons actually present in court may be selected as bystanders.

Under the Statute of 6 Geo. IV., c. 50, § 37, which provided that tales be named by the sheriff of the "able men of the county then present," it was held not to be necessary that the tales should be selected out of persons accidentally present, but that they might be selected out of persons whose presence the sheriff had taken previous measures to secure. *U. S. v. Loughery*, 13 Blatchf. (U. S.) 267; *Bac. Abr.*, tit. Juries. See also *State v. Lamon*, 3 Hawks (N. Car. 179.

Bystanders in Vicinity of Courtroom.

—Where the sheriff summons a talesman from the bystanders in the vicinity of the court-house and nearest thereto after the court has adjourned, on the day and on the next morning thereafter, before the court resumes its session, the summons is regular, and the juror, if not otherwise disqualified, is competent. *State v. Revells*, 35 La. Ann. 302.

A Verbal Order to Summon Talesmen will not necessarily require them to be summoned from the bystanders. *State v. Thomas*, 34 La. Ann. 1084.

Noncompliance with Statute.—Where no prejudice has resulted, a judgment will not be reversed because of completion of a regular panel by calling talesmen from the bystanders instead of complying with a statute requiring that in such a case "the requisite number of persons to supply the deficiency shall be drawn in the same manner as provided" by law for drawing the panel in the first instance. *State v. Rockwell*, 82 Iowa 429.

Refusal to Summon Outside Courtroom.

—The court may deny a request to direct the sheriff to fill vacancies in the jury by summoning persons outside the courtroom. *Boyer v. Berryman*, 123 Ind. 451.

Discretion of Court.—Under the *Indiana* statute in force in 1886, the method of filling a regular panel was left to the discretion of the judge, and where he directed that bystanders be taken, instead of jurors selected by the commissioner, the appellate court refused to interfere, in the absence of any showing that the discretion was abused. *Deig v. Morehead*, 110 Ind. 451.

Failure of Record to Show Summoning from Bystanders.—The mere fact that the record fails to show that a juror was selected or summoned from the bystanders, as he might have been, will not vitiate the verdict where it appears that the person selected was duly sworn to try the cause with the rest of the jury, and that the whole twelve were good and lawful men of the body of the county. *Montgomery v. State*, 3 Kan. 263.

Presumptions.—In *State v. Gallagher*, 26 La. Ann. 46, there was no complaint

talesmen to try criminal cases,¹ nor is it a ground of objection that a person summoned had been a member of a regular panel which had been quashed, for reasons which did not personally disqualify him,² nor that he had previously been summoned as a talesman,³ nor that as a regular juror he had been omitted from the list served,⁴ nor because of various other reasons set out in the subjoined notes.⁵

in the challenge to the array as to the mode by which talesmen were summoned, the objection being simply that they were selected by the sheriff from certain portions of the jurisdiction instead of being taken from among the bystanders within the vicinity of the court-house during the trial, but not stating that there were any bystanders present when the panel was exhausted, and the court said that it was bound to presume, in the absence of proper evidence to the contrary, that the judge and the officers of the court performed their duty in the premises.

1. *Rouse v. State*, 4 Ga. 136.

2. **Irregularities in Drawing Regular Panel.**—The sustaining of a challenge to the array for irregularity in the drawing is not a personal disqualification of the individual jurors, but they may be called as bystanders or summoned on a special venire. *State v. Yordi*, 30 Kan. 221.

Absence of Fraud.—The same jurors who were on a previous panel which had been quashed may be summoned as talesmen unless the challenge to the array was sustained on the ground of fraud. *Woolfolk v. State*, 85 Ga. 69; *State v. Degonia*, 69 Mo. 485; *Smith v. State*, 4 Neb. 277; *State v. McCurry*, 63 N. Car. 33; *Caperton v. Nickel*, 4 W. Va. 173.

In the Absence of Any Suggestion of Corrupt Motive on the part of the sheriff in the original summoning of the jurors, there is no error in his summoning and bringing them into court when he is authorized to summon talesmen on the exhaustion of a special venire. *Adams v. State*, 35 Tex. Crim. Rep. 285.

Summoning by Coroner.—Where a challenge to the array has been sustained and the coroner ordered to summon talesmen, the fact that he summoned as talesmen jurors who formed a part of the original panel is not error. *Dumar v. State*, 65 Ga. 472.

3. **Talesman Summoned Prior to Mistrial.**—There is error on the part of the court in overruling a challenge on

the ground that talesmen summoned prior to a mistrial, and who had not been put upon the prisoner, were ordered to return after a mistrial and constituted a part of the array. *Woolfolk v. State*, 85 Ga. 69.

Naming by Court of Talesman Previously Summoned by Sheriff.—In *State v. Plum*, 49 Kan. 679, by consent the court named talesmen, and among others named a person who had been previously selected by the sheriff as a talesman, but to whom objections had been made because of his possible interest. Upon this talesman the defendant exhausted his last peremptory challenge, and it was held that in the absence of any showing of partiality on the part of the sheriff in summoning the juror in question, there was no error of which the defendant could complain.

4. *Campbell v. State*, 30 Tex. App. 645.

5. **Juror on Regular Panel.**—Regular jurors may be summoned on a special venire should the court see proper to excuse them from the regular panel. *Brennan v. State*, 33 Tex. 266.

Members of Police Jury.—Under the *Louisiana* Act of 1873, members of a police jury may be drawn as talesmen in criminal trials. *State v. Daniel*, 31 La. Ann. 91.

Prior Jury Service.—Under Rev. Stat. *Illinois* (1874), c. 78, § 14, persons summoned to fill up the regular panel cannot be challenged for cause as having served on the jury within one year. *Mueller v. Rebhan*, 94 Ill. 142.

Right to Presence of Excused Juror.—Parties cannot require a juror who has been excused to be present and to serve as a talesman. *Golding v. Steamer C. Castro*, 20 La. Ann. 458.

In North Carolina (under Battle's Rev. Stat., c. 17, § 229a, and p. 860, addenda to Code), talesmen, in addition to possessing the qualifications of regular jurors, were required to be freeholders. *State v. Whitley*, 88 N. Car. 691; *Lee v. Lee*, 71 N. Car. 139; *State v. Car-*

f. ORDER OR DIRECTION — (1) *By Venire*. — Where the mode of procuring jurors to supply deficiencies in the panel is prescribed by statute, that mode should be pursued, as where the procurement is by means of a venire,¹ but there is no necessity for a venire in the absence of such requirement.²

(2) *By List to Officer*. — A requirement that a list be furnished to the summoning officer should be observed,³ but when resort is had to bystanders no list is required, though it may be necessary upon recourse to another mode prescribed by the same statute.⁴

land, 90 N. Car. 669; *State v. Ragland*, 75 N. Car. 12; *State v. Hargrave*, 100 N. Car. 484. And see *State v. Wincroft*, 76 N. Car. 38.

1. *Hamlin v. Fletcher*, 64 Ga. 549; *Poindexter v. Com.*, 33 Gratt. (Va.) 766.

Naming Jurors by Request as Substitute for Venire. — Where, by statute, it is made the duty of the judge upon the request of either party, to make up a deficiency of jurors and cause a venire to issue thereon, naming the juror to be selected, if the court on request names certain jurors, who enter the box for service, the failure to issue a formal venire will not be deemed substantial error. *Trembly v. State*, 20 Kan. 117.

Refusal of Venire After Direction for Talesmen. — Where a statute makes it the duty of the court, on a proper application, to issue a venire for talesmen, and, if sufficient jurors are not thereby procured, to issue others on the like application until a jury is secured, it is error on the part of the court to refuse an application for such a venire made after a direction to the sheriff to summon talesmen, but before he had proceeded to act. *Passenger R. Co. v. Young*, 21 Ohio St. 518.

Sufficiency of Venire. — A second writ of venire issued after the commencement of the term which fails to show that the list of names appended thereto was furnished by the court, as provided by statute, or that another venire was directed by the court, is an invalid writ. *Spurgeon v. Com.*, 86 Va. 652.

2. *State v. Jones*, 61 Mo. 232; *State v. Pitts*, 58 Mo. 556; *Samuels v. State*, 3 Mo. 68; *State v. Stephens*, 11 S. Car. 319; *State v. Williams*, 2 Hill L. (S. Car.) 381.

The Florida Statutes (Laws of 1868, c. 1628, § 21) respecting the filling of vacancies in the panel do not contemplate the issuance of a special venire, but provide that when the regular panel

has been exhausted the court shall call the requisite number of persons necessary to try the cause then pending, to be immediately summoned from the bystanders. *Green v. State*, 17 Fla. 670. And see *O'Connor v. State*, 9 Fla. 215.

In West Virginia the power conferred by the code (c. 116, § 14) to summon other than regular jurors whenever it is found necessary for the convenient despatch of business, etc., authorizes in a proper case the summoning of jurors from the bystanders without any other venire facias than the order of the court entered of record. *State v. Mills*, 33 W. Va. 455.

Defects in Unnecessary Writ. — Where there is no authority and therefore no necessity for issuing a special venire for additional jurors from a tales box, defects in such a writ are immaterial. *State v. Hill*, 19 S. Car. 435.

3. **Sufficiency of List.** — A statutory direction that the judge deliver to the proper officer a list of jurors sufficient to complete the panel is complied with where the judge, by written order, directs the marshal to summon a designated number of jurors. *State v. Sansone*, 116 Mo. 1.

4. Under a statute (Code Va. 1887, § 4019) providing that in any case of felony, if a jury cannot be obtained from those summoned and in attendance, the court may direct another venire and cause persons to be summoned from the bystanders or from a list furnished by the court, to complete the jury, etc., where an *alias* writ is issued to the sheriff for jurymen from the bystanders, no list of the bystanders need be given him. *Waller v. Com.*, 84 Va. 492; *Robinson v. Com.*, 88 Va. 900.

Signature to List. — The list need not be signed by the judge when bystanders are ordered. *Williams v. Com.*, 85 Va. 607.

(3) *Form and Sufficiency.*— Unless the statute under which talesmen are authorized is mandatory, the form of the order or direction is not highly important;¹ and where a deficiency may be supplied either from the bystanders or from the county at large, it is immaterial that the order is in the alternative form.² Nor is it material that improper requirements are contained in the order, where no injury has resulted,³ nor that there was an omission of a proper requirement,⁴ and where not required by the practice, it is unnecessary that the order be entered.⁵ But when entry is required, the sufficiency thereof will depend upon the particular facts.⁶

(4) *Presence of Accused.*— Though the accused may have a right to be present when talesmen or additional jurors are summoned, his absence when a direction is made will not vitiate the proceedings if he has sustained no prejudice.⁷

1. *Oral Direction.*— In *Texas*, after the passage of the law of 1876, and irrespective of that act, in a capital case the court could verbally direct the sheriff to summon talesmen from whom to complete the jury, after the exhaustion of a special venire. *Roberts v. State*, 5 Tex. App. 141.

Written Direction.— Though the directions of the court that the sheriff have talesmen in attendance in view of a possible exhaustion of the regular panel are usually oral, the fact that there was a written order to the same effect is immaterial. *State v. Allen*, 47 Conn. 121.

Specifying Causes.— The fact that the judge, in ordering a drawing of talesmen, specified the particular case in which they were to serve will not detract from the power conferred on him to order the drawing. *State v. Chambers*, 45 La. Ann. 36.

When Returnable.— An order to the sheriff to summon talesmen need not be made returnable on the same day. *State v. Lamon*, 3 Hawks (N. Car.) 175.

2. *Keech v. State*, 15 Fla. 591.

3. *Designating Talesman of Particular Color.*— While it is improper for the judge to request the sheriff to summon a talesman of a particular color, the fact that the request is acted on is not reversible error where it does not appear that the objecting party had exhausted his peremptory challenges. *Capehart v. Stewart*, 80 N. Car. 101.

4. *Direction for Qualified Persons.*— Unless so required by statute, the judge, in drawing talesmen to be summoned to complete a special venire, is not obliged to direct the sheriff to sum-

mon qualified persons only, or to inform him as to the qualification, though such a direction is necessary when ordering a special venire. In capital cases, however, it is advisable that such a direction should be given. *Dill v. State*, 1 Tex. App. 279.

5. *Entry of Order.*— The order of the court for talesmen to complete a venire need not be entered of record. *Morrison v. State*, 84 Ala. 405.

6. An entry by the clerk in a minute book, of an order for the drawing of talesmen, and not by the trial judge with his own hand, is a sufficient compliance with the *Louisiana* Act No. 138 of 1877, providing that when talesmen shall be required the judge shall enter an order on the minutes directing the drawing, etc. *State v. Walsh*, 44 La. Ann. 1122.

7. *Mabry v. State*, 50 Ark. 492.

Cure of Error by Subsequent Order.— The selection of a trial jury in a criminal case from a special panel ordered by the court in the absence of the defendant, even though erroneous, will not constitute reversible error if, by a subsequent order, made in the presence of the defendant, the special panel was retained and a jury selected to try the case without objection and without exhaustion of the defendant's peremptory challenges. *Hannum v. State*, 90 Tenn. 647.

Failure to Exhaust Peremptory Challenges.— An objection that in the absence of the defendant an order was made to summon bystanders to complete the regular jury is unavailing in the appellate court where the record fails to show that the defendant ex-

g. **NUMBER OF TALES JURORS.** — Where the law is silent as to the number of talesmen who may be procured, there is a discretion to procure any number which may be deemed necessary to complete the panel,¹ and the tendency of statutory regulations is to the same effect.² The number to be summoned at any one time may be restricted,³ but unless there is such a restriction, the court is not confined, in the exercise of this authority, to directing the presence of the precise number required to supply the deficiency.⁴

h. **SUMMONING.** — In procuring talesmen the formalities requisite to the drawing and summoning of regular jurors are unneces-

hausted his peremptory challenges, since the failure to challenge is an implied admission that the jurors are unobjectionable. *Mabry v. State*, 50 Ark. 492.

1. *McGuffie v. State*, 17 Ga. 497; *State v. Somnier*, 33 La. Ann. 237; *State v. Buckner*, 25 Mo. 167; *State v. Williams*, 2 Hill L. (S. Car.) 381.

Discretion of Summoning Officer. — Where the law is silent with respect to the number of talesmen to be summoned the court may specify the number deemed necessary, or may leave it to the discretion of the summoning officer. *State v. Lamon*, 3 Hawks (N. Car.) 175.

Drawing Less than Directed. — It is immaterial that, in drawing additional jurors, through mistake or the like a less number is drawn than was directed because of including in the drawing the name of a person who was drawn on the original panel. *People v. Thurston*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 49.

2. In *Com. v. Eaton*, 8 Phila. (Pa.) 428, in construing an act (Act of April 20, 1854) providing for the drawing from the wheel of five names for every talesman required, it was held, in view of another statute authorizing the judges to fix the number of petit jurors to be brought in on a venire, that the court was not limited to drawing five names for each juror deficient, but could direct how many talesmen should be brought in.

Two Entire Juries. — Under a statute empowering the court to cause jurors to be summoned from the bystanders or from the county at large to supply deficiencies in a regular jury, or to form one or more entire juries, when a venire has been quashed because irregularly issued and executed, the

court may order two entire juries to be summoned. *Linehan v. State*, 113 Ala. 70.

3. **Sufficient to Form Jury.** — A special venire is in aid of the original panel, and only such jurors are taken from it as are required to form a jury after the original panel has been exhausted without completing the jury. *State v. Washington*, 90 N. Car. 664.

Under the Early Maryland Practice, where but nine jurors were procured in a criminal case, the remainder of the panel being exhausted by peremptory challenges, there could only be an order for three talesmen; when eleven were sworn, an order for one, etc. *Burk v. State*, 2 Har. & J. (Md.) 426.

4. *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

In **Capital Cases** the tales may be granted for a larger number than the original process, in order to prevent the delays which might arise from peremptory challenges. *Chitty's Crim. Law* 619; 2 Hale P. C. 266. And see *Com. v. Eaton*, 8 Phila. (Pa.) 428.

At Request of Accused. — In capital cases the court may, if it so please, award an order to the sheriff to summon more than the precise number of talesmen necessary to supply the deficiency, and while there is no obligation on it to do so, such request of the prisoner or his counsel will usually be granted. *Burk v. State*, 2 Har. & J. (Md.) 426.

Complaint of Procurement at Own Request. — That too many additional jurors were drawn and summoned is not available as an objection where it appears that the action of the court was at the request of the complaining party, who then made no objection. *Allen v. State*, 74 Ala. 557.

sary, unless such a course is specifically required.¹ Where no special mode is pointed out, objection will not lie to the mode in which talesmen are procured, in the absence of any showing of improper conduct or partiality on the part of the court or the summoning officers, or of resultant injury therefrom.² Consequently there may be no necessity for procuring jurors by written summons,³ and when bystanders are summoned the

1. *State v. Smith*, 26 La. Ann. 62.

Summoning Tales Jurors Alphabetically. — It is not a good ground for challenge to the array that in selecting tales jurors the sheriff consulted the list and took names therefrom in the alphabetical order in which they stood on the list, confining the selection first to names all beginning with one and the same letter, in the absence of any statute restricting the sheriff as to what he shall take as a guide in fixing upon the particular persons whom he will summon as tales jurors, further than that they be qualified to serve. *Cox v. State*, 64 Ga. 375.

In Summoning under a Special Statute the summoning officer need not regard the rules and customs of the common law relative to the summoning of special or struck juries. *Vierling v. Chas. G. Stifel Brewing Co.*, 15 Mo. App. 125.

Resort to Open Venire. — If there is no statutory direction as to the mode of procedure which the court shall adopt for the purpose of completing a trial jury after the exhaustion of the regular jury boxes, an open venire may be resorted to. *Carter v. Territory*, 3 Wyoming 193; *U. S. v. Clawson*, 4 Utah 34; *Clauson v. U. S.*, 114 U. S. 477.

The Provision of the Iowa Code (§ 232) that the requisite number of persons to supply the deficiency in a regular panel shall be drawn in the same manner as is provided by law for drawing the panel in the first instance is directory, and a simple disregard of its provisions, where error does not affirmatively appear, is not enough to authorize a reversal of the judgment. *State v. Rockwell*, 82 Iowa 429; *State v. Harris*, 64 Iowa 289; *Brentner v. Chicago, etc., R. Co.*, 68 Iowa 530. See also *State v. Ryan*, 70 Iowa 155; *State v. McCahill*, 72 Iowa 111.

Absence of Provision in Repealing Act. — Where an existing law makes no provision as to procedure in capital cases after exhaustion of the special venire, and does not repeal prior laws

only so far as they conflict with it, the prior provisions may be followed. *Roberts v. State*, 5 Tex. App. 141.

Noncompliance with Statute. — Where, no jury being present, the jury should be drawn by the clerk as provided by statute, but instead is selected by the sheriff from the county under a venire, a challenge to the array should be sustained. *Lincoln v. Stowell*, 73 Ill. 246. See also *Gropp v. People*, 67 Ill. 156.

2. *State v. Kane*, 32 La. Ann. 999.

In Texas an act prohibiting the summoning of talesmen within the court house or yard, which did not confer any right of challenge on that ground, was held merely directory, and its violation not a ground for reversal unless prejudice resulted. *Matthews v. State*, 6 Tex. App. 23.

Objection to Violation of Statute. — An exception to the mode of summoning the juror, under the statute in question, will not furnish a ground for reversal when it appears that the sheriff could not procure a juror elsewhere, that the defendant did not exhaust his peremptory challenges, and that there was nothing to show that the trial was not fairly and impartially had. *Frye v. State*, 7 Tex. App. 94.

"Yard" Defined. — An unenclosed public square, used as a public market place, is not a "yard" of the court house within the statute, prohibiting the summoning of talesmen within the yard of the court house. *Matthews v. State*, 6 Tex. App. 23.

Summoning from Houses Facing Court-house Square. — A statutory prohibition against summoning talesmen from the court house or the yard thereof has no application to persons summoned from houses facing the court house square. *Baker v. State*, 4 Tex. App. 223.

3. *State v. Newton*, 28 La. Ann. 65; *Roberts v. State*, 5 Tex. App. 141.

Calling into Court. — Where a sheriff summoned persons other than bystanders, it was held that calling them into court was sufficient, and that when

officer need not make a formal return.¹

i. SERVICE OF LIST.—While, in some jurisdictions, the accused is entitled to a list of talesmen summoned, or to a reasonable time to examine an additional venire,² the general rule is that unless there is a statutory right to service of such a list, none is necessary.³

j. IMPANELING.—Unless so provided by statute the name of a person returned as a jurymen from the bystanders need not be put in the box,⁴ but where the practice as to procuring talesmen

they came in they were bystanders and bound to serve. *State v. Lamon*, 3 Hawks (N. Car.) 175.

1. *Green v. State*, 17 Fla. 670.

2. Unless the service of tales on the accused is waived in open court, the case should be adjourned for the purpose of making proper service. *Patterson v. State*, 48 N. J. L. 381.

Right to Examine List.—In *State v. Aaron*, 4 N. J. L. 268, which was the trial of an indictment for murder, it was held that the prisoner was entitled to an inspection of the panel with the tales annexed for two entire days before the trial, so as to enable him properly to prepare his challenges as well to the tales jurors as to the regular panel.

The Granting Time to Examine a List of jurors summoned on a special venire is discretionary. *Carthaus v. State*, 78 Wis. 560. In this case it was complained that the court allowed the defendant's attorney but ten minutes to examine the list, and this was held to have been sufficient, nothing appearing to show that the defendant was prejudiced by the refusal to grant a longer time.

In Louisiana, the right to a list exists in certain prescribed cases. *State v. Chambers*, 45 La. Ann. 36.

Section 7 of La. Act No. 44 of 1877, authorizing the district judge to draw additional jurors as talesmen, did not repeal nor conflict with section 992 of the Revised Statutes, requiring, in criminal cases where the punishment may be death or imprisonment at hard labor for seven years or upwards, service on the accused of a list of the jurors who are to pass on his case at least two entire days before the trial; consequently a list of additional jurors drawn as talesmen must be served as prescribed by the Revised Statutes. *State v. Stewart*, 34 La. Ann. 1037.

Right to List until Return of Summoning Officer.—Failure to furnish the list

of talesmen is not error where the talesmen are sworn as they appear, and it is impossible to furnish the accused with a list until the return of the absent sheriff. *State v. Henry*, 15 La. Ann. 297.

But see *State v. Reeves*, 11 La. Ann. 685; *State v. Bunger*, 14 La. Ann. 465; *State v. Bennett*, 14 La. Ann. 661, wherein the right was denied.

3. *Dow v. State*, 31 Tex. Crim. Rep. 278; *Brotherton v. State*, 30 Tex. App. 369; *Drake v. State*, 5 Tex. App. 649; *Harris v. State*, 6 Tex. App. 97; *Gardenhire v. State*, 6 Tex. App. 147; *Sharp v. State*, 6 Tex. App. 650; *Richardson v. State*, 7 Tex. App. 486. But see *Johnson v. State*, 4 Tex. App. 268, in which it was held that although a defendant is not entitled to a list of talesmen to fill a special venire, yet, if the jury box has been exhausted without completing the venire, he will be entitled to a list of the talesmen summoned to fill the box, as well as to the names of those drawn from the box.

List of Bystanders.—Where the defendant has been properly furnished with a list of a panel which has become exhausted before completion of the jury, a list of those summoned from the bystanders need not be furnished. *State v. Price*, 3 Mo. App. 586.

Statutory Construction—New Mexico.—“List of the jurors summoned” in the General Laws of New Mexico (Prince's ed.) 288, § 20, providing for furnishing such a list to the defendant in capital cases, refers to the regular panel summoned and accepted for the term, and does not include talesmen summoned to complete the jury after the exhaustion of the regular panel. *Territory v. Kelly*, 2 N. Mex. 292.

4. *State v. Wright*, 53 Me. 328.

Calling from List.—There is no error in directing the sheriff to call the names of special veniremen as they appear on the list instead of placing their names in a box and making selections there-

or additional jurors is otherwise than from the bystanders, such a course may be necessary.¹

b. UNITED STATES COURTS. — The United States courts have ample power, under section 804 of the Revised Statutes of the United States, to summon talesmen from the bystanders when necessary.²

5. Presentation of Jurors — *a. GENERALLY.* — The interposition of challenges is a part of the trial of a person accused of crime, and, in accordance with the doctrine that persons accused of felony are entitled to be present during the trial, and to have the panel put upon them, they have a right to be brought face to face with proposed jurors when challenges are made.³

from by lot. *State v. Ryan*, 70 Iowa 154, following *State v. Green*, 20 Iowa 424.

1. *Territory v. Clanton*, (Arizona 1889) 20 Pac. Rep. 94.

Mingling with Names of Regular Jurors. — The names of additional jurors which are made part of the panel by the act which empowers the judge to have them drawn as regular jurors should be placed in the jury box and mixed with the names of the regular jurors already therein. *State v. Brooks*, 36 La. Ann. 334.

Exhaustion of List Without Completion. — An objection that ballots containing the names of persons summoned as talesmen were not placed in the box, but that the names were called from a list made out and furnished to counsel by the sheriff, is unavailable where it appears that the entire list was exhausted before the panel was completed. *State v. Dorsey*, 40 La. Ann. 739.

In *Massachusetts*, under the statute in force in 1830, a talesman could not be sworn as a juror unless the court was satisfied that his name was in the jury box. *Com. v. Knapp*, 10 Pick. (Mass.) 477.

2. *U. S. v. Munford*, 16 Fed. Rep. 164; *U. S. v. Rose*, 6 Fed. Rep. 136.

Section 804 of the Revised Statutes of the United States provides that "when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel."

The Act of June 30, 1879, which provides that unless the judge orders the names of jurors to be drawn from the

boxes used by the state authorities all jurors, "including those summoned during the session of the court," shall be publicly drawn from a box containing not less than three hundred names, placed therein by the clerk and a commissioner appointed for the purpose, while it expressly repeals certain sections of the Revised Statutes respecting the selection, qualifications, and oath of jurors, does not touch the power of the court, whenever at the time of forming a jury to try a particular case the panel of jurors previously summoned according to law is found for any reason to have been exhausted, to call in talesmen from the bystanders to supply the deficiency. *Lovejoy v. U. S.*, 128 U. S. 171.

In the District Court of the United States, after a trial jury has been discharged a new venire may be ordered, and when that venire has been exhausted talesmen may be summoned; and this procedure is not affected by the jury law of 1879. *St. Clair v. U. S.*, 154 U. S. 134.

3. *Cochran v. State*, 62 Ga. 731; *Reynolds v. State*, 1 Ga. 222.

In a Civil Case there is no error in compelling the attorney for a party to proceed in the absence of his client and to impanel a jury. *Culley v. Walkeen*, 80 Mich. 443.

Jurors and Accused "Face to Face." — Where, during the examination of persons as to their qualifications as jurors, the defendant was in court, brought face to face with the jurors, and afforded an opportunity to participate in the examination, the proceedings were held regular. *Pointer v. U. S.*, 151 U. S. 396, distinguishing *Lewis v. U. S.*, 146 U. S. 376, *infra*.

In *Lewis v. U. S.*, 146 U. S. 370, it appeared that at the time of the trial

number prescribed by statute, is sometimes required; and when this requirement exists the failure to accord to the party all his rights in the premises may constitute reversible error.¹ There are decisions to the effect that for the purpose of making a challenge to the array when the panel is not full the tales may be prayed to complete the number and objection then made.²

Where Panel Depleted. — However, this right to the presentation of a complete panel before the exercise of the right of challenge does not necessarily require that every juror on the panel should be tendered, but is subject to exceptions, as where veniremen summoned have died or failed to appear, or where the panel has been depleted by excuses, rejections, discharges, or other like causes.³ Unless the presentation of the whole of the regular

be one created by the act of the court, and would be in violation of a statutory requirement to cause the names of all those whom the court may hold to be competent jurors to be placed on the lists from which the final selection is to be made. *Evans v. State*, 80 Ala. 4. See also *Thuston v. State*, 18 Tex. App. 26.

Waiver by Failure to Object. — Where the regular panel becomes exhausted without objection on the part of the defendant that it was not a full panel, an objection to proceeding with a special venire because the full regular panel has not been tendered is unavailable. *Lambright v. State*, 34 Fla. 564.

Excessive Number. — In *Bratt v. State*, (Tex. Crim. App. 1897) 41 S. W. Rep. 624, where the accused had the right to have but twenty-four jurors presented to him, and was furnished with a list of thirty names, three of which were afterwards taken from the list, leaving but twenty-seven names to choose from, there was held to be no ground of complaint. *Bratt v. State*, (Tex. Crim. App. 1897) 41 S. W. Rep. 624.

1. **Waiver of Peremptory Challenges** by the state will not cure error consisting of presenting to the accused less than the statutory number of veniremen from whom he is entitled to select a trial jury. *State v. Waters*, 1 Mo. App. 7.

2. *Cooley v. State*, 38 Tex. 636.

In *Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, it is said: "No challenge either to the array or to the polls can be taken until a full jury shall have appeared; and if twelve of those named in the original panel do not appear, a tales must be prayed, and the

appearance of twelve obtained before any challenge be made."

3. *State v. Hensley*, 94 N. Car. 1021.

In *South Carolina* it is unnecessary that the whole panel should be present at the commencement of the trial, so that the jury may be made up by choice from the whole number, *State v. Jackson*, 32 S. Car. 27; *State v. Stephens*, 13 S. Car. 285; or that every member of a special venire shall be present before the name of any one of the jurors included in such venire may be drawn and presented to the accused, *State v. Kelley*, 46 S. Car. 55.

Insufficient Panel. — Where, of a special venire of sixty persons, but twenty-nine were summoned and the remainder were returned "not found in the county," in the absence of any objection to the venire, the manner of service, or to the return of the sheriff, there was held to be no error in requiring the accused to announce, no showing being made that injury resulted or was likely to result from the ruling of the court. *Walker v. State*, 6 Tex. App. 576.

Where it is provided by statute that a jury in a particular court shall be composed of six men and shall be formed by drawing the names of twelve jurors, "or so many as there may be," etc., where there were but six regular jurors in attendance it was held no error to require the defendant to pass upon them before summoning others and placing their names in the box. *Goforth v. State*, 22 Tex. App. 405.

Depletion by Excusing Veniremen. — There is no error in proceeding with the selection of the jury after excusing members of the panel for cause, without first filling the vacancies caused by

panel is positively required by statute, a jury may be impaneled from those in actual attendance without sending for or waiting for the return of others of the panel who are engaged in the consideration of another case.¹

excusing such jurors. *Clough v. State*, 7 Neb. 320.

Depletion by Challenges. — Where there is no residuum from which to supply the place of regular jurymen challenged for cause, the court may require the accused to pass upon those in the panel, and then have the panel filled by having qualified persons. *West v. State*, 7 Tex. App. 150; *Speiden v. State*, 3 Tex. App. 156.

Rejection of Member of Completed Jury. — Where, after completion of the jury, one of their number is rejected for sufficient cause, the accused is not entitled to a full panel from which to supply the vacancy, but only to the number allowed if the juror had not been selected. *Lewis v. State*, 3 Head. (Tenn.) 127.

Unauthorized Departure of Juror. — The court may proceed to select a jury in the absence of a juror who had been summoned and was drawn from the jury box in due order, but who has departed without leave. *U. S. v. Byrne*, 19 Blatchf. (U. S.) 259.

Separate Trials — Discharge of Part of Panel. — Where two persons have been jointly proceeded against by indictment and separate trials are demanded and had, if the jury in the first case has been discharged it is not necessary that their names shall be returned to the box before drawing a jury for the second trial. *People v. Craig*, 48 Mich. 502.

1. *Alabama.* — *Shelton v. State*, 73 Ala. 5; *Kimbrough v. State*, 62 Ala. 248; *Redd v. State*, 69 Ala. 256; *Goodwin v. State*, 106 Ala. 670; *Dorsey v. State*, 107 Ala. 157, *distinguishing* *Evans v. State*, 80 Ala. 4, decided under a special jury law, which is also *distinguished* in *Chamblee v. State*, 78 Ala. 466, and in *Cole v. State*, 105 Ala. 76.

District of Columbia. — *U. S. v. Bowen*, 3 MacArthur (D. C.) 64.

Michigan. — *People v. Craig*, 48 Mich. 502.

South Carolina. — *State v. Campbell*, 35 S. Car. 28; *State v. Jackson*, 32 S. Car. 27.

Texas. — *Gulf, etc., R. Co. v. Duvall*, 12 Tex. Civ. App. 348; *Thurmond v. State*, 37 Tex. Crim. Rep. 422.

Right to Juror Engaged in Like Case. —

In a capital case the defendant is not entitled to a juror who is engaged in hearing another like case for which he had been specially drawn. *Prater v. State*, 107 Ala. 26, *citing* *Cole v. State*, 105 Ala. 76.

Refused to Follow Suggestion of Court.

— Jurors were deliberating in another case when called, and the court directed the sheriff to put the names of the absent jurymen back in the hat, to be drawn, to which the defendant objected. The court then offered to take any course to complete the jury which the defendant would move for, whereupon the defendant's counsel declined to make any motion, and stated that he would reserve an exception to any course the court might take thereafter. On the return of the absent jurors, the defendant moved that their names be placed in the hat, which motion was refused, and the court directed the sheriff to place therein, to be drawn, the names of two of them. It was held that the defendant had waived his right to except to the action of the court in that regard. *Shelton v. State*, 73 Ala. 5.

Special Statute — Texas. — Under a statute providing that when less than twelve names remain in the box the court shall direct the summoning of talesmen, there is an implication that if twelve remain, talesmen shall not be summoned until the number is reduced by challenge, and so long as it is possible to complete the panel without talesmen that should be done; hence, when it appeared that a number of jurors selected for the work were engaged in another case, there was held to be no error in directing the names of the remaining jurors to be drawn, and after twelve had been drawn in requiring the parties to exercise their right of peremptory challenge, and in overruling a request to place the names of the entire panel for the week in the box and have their names drawn therefrom. *Gulf, etc., R. Co. v. Greenlee*, 70 Tex. 553.

Return of Special Veniemen Before Completion of Jury. — There is no error in the refusal to postpone a case after exhaustion of the special venire, to

Informalities. — If a sufficient number is presented,¹ informalities in the mode of presentation will usually be deemed immaterial.²

Entire Panel at One Presentation. — It is sometimes necessary that the whole of the original panel should be tendered before talesmen or additional jurors are presented,³ and in some jurisdictions a full panel of twelve must be presented for acceptance or rejection.

await the return of veniremen deliberating in another case, that they may be passed on in the order in which their names appeared in the list, if the absent jurors return and are called and passed on before an order is made for talesmen. *Hudson v. State*, 28 Tex. App. 323 [*distinguishing* *Bates v. State*, 19 Tex. 123; *Thuston v. State*, 18 Tex. App. 26].

Venireman Challenged After Refusal to Bring Them In. — There is no error in the refusal to have two special veniremen, engaged in another case, called in, or to postpone the cause until the end of such other case, where it appears that before completion of the jury the two absentees were placed in the panel and were challenged, one by each side. *Stephens v. State*, 31 Tex. Crim. Rep. 365.

Return of Absentee — Failure to Restore Names. — In *People v. Edwards*, 101 Cal. 543, before the jury was impaneled, the names of the jurors engaged in another case were withdrawn from the box, but during the filling of the jury the absentees returned. Their names were not restored to the box until after ten jurors had been withdrawn therefrom, accepted, and sworn, when the defendant's counsel called the attention of the court to the condition of things, and moved to discharge the jury, which motion was denied, and the defendant, having exhausted his peremptory challenges, was compelled to accept the twelve jurors against his will. It was held that the error was of such a nature as required a reversal.

1. Sufficiency as to Number. — In *Cluverius v. Com.*, 81 Va. 787, it was held that the court properly proceeded in securing sixteen men free from exception, qualified by law, to take their places upon the panel, and submitting a list of the sixteen to the defendant, and that the contention of the defendant that twenty-four persons free from exception should be obtained, from whom sixteen should be selected, and the list of sixteen thus obtained submitted to him, was untenable. See also *Hall v. Com.* 80 Va. 555; *Richards*

v. Com., 81 Va. 110; *Honesty v. Com.*, 81 Va. 283.

2. Presentation of Whole Panel at Different Times. — Although a defendant is entitled to have the whole of a special venire put into the box at once instead of placing part of the names therein, yet if he makes no objection to the course of procedure, and after the names placed in the box are exhausted the remainder of the special venire is also placed therein, thus, in fact, having all the jurors tendered to him, there is no ground of complaint. *State v. Nash*, 8 Ired. L. (N. Car.) 35.

Where, in a criminal case, a part of the panel only was at first drawn from, under a misapprehension as to the number of challenges to which the defendant was entitled, but pending the selection of the jury the whole list was used, there was held to be no error of which complaint could be made. *Hardwick v. State*, 6 Lea (Tenn.) 103.

Under the Texas Revised Statutes, art. 3091-3094, the parties may be required to exercise their right of challenge when twelve names have been drawn and entered upon slips, and are not entitled to wait until the entire panel for the week has been placed in the box, and their names drawn by the clerk, nor until a sufficient number of talesmen are summoned to complete the list. *Gulf, etc., R. Co. v. Greenlee*, 70 Tex. 553.

3. In forming a jury the names of those constituting the original panel should be placed in the box and drawn before those of the special veniremen or talesmen. *State v. Benton*, 2 Dev. & B. L. (N. Car.) 196.

Tendering Tales with Incomplete Venire. — In the trial of a capital case the original venire ought to be first drawn and tendered; but if, there being but eleven of the original panel, the judge should direct tales jurors to be drawn with them, the prisoner has no right to a venire *de novo* on this account, if he has had an opportunity of accepting or rejecting all of the original venire. *State v. Lytle*, 5 Ired. L. (N. Car.) 58.

tion, and that number, corresponding to the number of the jury as completed, kept up, so that after rejection of any of them there shall be the number of twelve to pass on until a jury is obtained;¹ or the number to be presented at one time may be prescribed by statute.²

Presenting Jurors Singly. — On the other hand, the practice in some jurisdictions requires that each juror shall be called, passed on, and disposed of singly before another juror is presented.³

In *Bates v. State*, 19 Tex. 122, it was held error on the part of the court in the trial of a capital case to deprive the accused of the right to select from the whole of the venire, a copy of which had been served, by discharging twelve of the original venire, who were engaged in the consideration of another case, and issuing a special venire to complete the jury, which had been partially procured from the other portion of the regular panel.

Resort to Venire Previously Declared Exhausted. — It is error for the court, after going into the selection of jurors from a second special venire, to put that venire down and go back and call up a juror drawn on a former special venire that has been declared to be exhausted at the time the second special venire was ordered to be drawn. *Collins v. State*, 31 Fla. 574.

1. Under the Revised Laws of Illinois (1874, pp. 634, 635), which provide that the court shall, upon the request of either party or of its own motion, order the full number of twelve jurors into the jury box before either party shall be required to examine any of the jurors as to their qualifications, it is not alone sufficient that there shall be twelve jurors called into the jury box in the first instance, but neither party shall be required to examine unless the twelve are in the jury box; and if one party on examination of the jurors reduced the number of the jurors in the box by challenge to less than twelve, the other party is entitled to have the whole number of twelve in the box before he proceeds with his examination. *Sterling Bridge Co. v. Pearl*, 80 Ill. 251.

In *Kentucky*, after the examination of the proposed jurors as to their competency, and twelve are seated in the box, the commonwealth must accept or challenge, and if it declines to challenge the jurors are passed to the defense. When the number is lessened by challenge, twelve must again be seated in

the box, and so on until completion of the jury. *Shelby v. Com.*, 91 Ky. 563; *Munday v. Com.*, 81 Ky. 233; *Edrington v. Com.*, (Ky. Ms. Nov. 24, 1885); *Jenkins v. Com.*, (Ky. 1887) 4 S. W. Rep. 816; *Wilson v. Com.*, (Ky. 1887) 4 S. W. Rep. 818.

Wisconsin. — In *Lamb v. State*, 36 Wis. 424, the proper practice was stated to be for the clerk to call jurors until twelve were in the box; the parties, if so choosing, having the right to question the jurors so called, and challenge for principal cause or for favor; that if such challenges are allowed, the clerk should at once call another juror in place of the one challenged, so that twelve unchallenged jurors should always be in the box, to the end that no challenge should be made without the full number subject to challenge being in the box, and no juror sworn until the right of challenge was exhausted or the jury accepted. In this case it appeared that by the express ruling of the court, excepted to by the defendant, twelve of the number were not called before any was sworn; that the jurors were called and questioned singly, and singly submitted for peremptory challenge before another was called, and when not so called, were sworn in the case until the completion of the jury; and this was held such error as required a reversal and an award of a venire *de novo*.

2. **Panels of Four.** — Under a statute requiring the jury to be passed on in panels of four, each panel must be accepted by both parties before calling another. *Stirling Bridge Co. v. Pearl*, 80 Ill. 251.

3. *Wilkerson v. State*, 74 Ga. 398; *Williams v. State*, 60 Ga. 367; *Mitchell v. State*, 43 Tex. 513; *Horbach v. State*, 43 Tex. 242; *Ray v. State*, 4 Tex. App. 450; *Hardin v. State*, 4 Tex. App. 355; *Taylor v. State*, 3 Tex. App. 169; *Garza v. State*, 3 Tex. App. 286. See *Wasson v. State*, 3 Tex. App. 474.

Swearing Twelve at Once. — The court,

Discretion of Court. — While, again, the number presented at one time may be wholly immaterial, and a matter entirely within the discretion of the court.¹

Calling Names in Order. — Again, in certain prescribed cases, and where the jury is formed from a special venire, the names are required to be called in the order in which they appear on the venire or list.²

6. Challenges to the Array — *a. GENERALLY.* — The ordinary mode of questioning the regularity or proper organization of the panel is by challenge to the array,³ which is permitted in most of

to save time, may qualify twelve jurors at once, by administering to them, before putting questions on the *voir dire*, the simple oath that they will true answers make to such questions as may be put by the court or its authority, touching their competency, and may put each juror upon the prisoner separately. *Roberts v. State*, 65 Ga. 430.

In the absence of any statutory provision respecting the mode of impaneling a jury, there was held to be no error in placing twelve men in the box, swearing them to answer questions as to their competency, and as each of the twelve was called, requiring the parties to accept or challenge him for cause or peremptorily before another was called. *Smith v. Brown*, 8 Kan. 608.

In *Mississippi* it is said that in capital cases the list of the special venire being in the hands of the prisoner obviates all objection to the uniform practice which prevails in the state of calling one juror at a time. *Thompson v. State*, 58 Miss. 62.

Separate Presentation After Acceptance. — It is not error for the court to refuse to cause the jurors to be again tendered to the prisoner separately, if he has once accepted them. *O'Connor v. State*, 9 Fla. 215.

1. *Walker v. Collier*, 37 Ill. 362; *Johns v. State*, 55 Md. 350.

It is within the discretion of the court as to how many may be placed in the box for examination. *State v. Munch*, 57 Mo. App. 207.

2. *Robles v. State*, 5 Tex. App. 346.

In *Wasson v. State*, 3 Tex. App. 474, there was held to be no error in calling up any number of the special venire and swearing them together to answer questions touching their qualifications; but the jurors upon the trial of a capital felony, when examined by the court, should be examined separately.

The name of the first man on the list should be called; he should be examined alone touching his qualifications to serve on the jury, and if pronounced a competent juror should be accepted or rejected before another name is called, and so on until the jury is completed or the venire exhausted.

Passing Person Not Summoned. — Where, by statute, in selecting a jury the names of the venire were required to be called in the order in which they appeared on the list furnished to the defendant, and on the formation of the jury, when the eighth name on the copy served was reached, the sheriff informed the court that such person was not summoned, it was error on the part of the court, over the objection of the defendant, who waived nothing, to complete the panel from those whose names appeared subsequently on the list, but the selection of the jury should either have been suspended until the juror in question was brought in, or a new venire should have issued and the formation of the jury proceeded with anew. *Osborne v. State*, 23 Tex. App. 431.

3. *Alabama.* — *Hornsby v. State*, 94 Ala. 55.

Illinois. — *Mueller v. Rebhan*, 94 Ill. 147; *Borrelli v. People*, 164 Ill. 549.

Louisiana. — *State v. Da Rocha*, 20 La. Ann. 356; *State v. Morgan*, 20 La. Ann. 442.

Nebraska. — *Brown v. State*, 9 Neb. 157.

North Carolina. — *State v. Douglass*, 63 N. Car. 500; *State v. Underwood*, 6 Ired. L. (N. Car.) 96.

Pennsylvania. — *McDermott v. Hoffman*, 70 Pa. St. 31.

Texas. — *Ray v. State*, 4 Tex. App. 450.

Definition. — A challenge to the array is an exception to the whole panel in which the jury are arrayed and set in

the states of the Union,¹ but other modes may be available by force of statutes, or otherwise, as by motion to set the panel aside² or by plea in abatement.³

b. GROUNDS — (1) *At Common Law*. — At common law a challenge to the array of jurors was an objection to all the jurors returned by the sheriff, collectively, and was founded on some partiality or default in the sheriff, or his under officer, or the clerk who arrayed the panel.⁴

order by the sheriff in his return. 3 Black. Com. 359.

A challenge to the array is an irregular form of pleading by which exception is made to all the jurors upon the venire for some original defect in making the return thereto. 1 Chitty's Crim. Law, 537.

Array Defined. — The array is the whole body of persons summoned to attend a court as they are arrayed or arranged on the panel. Com. Dig., Challenge, B.

Duty to Object to Disqualified Officer. — A party who knows of objection to a summoning officer at the time the latter receives the process should then object to him, and not wait until the return and make his challenge to the array. *Perry v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 618.

Challenging for Cause. — A challenge to the array cannot be considered under a challenge for cause. *People v. Wallace*, 101 Cal. 281.

1. See *Vanhook v. State*, 12 Tex. 252; *Cooley v. State*, 38 Tex. 636.

Civil Cases. — In *Settle v. Batic*, 1 Iowa 141, it was questioned whether a challenge to the array would lie in a civil case unless the right was conferred by statute.

Statutory Prohibition of Challenge. — By the *Texas Code Crim. Pro.*, art. 662, where a jury has been selected by commissioners, no challenge to the array is allowed. *McCamant v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 610; *Arnold v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 734.

Constitutionality of Statute. — A statutory prohibition of any challenge to the array of jurors selected by commissioners is not in contravention of the Constitution of the United States because precluding a person from challenging an array from which it is alleged negroes have been excluded, the state laws ignoring all considerations of race or color in the selection of jurymen. *Cavitt v. State*, 15 Tex. App. 190.

Legislative Power to Abrogate Right. — In *Hare v. State*, 4 How. (Miss.) 187, it was held that an act of the legislature abrogating the right to challenge the array, except in capital cases, for partiality or corruption in the summoning officer on special venire, and providing that no regular venire shall be quashed for any cause, was not an impairment of the right of trial by jury.

2. *Anderson v. State*, 5 Ark. 445; *Hurley v. State*, 29 Ark. 17.

Motion to Quash Tales. — Objections to the mode of summoning must be taken by motion to quash the tales — if the objection is only to the tales. *Stone v. People*, 3 Ill. 326; *Gropp v. People*, 67 Ill. 160.

3. *Brown v. State*, 9 Neb. 157.

In *Cooley v. State*, 38 Tex. 636, it was said that it is competent under the practice of some of the states to plead in abatement the want of qualification on the part of individual jurors, or even a plea in abatement may be urged against the array, but it was there said that this is not the practice in *Texas*.

4. *Connecticut*. — *State v. Bradley*, 48 Conn. 535.

Louisiana. — *State v. Kane*, 32 La. Ann. 999.

Maine. — *State v. Knight*, 43 Me. 11. *Massachusetts*. — *Com. v. Walsh*, 124 Mass. 32.

Mississippi. — *Woodsides v. State*, 2 How. (Miss.) 665.

Missouri. — *State v. Powers*, 136 Mo. 194.

New York. — *People v. M'Kay*, 18 Johns. (N. Y.) 212; *Gardner v. Turner*, 9 Johns. (N. Y.) 260; *Morgan v. Dyer*, 9 Johns. (N. Y.) 255; *Pringle v. Huse*, 1 Cow. (N. Y.) 432.

Pennsylvania. — *Munshower v. Patton*, 10 S. & R. (Pa.) 334.

Wisconsin. — *Conkey v. Northern Bank*, 6 Wis. 447.

United States. — *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434.

England. — *Rex v. Sheppard*, 1 Leach C. C. 101; *Rex v. Johnson*, 2 Stra. 1000.

(2) *Departure from Modes of Selection, Drawing, etc.* — In modern practice the grounds which will support a challenge to the array or an objection of a similar character usually embrace those recognized at the common law and those specially designated by statute, and it may be stated generally that objections to the array will be sustained for any material departure from the prescribed mode of selecting, listing, or drawing jurors.¹

See also 3 Black. Com. 358, 359; Co. Litt. 156, 158; 1 Archb. Pr. 204.

Selecting Instead of Drawing. — Challenge to the array will lie for default or misconduct on the part of the clerk in selecting instead of drawing trial jurors. *Pringle v. Huse*, 1 Cow. (N. Y.) 432.

1. *Freel v. State*, 21 Ark. 212; *Buford v. McGetchie*, 60 Iowa 298; *Gott v. Brigham*, 45 Mich. 424; *Gardner v. Turner*, 9 Johns. (N. Y.) 260; *State v. Speaks*, 94 N. Car. 865; *Turner v. U. S.*, 66 Fed. Rep. 280. And see *Friery v. People*, 54 Barb. (N. Y.) 319. See also *infra*, IX. 13. *Mandatory and Directory Statutes.*

Venire for Insufficient Number. — The issuance of a venire for fifteen jurors, instead of twenty-four as required by statute, is a "material departure" from the requirements of the statute which will require the quashing of the venire. *Baker v. The Steamboat Milwaukee*, 14 Iowa 214.

Making Up List. — A defect or violation of a statute in the manner in which the jury list is made up must be taken advantage of by challenge to the array, and not to the person of the juror. *McCloskey v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 308.

The Act of 1799 directing jury lists to be made from the tax returns once in every three years is purely directory to public officers in the discharge of their duty; and if they fail to discharge it, and the jury is drawn from the old list, it does not vitiate the array, nor is it cause of challenge to the polls. *State v. Massey*, 2 Hill L. (S. Car.) 379.

Right to Select from Invalid List. — A litigant cannot insist on drawing from a jury list known to be invalid, merely because some party to an action has not raised the question. *Smaltz v. Boyce*, (Mich. 1896) 69 N. W. Rep. 21. See *Robinson v. Mulder*, 81 Mich. 75.

Unless There Is a Palpable Disregard of the Statute relative to the selection and list of jurors, the array will not be quashed. *State v. Whisner*, 35 Kan.

271. See also *Atchison, etc., R. Co. v. Davis*, 34 Kan. 199; *State v. Jenkins*, 32 Kan. 477.

Selection by Disqualified Judge. — Objection to a jury selected by a judge disqualified to sit in the cause must be taken by a challenge to the panel, that the defect, if any, may be remedied by a special venire, and comes too late after verdict. *People v. Ah Lee Doon*, 97 Cal. 171.

Majority of Panel Qualified. — In *Niles v. Steere*, 102 Mich. 328, it was held that a challenge to the array upon the ground that the list was selected from the assessment roll of the year previous instead of that of the current year was properly overruled, when it appeared that a majority of the persons selected were admittedly qualified.

Power to Draw After Mistrial. — In *Woolfolk v. State*, 85 Ga. 69, at a term ordered for the purpose of trying the defendant, a jury was partially selected, and the remaining jurors were discharged for the term. Thereafter there was a mistrial, and talesmen in attendance were ordered by the court to return, and the sheriff was directed to summon the names of persons thereupon drawn from the box; and from those in attendance thereafter, two regular panels of jurors were impaneled, and the array put upon the prisoner. It was held that there was no impropriety in overruling a challenge to the array made on the ground that the judge had no power to draw the jurors at the time he did, and that the defendant, when again placed on trial, was entitled to have first put upon him the jurors drawn before the organization of the court, at the beginning of the term, who had been impaneled at that time.

Officer Acting under Color of Title. — A challenge to the array will not be sustained where the panel has been selected by a jury commissioner acting under color of appointment. *Thompson v. People*, 6 Hun (N. Y.) 135.

Selections by Wrong Officer. — A chal-

(3) *Bias, Partiality, etc., of Summoning Officer.* — A challenge to the array or panel will also lie for the bias, partiality, or irregular action of the summoning officer;¹ but where some of the persons named in the venire cannot be found the failure to summon all of them will not constitute a good ground of objection.²

lenge to the array will lie when the panel was not selected by the jury commissioners. *Anderson v. State*, 34 Tex. Crim. Rep. 96.

Failure to Show Injury. — A challenge to the array, merely alleging the failure of the assessor to revise the jury list and furnish a new list to the clerk of the court as designated by statute, is not a ground for reversal without some showing to the trial court that the challenger in some material way suffered injury. *Territory v. McFarlane*, 7 N. Mex. 421.

1. Employment of Attorney for Party. — That a constable who served a venire employed an attorney at the request of the defendant to appear for her on the trial will not support a challenge to the array. *Miles v. Pulver*, 3 Den. (N. Y.) 84.

Relationship to Party. — A challenge to the array for relationship of the summoning officer to one of the parties should be sustained. *Vanauken v. Beemer*, 4 N. J. L. 416.

Counsel for Party. — It is a cause of challenge to the array that the summoning officer was counsel for one of the parties. *Watkins v. Weaver*, 10 Johns. (N. Y.) 107.

Pleading for Party. — The fact that the constable who served a venire appeared for the defendant on the return of the summons, and pleaded, is not a ground of challenge to the array, where it does not appear that he performed any further act for the defendant. *Miles v. Pulver*, 3 Den. (N. Y.) 84.

Party to Cause. — It is a good ground of challenge to the array that the sheriff was a party to the cause in which he executed the venire. *Woods v. Rowan*, 5 Johns. (N. Y.) 133; *Cowgill v. Wood-en*, 2 Blackf. (Ind.) 332.

Under the Mississippi Act of 1836 no challenge to the array nor motion to quash the venire could be sustained for any cause except in capital cases, and then only for partiality or corruption of the summoning officer. *King v. State*, 5 How. (Miss.) 730.

In Texas, under Paschal's Digest, art. 3034, the only cause allowed as a challenge to the array was that the sum-

moning officer acted corruptly, and wilfully summoned persons upon the jury known to be prejudiced against the defendant, and with a view to cause him to be convicted. *Harris v. State*, 6 Tex. App. 97; *Swofford v. State*, 3 Tex. App. 88; *Williams v. State*, 44 Tex. 34; *Bowman v. State*, 41 Tex. 417.

The Intentional Omission of a Sheriff to summon a juror, duly drawn, is a good cause of challenge to the array, under the *Idaho Criminal Practice Act*, § 322. *People v. Armstrong*, 2 Idaho 275.

Summoning Members of Quashed Panel. — That the sheriff summoned jurors who had been drawn on a panel to which a challenge to the array had been sustained will not invalidate the new panel. *Arnold v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 734, citing *Anderson v. State*, 34 Tex. Crim. Rep. 96.

Failure to Summon from Body of County. — That jurors in a case arising under the laws of the United States were not summoned from the county in which the offense is alleged to have been committed is not a good ground of challenge to the array, but the fact that they were not taken from the body of the district is. *Beery v. U. S.*, 2 Colo. 186.

Objection to Mode of Summoning Talesmen. — The accused cannot object to the manner of summoning talesmen without showing improper conduct or partiality on the part of the sheriff or resultant injury to him. *State v. Kane*, 32 La. Ann. 999.

Extent of Bias. — Under the Criminal Practice Act of *California*, § 237, a challenge to the array would lie on account of any bias of the summoning officer which would be good ground of challenge to a juror. *People v. Coyodo*, 40 Cal. 586.

2. Inability to Find Venireman. — The fact that a juror whose name was drawn cannot be found is not a ground for quashing the venire. *Ezell v. State*, 102 Ala. 101.

Death and Removal. — In *State v. Fuller*, 114 N. Car. 885, there was held to be no error in refusing to quash the array because one of the persons named

(4) *Statutory Prescription.* — Where the grounds upon which a challenge to the array will be sustained are prescribed by statute, challenges for other causes will not, as a rule, be considered.¹ There are, however, various exceptions to this rule, as it is evident that causes may arise where the court, under its general powers, might quash the panel upon other than the statutory grounds.²

on the special venire had removed from the county and another was dead at the time the jury list had been revised by the county commissioners. *State v. Whitt*, 113 N. Car. 716, following *State v. Hensley*, 94 N. Car. 1024.

Objection on Appeal. — Objection that a full panel of jurors was not summoned cannot be raised for the first time on appeal, where the record shows that twelve good and lawful men were obtained. *State v. Klinger*, 46 Mo. 224.

Panel Composed in Part of Tales. — A challenge to the array will not lie where the panel consists of eleven regular jurors and one talesman, but if the party is not satisfied with filling up the jury with talesmen he can challenge the talesmen and compel a resort to the additional drawing authorized by statute. *Buford v. McGetchie*, 60 Iowa 298.

1. *People v. Wallace*, 101 Cal. 281; *Coker v. State*, 7 Tex. App. 83.

Objections to the Qualifications of jurors are not a ground of challenge to the array. *Bowman v. State*, 41 Tex. 417.

Race Distinction. — On trial of a colored man, it is not a ground of challenge to the array that the special venire was entirely composed of white persons, where there is no charge of corruption or unfairness made against the sheriff. *State v. Sloan*, 97 N. Car. 499.

Bias — Constitutionality of Statute. — A charge based upon the bias of the veniremen and the unconstitutionality of the law permitting them to be put upon the panel is not an objection to the panel. *State v. Raymond*, 11 Nev. 98.

Causes Other than Fraud. — Challenges to the array will not be sustained except for fraud, and then only to a special venire in a criminal case. *Rolls v. State*, 52 Miss. 391.

In the Absence of Fraud a motion to quash a general venire is unavailable. *State v. Saintes*, 46 La Ann. 547.

In North Carolina a challenge to the

array can only be taken for partiality in the summoning officer or some irregularity in making out the list. *State v. Speaks*, 94 N. Car. 865.

In Georgia, under the law existing before the adoption of the code (Clay's Digest 459, §§ 53, 54), a person indicted for a capital offense, if in actual confinement, was entitled to have a list of the jurors specially summoned for his trial, not including the regular jurors for the week or term, delivered to him two entire days before the trial; and if a copy of the entire venire, including both the jurors regularly and those specially summoned, was thus delivered to him, he could not have the whole venire quashed, nor refuse to proceed with his trial, on account of any defect in summoning one of the regular jurors. *Chaney v. State*, 31 Ala. 342.

Hearing Evidence on Trial of Persons Jointly Indicted. — An objection to an entire panel that all the jurors had heard the evidence adduced on the trial of others jointly indicted, and had formed an express opinion, etc., is properly overruled as a challenge to the array, though if good it might have been urged as a challenge to the polls. *Brown v. State*, 97 Ga. 215.

Hearing Part of Case. — The fact that jurors constituting the panel in attendance were in the court room during the argument for a continuance and heard part of the evidence proposed to be introduced in the case is not a ground of challenge to the array, but if a ground of challenge at all, it should be to the polls. *Jones v. State*, 90 Ga. 616.

2. Generally. — Challenges to the array are allowed for any cause going to show that the jury was not fairly or properly impaneled, or ought not to be put upon the panel. *Dumas v. State*, 65 Ga. 475.

Interference by Party. — Interference with the selection or return of the jury by either party to the cause is a good ground of challenge to the array. *McDonald v. Shaw*, 1 N. J. L. 6; *State v.*

(5) *Miscellaneous*. — The misnomer of veniremen usually will not be sufficient to sustain a challenge or like objection to the array,¹ nor will the panel be quashed because jurors were discharged therefrom and excused from further service during the term,² or because they were excused for causes not prescribed by statute.³

(6) *Cause Affecting Part of Panel*. — To be available, a challenge or objection to the array or panel must be for a cause which affects all the jurors alike,⁴ and not for a cause which goes to the competency or disqualification of an individual juror or a small portion of the entire panel.⁵

Johnson, 1 N. J. L. 253. See Boyles v. M'Eowen, 3 N. J. L. 253.

Deprivation of Right to Examine Jury List. — Where it is the evident intention of the statute that the person accused of crime shall have a prescribed time for the examination of the jury list, a challenge to the array will lie if the jury is drawn without affording him the time. *Powell v. People*, 5 Hun (N. Y.) 169, 63 N. Y. 88.

1. *Walker v. State*, 97 Ala. 85; *Gibson v. State*, 89 Ala. 121; *McKee v. State*, 82 Ala. 32; *Floyd v. State*, 55 Ala. 61; *Hubbard v. State*, 72 Ala. 164; *Jackson v. State*, 76 Ala. 26.

Initial of Middle Name. — Where J. F. M., who was served as J. R. M., the first and last name being similar, appeared and answered, as likewise did another whose name was J. R. M., it was held that the error in the rule of middle name was not a sufficient cause for challenge to the array. *Clawson v. State*, 59 N. J. L. 434.

Duplication of Name. — That the name of a venireman appeared twice on the original venire and on the list served, will not warrant the quashal of the array. *McKee v. State*, 82 Ala. 32.

Purging Panel. — The general jury law of *Alabama* provides that the venire shall not be quashed unless the court, in its discretion, is of opinion that the ends of justice so require; but the court must direct the names of such persons to be discarded, and others forthwith summoned to supply their places, etc. And under this statute the court in *Jackson v. State*, 76 Ala. 26, declined to interfere with the action below in reference to a juror summoned, and as to whose name there was a mistake.

Ohio. — By the Revised Statutes of Ohio, § 5175, a misnomer is no ground of challenge to the array.

2. *People v. Packenham*, 115 N. Y. 200.

3. *Fulton County v. Amorous*, 89 Ga. 614.

4. *State v. Hogan*, 67 Conn. 581; *State v. Cartright*, 20 W. Va. 32.

5. *Fields v. State*, 52 Ala. 348; *Birdsong v. State*, 47 Ala. 68; *Com. v. Walsh*, 124 Mass. 32; *Foust v. Com.*, 33 Pa. St. 338; *Woodside v. State*, 2 How. (Miss.) 655; *Veramendi v. Hutchins*, 56 Tex. 414; *Mitchell v. State*, 43 Tex. 513. See also 6 Dane Abr. 535.

A Matter of Challenge Confined to Four Jurors is not broad enough to vitiate the array. *Blackman v. State*, 80 Ga. 785.

Jurors Not Drawn for Term. — It is not a good ground of challenge to the array that a portion of the jurors on the panel were not drawn to serve for the week in which the panel was made up. *Fulton County v. Amorous*, 89 Ga. 614.

Members of Quashed Panel. — The fact that a few persons summoned on a special venire had also been summoned on a prior venire, which had been quashed for irregularity in drawing, is not a ground of challenge to the panel, but objections, if any, should be presented to the individual jurors. *People v. Vincent*, 95 Cal. 425.

Prior Service on Trial for Same Offense. — That the venire served included the names of persons who served upon a jury in the case of a person jointly indicted with the defendant, is not a ground for quashing the venire. *Woodley v. State*, 103 Ala. 23.

"It is no cause of challenge to the array, that twelve out of the eighteen jurors constituting the array had just served as a jury for the trial of another person indicted for a like offense growing out of the same transaction involved in the pending indictment against the accused, that a verdict of guilty was rendered in that case, and that the witnesses and the evidence in the present case would be the same as they were in the former. If the matter

c. TIME OF INTERPOSITION. — The time when objections or challenges to the array are required to be made is sometimes prescribed by statute, and when so prescribed it is necessary that there should be a compliance therewith;¹ but independently of statutes, all objections of this character should be timely.² Hence a motion to quash the array must be made as soon as the facts which warrant it become known,³ and it is generally held that the challenge or objection must be interposed before entering on the formation of the jury,⁴ before the interposition of challenges to the polls,⁵ before the jury has been completed or

of the challenge was good at all, it would not set aside the panel, but would be available only by challenges to the polls." *Schnell v. State*, 92 Ga. 459.

On Trial of Same Defendant. — A challenge to the array will not lie because the jury previously tried a similar issue against the same defendant; the challenge should be to the polls. *Baker v. Harris*, 1 Winst. L. (N. Car.) 277.

On Trial for Similar Offense. — That the array of jurors heard and tried a case against another party charged with an offense of the same character, was not a ground of challenge to the array. *Anderson v. State*, 34 Tex. Crim. Rep. 96; *Staley v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 272.

Purging Panel. — The court may purge a panel without sustaining a challenge to the array. *Dolan v. People*, 64 N. Y. 485; *Atchison, etc. R. Co. v. Davis*, 34 Kan. 199, *distinguishing* *State v. Jenkins*, 32 Kan. 477.

1. *Woodard v. State*, 9 Tex. App. 412.

In Louisiana all the objections to the manner of drawing jurors, or to any defect or irregularity that can be pleaded against any array or venire, must be urged on the first day of the term. *State v. Thomas*, 32 La. Ann. 349; *State v. Given*, 32 La. Ann. 782; *State v. Coudler*, 36 La. Ann. 291; *State v. Pruett*, 49 La. Ann. 283; *State v. Collins*, 48 La. Ann. 1454. To allow it to be heard thereafter, exceptional circumstances must be shown, *State v. Ashworth*, 41 La. Ann. 683; though circumstances may exist which will authorize relief from the effect of the failure to take the objection at the statutory time. *State v. Simmons*, 43 La. Ann. 991; *State v. Sterling*, 41 La. Ann. 680; *State v. Strickland*, 41 La. Ann. 513; *State v. Vance*, 31 La. Ann. 398.

Before Swearing Jury. — In *Myers v. Com.*, 90 Va. 785, a statute requiring objection to a venire to be made before the qualification of the jury by oath was held inapplicable to a criminal proceeding in which there was a total absence of venire.

Statutory Curtailment of Time. — By a statute in existence at the time of the alleged commission of the crime, forty-eight hours were allowed a defendant in which to make his challenge, but by a later statute the time was cut down to twenty-four hours (Laws 1889, § 165), and it was held that the act was not *ex post facto* and as such in conflict with the provisions of the Constitution of the United States. *State v. Taylor*, 134 Mo. 109.

2. *McMahon v. State*, 17 Tex. App. 321; *Caldwell v. State*, 12 Tex. App. 302; *Jones v. State*, 37 Tex. Crim. Rep. 433.

Before Announcing "Ready." — A motion to quash a venire is properly made before the defendant has been called upon to announce as to his readiness for trial. *Peters v. State*, 100 Ala. 10.

Objection After Plea. — After the accused has pleaded to the indictment, it is too late to object that the jury were not legally summoned. *Brown v. State*, 9 Neb. 157.

Before Drawing from Box. — Under the provisions relative to the striking out of jurors, parties may challenge the arrays or the polls and have their cause of challenge heard and determined before the list is drawn from the box. *Hamlin v. State*, 67 Md. 333.

3. *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. St. 521; *Wallace v. Jameson*, 179 Pa. St. 98.

4. *Mueller v. Rebhan*, 94 Ill. 147; *Jackson v. State*, 4 Tex. App. 292.

5. *California*. — *People v. Roberts*, 6 Cal. 214.

Illinois. — *Gropp v. People*, 67 Ill. 154.

made up¹ or has been sworn,² before entering on the trial,³ and it is certainly too late after trial and verdict,⁴ or on

Iowa. — *State v. Bryan*, 40 Iowa 379; *State v. Davis*, 41 Iowa 311.

Kansas. — *State v. Wright*, 45 Kan. 136; *State v. Egle*, 45 Kan. 138.

Missouri. — *State v. Clark*, 121 Mo. 500; *State v. Taylor*, 134 Mo. 109.

Nevada. — *State v. Davis*, 14 Nev. 448. *New York*. — *People v. M'Kay*, 18 Johns. (N. Y.) 212.

Texas. — *Cooley v. State*, 38 Tex. 636. See also Co. Litt. 158; Bac. Abr., tit. Juries, (E) 11; Whart. Cr. Pl. and Pr. (9th ed.), § 610.

Challenge to the array must be first in the order of challenges, then the challenges to the polls. *New York v. Mason*, 4 E. D. Smith (N. Y.) 143.

Before Challenges to Polls and Before Returned. — A challenge to the array because of the impartiality of the summoning officer comes in time when made before challenge to the polls by the other side and before the officer has made a return of the venire. *State v. Powers*, 136 Mo. 194.

Challenge to Array Based on Objection to Individual Jurors. — In *State v. Clark*, 121 Mo. 500, the first challenge to the array which was one in form was based on objections to four individuals of the jury, for the reason that they were over the age limit. It was held that this was a challenge to the polls, and as such it precluded the defendant from thereafter challenging the array.

Waiver of Inherent Fatal Objection. — The exercise of the right to challenge for cause and peremptorily is not a waiver of an inherent and fatal objection to the entire panel. *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434.

Waiver of Challenges to the Polls. — A waiver of peremptory challenges and challenges for cause is a waiver of a challenge to the array previously made. *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139.

1. After a trial jury is made up, it cannot be objected by way of motion to quash or to set aside the panel that an incompetent juror was on the trial, or that during the formation of the jury persons were put upon the defendant who were not on the legal jury list. *Eberhart v. State*, 47 Ga. 598.

2. *St. Louis, etc., R. Co. v. Casner*, 72 Ill. 384; *Gropp v. People*, 67 Ill. 154; *New York v. Mason*, 4 E. D. Smith (N. Y.) 142; *Salisbury v. McClaskey*, 26

Hun (N. Y.) 262; *Ayres v. Hammondsport*, (Supreme Ct.) 11 N. Y. St. Rep. 706; *McDermott v. Hoffman*, 70 Pa. St. 31.

3. Objection that the names of some of the jurors who served did not appear on the venire or list drawn must be made before the trial is gone into. *State v. Turner*, 25 La. Ann. 573.

Announcement of Readiness by One Party. — A motion by defendant to quash the venire is not too late when made after overruling a demurrer to the indictment, a plea of not guilty, and an announcement of readiness for trial by the prosecution, but before a similar announcement by the defendant. *Peters v. State*, 100 Ala. 10.

4. *Alabama*. — *Martin v. State*, 77 Ala. 1.

Arkansas. — *Freel v. State*, 21 Ark. 213; *Brown v. State*, 12 Ark. 623.

Colorado. — *Solander v. People*, 2 Colo. 48.

Kentucky. — *Kennedy v. Com.*, 14 Bush (Ky.) 340.

Louisiana. — *Vidal v. Thompson*, 11 Martin (La.) 23.

Maine. — *Walker v. Green*, 3 Me. 215.

Massachusetts. — *Amherst v. Hadley*, 1 Pick. (Mass.) 38.

Michigan. — *Robinson v. Mulder*, 81 Mich. 75.

Minnesota. — *Steele v. Maloney*, 1 Minn. 347.

Missouri. — *Samuels v. State*, 3 Mo. 68; *State v. Marshall*, 36 Mo. 400; *State v. Sansone*, 116 Mo. 1; *State v. Waters*, 62 Mo. 197; *State v. Klinger*, 46 Mo. 224; *State v. Gilmore*, 95 Mo. 554; *State v. Smith*, 114 Mo. 406; *State v. Jones*, 61 Mo. 232; *State v. Ward*, 74 Mo. 253; *State v. Collins*, 86 Mo. 245.

New Mexico. — *Territory v. Abeita*, 1 N. Mex. 545.

New York. — *Bergmann v. Wolff*, (Buffalo Super. Ct.) 11 N. Y. Supp. 591; *Goodman v. Goetz*, (C. Pl.) 36 N. Y. St. Rep. 731.

North Carolina. — *State v. Boon*, 82 N. Car. 637; *State v. Douglass*, 63 N. Car. 500; *State v. Underwood*, 6 Ired. L. (N. Car.) 96.

United States. — See *Turner v. U. S.*, 66 Fed. Rep. 280.

In Arrest. — Where the defect appears on the record it may be the subject of a motion in arrest, though not previously objected to, as where the defect

motion for a new trial.¹

d. WAIVER OF RIGHT OF CHALLENGE. — All irregularities which will vitiate the array will be deemed waived by the omission to call attention to them by challenge or other proper objection,² or by withdrawal or abandonment of a challenge previously interposed.³

e. FORM AND SUFFICIENCY — (1) *Written Challenge.* — At common law a challenge to the array was required to be in writing, and where this requirement has not been abrogated by statute the rule of the common law is still in force.⁴

(2) *Specificity.* — A challenge or objection to the panel should be specific, and should sufficiently point out the ground or

is in the venire. *State v. Stephens*, 11 S. Car. 319; *State v. Dozier*, 2 Spears L. (S. Car.) 211; *State v. Williams*, 1 Rich. L. (S. Car.) 188.

1. *Vierling v. Chas. G. Stifel Brewing Co.*, 15 Mo. App. 125; *State v. Underwood*, 6 Ired. L. (N. Car.) 96; *Ray v. State*, 4 Tex. App. 450; *Yanez v. State*, 6 Tex. App. 429; *Buie v. State*, 1 Tex. App. 452.

Exceptions on Motion for New Trial. — Where no objection is made or exception saved as to the method of summoning and impaneling the jury, it is too late to do this for the first time on motion for a new trial. *State v. Smith*, 114 Mo. 406; *State v. Waters*, 62 Mo. 197; *State v. Klinger*, 46 Mo. 224; *State v. Gilmore*, 95 Mo. 554; *Stone v. People*, 3 Ill. 328.

2. *Gropp v. People*, 67 Ill. 154; *Robinson v. Mulder*, 81 Mich. 75; *Brown v. State*, 9 Neb. 157.

Consent. — A challenge to the array on account of alleged irregularity may be waived by the act of the party in consenting to the array. *Watkins v. Waver*, 10 Johns. (N. Y.) 107.

Where, eleven jurors only having been procured out of the panel, the remaining juror was selected from a panel of twelve taken from those remaining on the list, the defendant's counsel expressing his willingness to that course, there was held to be a waiver of the array, especially as no demand for the array was made, no cause of challenge thereto intimated, and no statement made denying the waiver. *Inman v. State*, 72 Ga. 269, *distinguishing* *Cochran v. State*, 62 Ga. 731.

3. *Abandonment.* — In *Cox v. People*, 80 N. Y. 500, a challenge to the array was at first overruled. The jurors were called, and three took their places, but were not sworn. Subsequently, and

before the swearing of the jury, the court announced that it would allow the prisoner to renew the challenge, but would try the issue raised by a traverse, and let the jurors in the box stand aside. The district attorney then offered to traverse the facts alleged in the challenge, and consented that the jurors should stand aside, but counsel for the prisoner declined the offer, and insisted upon going to trial, whereupon the jury was completed, two of the jurors being selected from the panel to which the challenge had been interposed. It was held that, assuming the challenge to have been good, the prisoner by his course had precluded himself from insisting upon his exception to the rule, and would be regarded as having abandoned the challenge. See also *Pierson v. People*, 79 N. Y. 424.

4. *California.* — *People v. Brown*, 48 Cal. 253.

Iowa. — *State v. Davis*, 41 Iowa 311. *Maine.* — *State v. Knight*, 43 Me. 110.

Michigan. — *People v. Doe*, 1 Mich. 451; *Ryder v. People*, 38 Mich. 269.

Missouri. — *State v. Taylor*, 134 Mo. 109; *People v. Clark*, 121 Mo. 500.

New York. — *People v. M'Kay*, 18 Johns. (N. Y.) 218; *Cox v. People*, 80 N. Y. 500.

Texas. — *Cooley v. State*, 38 Tex. 636; *Perry v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 618; *Jackson v. State*, 4 Tex. App. 292.

See also 1 Chitty's Crim. Law 546; 2 Tidd's Pr. 851.

An Amended Written Challenge to the array is a substitute for the original. *People v. Brown*, 48 Cal. 253.

By the Washington Code Pro., § 1300, a challenge to the array must be in writing, sworn to, and proved. See *State v. Payne*, 6 Wash. 564.

grounds relied on by the complaining party, that the court may not be compelled to consider matters as to which no real cause of complaint exists.¹

f. **SUPPORT OF CHALLENGE.** — A challenge or objection to the array or panel must be supported by proof of the irregularity charged.²

1. *People v. Collins*, 105 Cal. 504; *Mann v. Glover*, 14 N. J. L. 195; *Conkey v. Northern Bank*, 6 Wis. 447; *Perry v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 618.

Particularizing the Default or Partiality. — A challenge to the array relates to the acts of the summoning officer, and should charge him with a particular default or partiality in arraying the panel. *Woodside v. State*, 2 How. (Miss.) 665.

Sufficiency of Specification. — A challenge on the ground that the jurors "were not ordered, drawn, or summoned, according to law, in this: that they were summoned under an open venire, and without any necessity existing for not drawing or summoning the jury herein in the regular way," is too general, and unless there is something to show that the court abused its discretion the appellate court will not interfere. *State v. Angelo*, 18 Nev. 425.

An Objection to Each and Every Juror drawn is a challenge to the panel, and not to the individual jurors. *State v. Dale*, 8 Oregon 229.

Following Statutory Requirements. — Under a statute authorizing challenges to the panel, it was held that a challenge to the "array" was not sufficient as a challenge to the panel. *State v. Davis*, 41 Iowa 311.

Invalidity of Precept. — Where a challenge to the array is made on the ground that no legal precept had been issued or served, the challenge is properly overruled where there is no showing as to what sort of precept had been issued and served, or that there had been none in fact. *Williams v. State*, 69 Ga. 11.

Separation of Distinct Causes of Challenge. — Under a statute authorizing a challenge to the panel founded on a material departure from the facts described in respect to the drawing and return of the jury, or upon the intentional omission of the sheriff to summon jurors drawn, or upon bias of the summoning officer on an open venire, the separate causes of challenge should be taken separately, and the challenge

should show on its face whether it was taken for implied or actual bias. *State v. Gray*, 19 Nev. 212.

Apparent Defect. — Where the defect in a writ is apparent on its face, on motion to quash the error need not be specified. *Wash. v. Com.*, 16 Gratt. (Va.) 530.

2. *Borrelli v. People*, 164 Ill. 549; *State v. Rigg*, 10 Nev. 284; *State v. Cameron*, 2 Pin. (Wis.) 490; 2 Chand. (Wis.) 172.

Necessity of Proof. — In a criminal trial a challenge to the array is not within a statutory provision that no plea in abatement or other dilatory plea to an indictment shall be received unless the truth thereof be proven. *Cox v. People*, 80 N. Y. 500.

Information and Belief. — An affidavit on a motion to quash a venire which alleges facts generally on information and belief should be supported by proof. *Savage v. State*, 18 Fla. 909.

Who May Prove — *Texas.* — Under the Texas Code of Criminal Procedure the challenge must be supported by the affidavit of the challenging party or of some credible person. *Perry v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 618.

Requirements of Affidavit. — In Texas, under the provisions of the Code of Criminal Procedure (arts. 661, 663), where the array is challenged on the ground that improper persons were summoned, it must be stated under oath that the summoning officer acted corruptly and wilfully summoned persons known to be prejudiced against the defendant and with the view of causing him to be convicted. *Arnold v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 734.

Incorporation of Affidavit in Challenge. — The challenging party cannot incorporate his affidavit into a written challenge to the array, and thus make it evidence of facts averred in the challenge. *People v. Brown*, 48 Cal. 253.

Irregularities Must Appear of Record. — Irregularities in the mode of summoning a jury cannot be shown by affidavit of the objectant, but must be shown by

g. EFFECT OF SUSTAINING OR OVERRULING CHALLENGE. — On sustaining a challenge to the array it is proper to discharge all the jurors drawn for the term, and the challenging party is estopped from complaining of the action of the court in this respect;¹ and it has been held that a plaintiff is not chargeable with default in not proceeding to trial where he has interposed a valid challenge to the array which has been overruled.²

7. Challenges for Cause — a. OBJECT AND RIGHT OF CHALLENGE. — The purpose of allowing challenges for cause is to secure a fair and impartial trial,³ and for that reason they are usually considered as of right,⁴ in civil actions as well as in the

the record. *Roberts v. Com.*, 94 Ky. 499.

1. *Muscoe v. Com.*, 87 Va. 463; *Robinson v. Mulder*, 81 Mich. 75.

Erroneous Discharge — Rights of Other Litigants. — Where a motion to discharge a jury because of the disqualification of one of the officers who acted in the drawing is not made within the time prescribed by statute, and is erroneously granted, a party other than the movant may insist on a trial by the regular jury, and cannot be compelled to go to trial before a new jury, summoned after the discharge of the regular jury. *Hight v. Langdon*, 53 Ind. 81.

Error in Directing Talesmen to be called from a particular part of the county is cured by vacating the order, on the defendant's objection, quashing the panel, and directing a new drawing from the body of the county. *Smith v. State*, 4 Neb. 277.

2. *Morgan v. Dyer*, 9 Johns. (N. Y.) 255.

3. *Waters v. State*, 51 Md. 430; *Birdsong v. State*, 47 Ala. 68.

4. *Holton v. Hendley*, 75 Ga. 847; *Boles v. State*, 13 Smed. & M. (Miss.) 393.

Right Common. — The right to challenge for cause is common to both parties, and the court must judge of the sufficiency of the cause assigned. *Cooley v. State*, 38 Tex. 636; *Pierson v. State*, 21 Tex. App. 14; *Washington v. State*, 19 Tex. App. 524; and see *Mason v. State*, 15 Tex. App. 534.

Challenges for Actual Bias are of right. *State v. McClear*, 11 Nev. 39.

Legislative Control — Actual Bias. — The legislature cannot deprive one accused of crime of the right of challenge for actual bias. *State v. McClear*, 11 Nev. 39.

Implied Bias. — "The right to chal-

lenge for implied bias for having formed or expressed an opinion upon the guilt or innocence of defendant may, to some extent, be regulated by the legislature, care being always taken to preserve inviolate the right of trial by a jury of twelve impartial men." *State v. McClear*, 11 Nev. 39.

A statute taking away a right to challenge for implied bias is not unconstitutional because impairing the right of trial by jury. *People v. Ah Lee Doon*, 97 Cal. 171.

Special Venire. — In capital cases the accused has the right to select a jury from the list of those summoned on special venire furnished him, so far as proper for him to do so, by exercising his right of challenge. *Boles v. State*, 24 Miss. 445.

Right Before Striking from List. — In civil cases in *Kentucky*, under a statute relative to procuring a jury by striking from the lists until a jury of twelve is obtained, before either of the party can be required to strike he is entitled to challenge any juror on the list for cause and have others drawn competent to try the case. *London, etc., F. Ins. Co. v. Rufer*, 89 Ky. 525. See also *Dothard v. Benson*, 72 Ala. 541.

Power of United States Courts to Make Rules. — In *U. S. v. Shackelford*, 18 How. (U. S.) 588, it was held that the Act of July 20, 1840 (Rev. Stat. U. S. § 800), empowered the federal courts to make rules regulating the challenges of jurors, though some doubts had been expressed previously on the subject in the Circuit Courts.

A Spiritual Court is not compelled to observe the rules of law as to the challenging of jurors. *Chase v. Cheney*, 58 Ill. 509.

A Party Is Not Obligated to Tender His Challenge Twice, but when once presented the court should try it unless

trial of criminal causes,¹ and are available to either party.²

b. CLASSIFICATION. — At common law challenges to the polls were divided into two classes, challenges for cause and peremptory challenges, and were exceptions to particular jurors. Challenges for cause were again divided into challenges for principal cause and challenges to the favor.³

A Principal Cause of challenge to a juror is one founded upon such a state of facts as will authorize a presumption of the existence of such a bias, prejudice, or incompetency as absolutely to disqualify the person to act as an impartial juror in the particular case.⁴

Challenges to the Favor are proper where the matter shown does not demonstrate *per se* unindifference of the juror, but only excites a suspicion thereof, and leaves it as a matter of fact to be found or not found upon evidence.⁵

The Distinction between principal challenges and challenges to the favor has been practically abolished in most of the states, except as to the mode of trying them, the former being considered matters exclusively for the consideration of the judge, and the latter matters for triers or for the court sitting as a trier.⁶

c. GROUNDS — (1) *At Common Law.* — At common law the grounds which would justify a challenge for cause were various and not subject to precise definition. As before stated, the ground for principal challenge was one from which bias or partiality might be inferred as a logical conclusion, while the ground of challenge to the favor was some probable suspicion of

trial is explicitly waived. *Meeker v. Potter*, 5 N. J. L. 678.

1. *Boileau v. Life Ins. Co.*, 9 Phila. (Pa.) 218.

2. *State v. Knight*, 43 Me. 11.

Trial on Joint Indictment. — In criminal cases, if several persons be tried on a joint indictment by the same jury, each has a separate and independent right to his challenges, whether peremptory or for cause. *People v. Welmer*, (Mich. 1896) 68 N. W. Rep. 141; *Bixbee v. State*, 6 Ohio 86; *Mahan v. State*, 10 Ohio 233; *State v. Durein*, 29 Kan. 688.

Two of three persons jointly on trial cannot complain of the action of the court in rejecting a juror because not indifferent as to the other defendant. *State v. Prater*, 26 S. Car. 198.

Self-challenge. — A juror cannot challenge himself. *Den v. Pissant*, 1 N. J. L. 254. See also *U. S. v. Cornell*, 2 Mason (U. S.) 106.

3. *Milan v. State*, 24 Ark. 348; *Dumas v. State*, 65 Ga. 475; *State v. Howard*, 17 N. H. 171; *People v. Mal-*

lon, 3 Lans. (N. Y.) 224; *Schoeffler v. State*, 3 Wis. 823; 1 Chitty's Crim. Law, 518.

For a discussion of peremptory challenges see *infra*.

Coke's Classification. — Challenges to the polls *su capita* are exceptions to the particular jurors; these were reduced to four heads by Sir Edward Coke; *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*. 3 Black. Com. 361.

4. *Jefferson County v. Lewis*, 20 Fla. 980; *State v. Howard*, 17 N. H. 171; *People v. Bodine*, 1 Den. (N. Y.) 281; *Stagner v. State*, 9 Tex. App. 440; *Schoeffler v. State*, 3 Wis. 823.

5. *State v. Potter*, 18 Conn. 166; *People v. Bodine*, 1 Den. (N. Y.) 307; *State v. Benton*, 2 Dev. & B. L. (N. Car.) 212; *Schoeffler v. State*, 3 Wis. 823; 3 Black. Com. 363.

6. *Stephens v. People*, 38 Mich. 739; *Holt v. People*, 13 Mich. 224. And see *Thomas v. People*, 67 N. Y. 218.

See *infra*, IX. 8. *Examination and Trial of Challenges.*

bias or partiality.¹

(2) *Formation and Expression of Opinion.* — The formation and expression of an opinion relative to the merits of the case, or to the guilt or innocence of one accused of crime, is a well-recognized ground of challenge,² which, however, can be urged only by the party against whom it was formed and expressed.³ Where the common-law distinction as to challenges for cause is still preserved, if the opinion is fixed, definite, and unconditional the challenge will lie for principal cause,⁴ but if the opinion is

1. **Blackstone's Statement.** — "A principal challenge is such where the cause assigned carries with it *prima facie*, evident marks of suspicion, either of malice or favor; as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him; all these are principal causes of challenge which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges to the favor are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance and the like, the validity of which must be left to the determination of triers, whose office is to decide whether the juror be favorable or unfavorable." 3 Black. Com. 363.

General Discussion. — "Among the various matters which, at common law, were held to be principal cause of challenge, that is, cause from which bias or partiality would be inferred as a logical conclusion, were these: consanguinity or affinity of the juror with either of the parties within the ninth degree; that the juror was godfather to the child of either party, or *e converso*; that the juror was of the same society or corporation with either party; or was tenant or 'within the distress' of either party; or had an action implying malice depending between him and either party; or was master, servant, counsellor, steward, or attorney for either party; or after he was returned, he ate and drank at the expense of either party; or had been chosen as arbitrator by either party. By most of the authorities it was held to be ground of principal

challenge that the juror had formed and declared his opinion touching the matter in controversy. * * * According to these authorities and others like them, where the matter alleged was held to be ground for principal challenge, all the challenging party was called upon to do was to prove the existence of the fact alleged by him as a ground of challenge, and that being shown, the incompetency of the juror followed as a necessary legal consequence, and in such case no inquiry was permitted as to whether, notwithstanding the fact shown, he could sit as a juror and render a fair and impartial verdict. The law, from the fact proved, conclusively presumed bias, and permitted no further inquiry." Coughlin v. People, 144 Ill. 164.

2. Trimble v. State, 2 Greene (Iowa) 404; Com. v. Knapp, 9 Pick. (Mass.) 499; Com. v. Ruzzell, 16 Pick. (Mass.) 153; Blake v. Millspaugh, 1 Johns. (N. Y.) 316; Pringle v. Huse, 1 Cow. (N. Y.) 432; People v. Rathbun, 21 Wend. (N. Y.) 542; People v. Bodine, 1 Den. (N. Y.) 281; State v. Benton, 2 Dev. & B. L. (N. Car.) 196.

Voluntary Attempt at Disqualification. — If a juror who has been summoned voluntarily forms and delivers an opinion with a view of disqualifying himself for service as a juror, it is a contempt of court. U. S. v. Devaughan, 3 Cranch (C. C.) 84.

3. State v. Bill, 15 La. Ann. 114; State v. Bunger, 14 La. Ann. 465; State v. Benton, 2 Dev. & B. L. (N. Car.) 196.

4. State v. Williams, 3 Stew. (Ala.) 454; People v. Rathbun, 21 Wend. (N. Y.) 509; Stout v. People, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 71.

The Fact that a Juror Had Expressed an Opinion respecting a cause, before he was summoned, is not necessarily a ground of principal challenge; but if the evidence adduced shows also malice, ill will, interest, or a fixed opinion or determination, this raises a legal

merely hypothetical and indefinite the challenge will lie to the favor.¹

(3) *Bias or Partiality*. — Bias or partiality of the juror is a good cause of challenge, the mere suspicion thereof warranting no more than a challenge to the favor,² but the existence of bias or prejudice against crime will not constitute a ground of challenge.³

(4) *Relationship*. — Relationship of a venireman to a party by blood or by affinity within proscribed degrees was at common law

presumption against the indifference of the juror. In other cases the court, in its discretion, may inquire under what circumstances the opinion was expressed, and upon such inquiry determine whether the juror stands indifferent. If unexplained, the expression of an opinion is sufficient to set him aside. *State v. Howard*, 17 N. H. 171.

1. *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 71; *Pringle v. Huse*, 1 Cow. (N. Y.) 436; *People v. Bodine*, 1 Den. (N. Y.) 281; *State v. Benton*, 2 Dev. & B. L. (N. Car.) 196.

Right to Challenge. — A statutory provision that an opinion or impression as to the guilt or innocence of a prisoner, or the expression of the same, shall not be a sufficient ground of challenge for proper cause, will not affect the right to challenge for favor upon those grounds. *Thomas v. People*, 67 N. Y. 218.

2. *Courtwright v. Strickler*, 37 Iowa 382; *Jones v. Butterworth*, 3 N. J. L. 48.

Supposed Interest in Case. — It is not error that the challenge of a juror for cause was allowed upon its appearing that he was interested in the result of the trial, although it became manifest in the further progress of the trial that the juror had no interest. *Silvis v. Ely*, 3 W. & S. (Pa.) 420.

Adverse Interest to Opposing Party. — It is not a ground of challenge by one party that a juror has an adverse interest to that of the other party. Thus it is not a ground of challenge by a defendant which is a municipal corporation, that a proposed juror is a taxpayer, and may ultimately be compelled to contribute to the payment of any judgment recovered, etc. *Conklin v. Keokuk*, 73 Iowa 343; and see *Hollenbeck v. Marshalltown*, 62 Iowa 24.

Partial Knowledge of Facts of Case. — The fact that a juror was present at the examination of an officer as to the efforts of the latter to secure the pres-

ence of witnesses will not incapacitate the juror from sitting in the case. *Com. v. Reid*, 8 Phila. (Pa.) 385.

That certain jurors heard the evidence on a motion for a change of venue, is not a ground for excluding them from the panel. *State v. Wisdom*, 84 Mo. 177.

Landlord and Tenant. — It has always been considered a principal cause of challenge to a juror that he is the tenant of either of the parties to the suit. *Hathaway v. Helmer*, 25 Barb. (N. Y.) 29.

Bail for Prisoner. — It is a good objection to a talesman who is called as a juror that he is bail for the prisoner's appearance. *People v. M'Collister*, 1 Wheel. Cr. Cas. (N. Y.) 391.

Juror as Witness. — That the juror was summoned as a witness by the prisoner, is a principal cause of challenge. *Com. v. Joliffe*, 7 Watts (Pa.) 585.

A Venireman Who Has Bet on the Result is properly set aside on challenge. *Cluverius v. Com.*, 81 Va. 787.

Prejudice Against Theatricals. — In an action by theatrical manager for alleged libel concerning the characterization of the performance, the fact that a juror states that he is opposed to theatrical representations is not a ground of challenge for principal cause, but only of challenge to the favor. *Maretszek v. Cauldwell*, 5 Robt. (N. Y.) 660.

When a Principal Cause of Challenge. — A challenge on the ground that the juror entertains and has manifested a strong bias and prejudice against the defendant is a principal challenge and not a challenge to the favor. *Mann v. Glover*, 14 N. J. L. 195; *People v. Allen*, 43 N. Y. 28.

3. *Davis v. Hunter*, 7 Ala. 135; *Williams v. State*, 3 Ga. 453; *Albrecht v. Walker*, 73 Ill. 69; *Kroer v. People*, 78 Ill. 294; *State v. Burns*, 85 Mo. 47.

cause of principal challenge, and still is a good ground of challenge.¹ The mere acquaintance, however, of a venireman with counsel is not a ground of challenge for cause,² though business relations with him may be;³ but in the absence of a statutory provision prescribing relationship of a juror to the prosecuting attorney as a ground of challenge, the court will not disturb a conviction in a case wherein such conditions existed.⁴

(5) *Participation in Former Trial.* — It is also a good cause of challenge that a person acted as a juror on a former trial of the same cause.⁵ The mere fact, however, that a juror attended at a former trial is not of itself a good objection, if he did not participate in the finding of a verdict.⁶

Joint Indictment. — It is considered, however, that the fact that a venireman served on the trial of a person jointly indicted for the same offense will constitute a good probable cause of challenge, or at least furnish a good reason for trying the matter of his indifference.⁷

1. Trullinger v. Webb, 3 Ind. 198; Stevenson v. Stiles, 3 N. J. L. 310.

If All the Jurors Were of Affinity to a party, it was not a ground of challenge to the array, but only of challenges to the polls. 2 Roll. Abr. 638. See Com. v. Walsh, 124 Mass. 32.

Refusal to Consent to Discharge of Juror Sworn. — In Spong v. Leshner, 1 Yeates (Pa.) 326, it was held, the verdict appearing to be just, that a new trial should not be granted to the defendant for the reason that, a brother-in-law of one of the plaintiffs having been sworn as a juror, upon discovery of the fact he was not discharged by the court, it appearing, however, that the plaintiff agreed to waive the juror if the defendant would consent to substitute another in his stead, but this consent was not given.

2. Vojta v. Pelikan, 15 Mo. App. 471. *Boarding with Counsel.* — The fact that a juror boarded with counsel will not tend to disqualify him. Statham v. State, 84 Ga. 17. *Distinguishing* Walker v. Walker, 11 Ga. 203; Walker v. Hunter, 17 Ga. 364; Springer v. State, 34 Ga. 379.

3. *Deputy of Prosecuting Attorney.* — That the juror is the deputy of the prosecuting attorney, is a good ground. Block v. State, 100 Ind. 357.

4. People v. Waller, 70 Mich. 237. 5. Freeman v. Wall, 3 Luz. L. Reg. (Pa.) 33.

Partial Trial. — The fact that one was a juror upon a former, although merely partial, trial of the cause incapacitates

him as a juror. Weeks v. Medler, 20 Kan. 57.

6. *Juror Excused.* — There is no objection to a conviction because the defendants were compelled to challenge peremptorily a juror who had been called on the previous trial of the case but who did not sit, having been excused. Carthaus v. State, 78 Wis. 560.

Jurors Rejected. — That jurors at a previous trial on the same indictment were rejected by the defendant, is not a ground of challenge to the polls. Blackman v. State, 80 Ga. 785; State v. Henley, R. M. Charl. (Ga.) 505.

Disagreement of Former Jury. — In the absence of any showing that a juror was prejudiced or biased, there is no error in refusing to set him aside, after he has been regularly impaneled and sworn, because he previously sat in the same cause, wherein the jury disagreed. Whitner v. Hamlin, 12 Fla. 18.

Former Witness. — It is not a good ground of challenge that a juror has been called as witness for the state on a former trial of the same indictment to testify against the general character of the prisoner. Fellow's Case, 5 Me. 333.

7. *Challenge to Favor.* — On separate trials of a joint indictment, it is not a cause of challenge that a juror sworn on one trial found a verdict of guilty, though it is good cause to submit his indifference to triers. U. S. v. Wilson, 1 Baldw. (U. S.) 78.

It is no ground for a postponement or continuance of a felony case, that

(6) *Alienage*. — Alienage, though not necessarily a disqualification, is a ground of challenge for cause.¹

(7) *Ignorance of English Language*. — That a juror is ignorant of the English language, or has an insufficient knowledge of it, may furnish a good ground of challenge.²

(8) *Conscientious Scruples*. — In some jurisdictions a fixed opinion or conscientious scruples against the infliction of the death penalty or of the higher grades of punishment, or an unwillingness to convict for offenses so punishable, is such a disqualification of the juror that it may furnish good ground for challenge by the prosecution.³

some of the jurors constituting the panel put upon the accused had, at the same term, served in the trial of another person jointly indicted with the accused for the same offense. The proper method of objecting to such jurors would be by challenge to the polls, if they qualified upon their *voir dire*. *Humphries v. State*, 100 Ga. 260.

Trial for Aiding in Commission of Crime. — It is error to permit a juror to sit in a criminal case where it appears that he served as a jurymen at the trial of another charged with aiding the defendant in the commission of the offense. *People v. Troy*, 96 Mich. 530.

Trial for Similar Offense. — In *Smith v. State*, 55 Ala. 1, which was a prosecution for selling intoxicating liquors to a man of "known intemperate habits," it was held that a person who had sat as a juror on the trial of another, charged with selling to the same man, might be challenged for cause, although the statute made no express provisions for challenges in such a case; *overruling Boggs v. State*, 45 Ala. 30, and *Lyman v. State*, 45 Ala. 72, in which the grounds specified in the statute were held to be exclusive of all others.

"Joint Indictment" — Statutory Construction. — In *State v. Sheely*, 15 Iowa 404, a statute allowing a challenge for cause to any person who had served on a jury which tried another defendant for the offense charged in the indictment was construed to refer to cases where two or more had been jointly indicted for the same offense, and had served in their trial, and not to a class of cases where the offense is single and in its nature cannot be committed jointly.

1. *Chase v. People*, 40 Ill. 352; *Durrah v. State*, 44 Miss. 789; *State v. Quarrel*, 2 Bay L. (S. Car.) 150.

12 Encyc. Pl. & Pr. — 28

Naturalizing Alien Juror During Trial. — In *Territory v. Hart*, 7 Mont. 42, there was held to be no available error where it appeared that during a trial of a capital offense there was objection to a juror on the ground of alienage, whereupon, opportunity being afforded by the court, the objectionable juror was naturalized in proper form, and the trial proceeded.

2. *State v. Gay*, 25 La. Ann. 472; *Garcia v. State*, 12 Tex. App. 335; *Etheridge v. State*, 8 Tex. App. 133; *Campbell v. State*, 30 Tex. App. 645.

Where by statute (Code Pro. Tex. art. 636, subdiv. 14) it is provided that a challenge for inability to read and write the English language shall not be sustained if it appears that the requisite number of jurors who are able to read and write the language cannot be found in the county, on appeal from a decision overruling a challenge on that ground, the record must show affirmatively that it appeared to the trial court that there could not be found in the county a sufficient number of qualified jurors able to read and write the language. *Garcia v. State*, 12 Tex. App. 335.

3. *Alabama*. — *Stalls v. State*, 28 Ala. 25; *Waller v. State*, 40 Ala. 325; *Smith v. State*, 55 Ala. 1; *Jackson v. State*, 74 Ala. 26; *Garrett v. State*, 76 Ala. 18; *Harrison v. State*, 79 Ala. 29.

Arkansas. — *Atkins v. State*, 16 Ark. 579.

California. — *State v. Tanner*, 2 Cal. 258; *People v. Ah Chung*, 54 Cal. 398; *People v. Majors*, 65 Cal. 138.

Colorado. — *Jones v. People*, 6 Colo. 452.

Delaware. — *State v. Windsor*, 5 Harr. (Del.) 512.

Florida. — *Metzger v. State*, 18 Fla. 481.

Indiana. — *Greenley v. State*, 60 Ind. 141; *Stephenson v. State*, 110 Ind. 358;

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(9) *Prior Service as Juror*.—In addition to the several grounds which were recognized at common law, and now generally by statute, there are various other grounds of challenge which have been prescribed by legislation in the several states. Thus the fact that a venireman has performed jury service within a prescribed time is made a cause of challenge in some of the states,¹ and in some jurisdictions provisions of this nature are deemed applicable to tales jurors,² while in others the contrary

Davidson v. State, 135 Ind. 254; *Gross v. State*, 2 Ind. 329.

Mississippi.—*Jones v. State*, 57 Miss. 684; *Coleman v. State*, 59 Miss. 484.

Missouri.—*State v. West*, 69 Mo. 401; *State v. Leabo*, 89 Mo. 247.

Nebraska.—*St. Louis v. State*, 8 Neb. 405; *Bradshaw v. State*, 17 Neb. 147; *Johnson v. State*, 34 Neb. 257.

Nevada.—*State v. Pritchard*, 15 Nev. 75.

New York.—*Walters v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 15; *People v. Damon*, 13 Wend. (N. Y.) 351.

Pennsylvania.—*Com. v. Leshner*, 17 S. & R. (Pa.) 155.

Texas.—*Shafer v. State*, 7 Tex. App. 239; *Clanton v. State*, 13 Tex. App. 139; *Caldwell v. State*, 41 Tex. 86; *White v. State*, 16 Tex. 206.

Virginia.—*Cluverius v. Com.*, 81 Va. 787.

United States.—*U. S. v. Cornell*, 2 Mason (U. S.) 91; *U. S. v. Wilson*, 1 Baldw. (U. S.) 78.

The Accused Cannot Complain That the State Declined to Challenge for cause a juror who had a fixed opinion against capital or penitentiary punishment. *Wesley v. State*, 61 Ala. 282; *Murphy v. State*, 37 Ala. 142; *Harrison v. State*, 79 Ala. 29.

In Kentucky, the right of challenge for implied bias given by the code for conscientious scruples against the death penalty, in the trial for an offense punishable with death, was held not to have been abrogated by an amendment permitting the jury to fix the penalty for murder. *Smith v. Com.*, (Ky. 1896) 37 S. W. Rep. 586.

In Mississippi, persons with conscientious scruples against the death penalty are incompetent persons in capital cases, notwithstanding a statute permitting the jury to fix the punishment at imprisonment for life. *Spain v. State*, 59 Miss. 19; *Thompson v. State*, 19 Tex. App. 593.

United States Courts.—In *U. S. v. Hewson*, *Brunner's Coll. Cas.* 532, it

was held that conscientious scruples against a verdict which would necessitate capital punishment were a good cause of challenge in a capital case; *Story, J.*, saying that it had been the practice in that court ever since the escape of two atrocious men through the scruples of two jurymen, that each juror, before being sworn in chief, should be asked whether he had any conscientious scruples as to finding a verdict of guilty in a capital case.

In Iowa it is not a ground of challenge for cause in a capital case that a juror has conscientious scruples against capital punishment. *State v. Lee*, 91 Iowa 499.

1. In *Indiana* it is ground for challenge that a juror has served during the preceding year. *Goshen v. England*, 119 Ind. 368.

In *Nebraska* and *Vermont* service within two years prior to the time of the challenge is ground. *Wiseman v. Bruns*, 36 Neb. 467; *Plattsburgh First Nat. Bank v. Post*, 66 Vt. 237.

Service on Regular Panel.—Within the *Illinois* act relative to exemptions from jury duty after a prescribed time of service, the "regular panel" contemplates the panel selected under the act relative to jurors. *Chicago, etc., R. Co. v. Eaton*, 136 Ill. 9.

What Constitutes Prior Service.—In *Neuby v. Harrell*, 99 N. Car. 149, wherein a juror was challenged on the ground that he had served within two years, it appeared that he was of the regular panel, and had served in a capital case on the previous day; that when the verdict was rendered the court discharged all jurors except those of the regular panel who had no desire to go home. These were required to be in court on the next day, at which time the juror in question was called and took his seat in the jury box. It was held that he was a regular juror, and that the ground of the challenge was insufficient.

2. *Barker v. Hine*, 54 Ind. 542.

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doctrine prevails.¹ Where the challenge is on this ground it seems to be necessary that the challenger should sustain his objection by showing actual former service² or service in the same court.³

(10) *Cause Pending at Term.*— Another statutory cause of disqualification, and consequently a good cause of challenge, is the fact that a juror has a cause pending at the same term at which he attends.⁴

(11) *Other than Statutory Causes.*— Causes of challenge are not necessarily limited to those prescribed by statute, so as to preclude the court, in the exercise of its discretion, on the presentation of a proper case,⁵ though there are decisions

Christie v. State, 44 Ind. 408; *Kassebaum v. State*, 45 Ind. 277; *Demaree v. State*, 45 Ind. 299; *Williams v. State*, 45 Ind. 299; *Wiseman v. Bruns*, 36 Neb. 467.

Michigan.— Section 7584a of Howell's Michigan Statutes, providing that a juror who has already served in the same court within a year shall be disqualified, applies to one who served as talesman in a street-opening case. *Williams v. Grand Rapids*, 53 Mich. 271.

1. The Vermont Statute 111, of 1884, disqualifying jurors drawn from towns of more than two hundred inhabitants from serving as jurors within the two years of the drawing, is applicable to those taken from the regular panel, and not to talesmen. *Plattsburgh First Nat. Bank v. Post*, 66 Vt. 237.

United States Courts.— In *Walker v. Collins*, 4 U. S. App. 406, 50 Fed. Rep. 737, it was held that the Act of Congress of 1872, requiring conformity in the federal courts, as nearly as may be, to the state practice, did not make a statutory provision relative to prior service of talesmen in the same court as a sufficient ground for challenge, which had not been adopted by the federal court, binding upon that court.

2. *State v. Miller*, 53 Iowa 84; *State v. Whitfield*, 92 N. Car. 831; *State v. Thorne*, 81 N. Car. 555; *State v. Brittain*, 89 N. Car. 481.

Discharge Without Service.— The challenge of a juror on the ground that he had served in a court of record during the next term preceding the trial is not good unless it is shown that the juror actually sat in the case. It is not a ground that he was merely summoned on the regular panel at a preceding term of the court, but was discharged on the first day of his attendance be-

cause there was no jury case to try. *State v. Lowe*, 56 Kan. 594.

3. Within a provision that prior service within the year will be a sufficient excuse for service at the same court, and also a ground of challenge, the service must be made in the same court. *Courvoisier v. Raymond*, 23 Colo. 113.

4. See *Murphy v. State*, 9 Lea (Tenn.) 378.

Necessity of Objection.— It is not a ground for a new trial that a party to a suit pending at the same term, disqualified for that reason, sat in another cause, where no motion to discharge him was made— the statute in question requiring him to be discharged for the term on a motion to that effect. *Bellows v. Weeks*, 41 Vt. 590.

At Issue.— In *Hodges v. Lassiter*, 96 N. Car. 351, it was said that assuming that a prosecution for a criminal offense could be treated as a suit, yet a statutory provision disqualifying for service jurors drawn, who had suits pending and at issue, was inapplicable to a person under indictment, which had been long pending, but to which he had not pleaded.

Necessity of Trial During Term.— A statute declaring incompetent a party to a suit pending for trial was held to apply to a juror who had a civil suit pending for trial, and further it was held that it was immaterial whether or not the cause was tried during the term. *Plummer v. People*, 74 Ill. 361.

5. *Block v. State*, 100 Ind. 357; *Lester v. State*, 2 Tex. App. 432; *Smith v. State*, 55 Ala. 1, overruling *Boggs v. State*, 45 Ala. 30, and *Lyman v. State*, 45 Ala. 72.

In *Texas* the power to allow a challenge for cause other than that prescribed by statute is discretionary, and

to the contrary.¹

(12) *Miscellaneous Grounds — Exemption.* — The decided weight of authority is to the effect that a statutory exemption which is not an absolute disqualification, but a mere personal privilege which may be waived, is not a ground of challenge,² though it has been held that the fact that persons are returned as jurymen who are over the age limit, and disqualified by statute, is a good ground.³

Objection to Array. — A ground which would be a good ground of challenge to the array is not sufficient for a challenge to the cause.⁴

A Ground of Challenge to a Talesman may not be necessary ground of challenge to a regular juror, and *vice versa*.⁵

d. WAIVER OF RIGHT OF CHALLENGE. — The right to challenge for cause may be waived⁶ by neglect or omission to chal-

will not be revised unless it is made clearly to appear that the party complaining was deprived of a trial by a fair and impartial jury. *Couts v. Neer*, 70 Tex. 468.

1. *People v. Darr*, 61 Cal. 554; *Roundtree v. Gilroy*, 57 Tex. 176.

Refusal to Allow Cross-examination of Exposed Juror. — Possible error in excusing a proposed juror for impartiality and the refusal to allow the accused to cross-examine him are not, of themselves, legal grounds of challenge. *State v. Claire*, 41 La. Ann. 1067.

2. *Patterson v. State*, 48 N. J. L. 381. And see *Williams v. State*, 67 Ala. 183; *Davison v. People*, 90 Ill. 221; *Murphey v. People*, 37 Ill. 447; *State v. Miller*, 2 Blackf. (Ind.) 35; *State v. Adams*, 20 Iowa 486; *Moor v. Cass*, 10 Kan. 288; *State v. Quimby*, 51 Me. 395; *Green v. State*, 59 Md. 123; *Munroe v. Brigham*, 19 Pick. (Mass.) 368; *State v. Forshner*, 43 N. H. 89; *Glassinger v. State*, 24 Ohio St. 206; *Kennedy v. State*, 19 Tex. App. 619; *Breeding v. State*, 11 Tex. 257; *Booth v. Com.*, 16 Gratt. (Va.) 519.

3. *People v. Baumann*, 52 Mich. 584.

4. *Com. v. Walsh*, 124 Mass. 32.

Clerk Attorney for Party. — It is not a ground for principal cause that the circuit clerk is the attorney for one of the parties at the time of drawing, making up, and arraying the panel. *Wakeman v. Sprague*, 7 Cow. (N. Y.) 164.

Summoning from Wrong Class. — In *Lawrence v. Com.*, 81 Va. 486, where one of a panel has been summoned by mistake, or misapprehension of law, or

otherwise, from a place near to instead of remote from the vicinage, an objection for that reason should not be made to the array, but to the individual juror so summoned.

After Challenge to Array. — If one challenge the array, he cannot afterwards challenge the polls, for what would have been a good challenge to the array. *Mann v. Glover*, 14 N. J. L. 195; *Trials per Pais*, 189. See also 21 Vin. Abr. 274.

5. *Dill v. People*, 19 Colo. 469.

Name of Talesman Not Listed. — It is not a valid objection to a talesman summoned as a bystander that his name does not appear on the list required to be made out by the county court. *Sayle v. State*, 8 Tex. 120.

6. *The Statutory Privilege of a Prisoner to Forty-eight Hours* in which to make challenges may be waived. *State v. Gilmore*, 95 Mo. 554, citing *State v. Klinger*, 46 Mo. 224, and *State v. Waters*, 62 Mo. 196.

Waiver Conclusive. — One waiving his right to challenge a juror who declares he has formed an opinion cannot urge such partiality as a ground for a new trial. *Stachlin v. Destréhan*, 2 La. Ann. 1019.

Right of Adverse Party. — In *People v. Mather*, 4 Wend. (N. Y.) 231, it was agreed by both sides that talesmen should be treated as if challenged by each side, and that the evidence given should be considered as demurred to; the duty of passing on the jurors consequently devolved on the judge, but the right of excepting to his decision was mutually reserved; and it was held that where the defendant waived his

lunge when the opportunity is afforded¹ by acceptance of the juror,² or by challenging peremptorily.³

c. TIME OF INTERPOSITION.—In the absence of any statute rule prescribing at what stage challenges shall be interposed, the time of their interposition, if after presentation of the juror and before he is accepted and sworn, as hereinafter stated, is not material.⁴ Sometimes the challenge is required to be made as the jurors are presented,⁵ but in any event good practice requires that challenges should be interposed before the person presented

right to object to a talesman, against whom good cause of challenge existed, the public prosecutor could not insist upon having the juror excluded.

1. *State v. Hoyt*, 47 Conn. 518; *O'Brian v. Com.*, 9 Bush (Ky.) 333; *Ship Milwaukie v. Hale*, 1 Dougl. (Mich.) 306; *Eggleston v. Smiley*, 17 Johns. (N. Y.) 133; *Clark v. Van Vrancken*, 20 Barb. (N. Y.) 278; *Bloomingtondale v. Adler*, 7 Misc. Rep. (N. Y. C. Pl.) 182; *Bergman v. Wolff* (Buffalo Super. Ct.), 11 N. Y. Supp. 591; *Com. v. Travis*, 13 W. N. C. (Pa.) 353; *Miller v. Wilson*, 24 Pa. St. 114; *State v. Quarrel*, 2 Bay L. (S. Car.) 150; *Preswood v. State*, 3 Heisk (Tenn.) 468; *Evans v. Gee*, 11 Pet. (U. S.) 85.

Notice of Disqualification.—If the circumstances are such that they will give a party constructive notice of the disqualification of the juror, his failure to object at the proper time will be deemed a waiver. *Irvine v. M. & M. Bank*, 1 Pittsb. (Pa.) 422.

Failure to object to a juror as *non compos mentis* where during the trial the objecting party had personal notice of the condition of the juror is a conclusive waiver of the objection. *Oliver v. Herron*, 106 Ala. 639.

Questioning without Challenge.—There is no error in allowing jurors questioned by counsel, but not challenged, to be sworn. *Crippen v. People*, 8 Mich. 117.

The Mere Passing of the Juror over to the court or the other party is not an absolute waiver of the right to challenge, if good cause be shown afterwards. *McFadden v. Com.*, 23 Pa. St. 12.

2. The Acceptance of a juror by the defendant in a criminal case is a waiver of objections on account of matters stated by the juror on his *voir dire* examination. *State v. Pollard*, 14 Mo. App. 583.

Right to Challenge on Second Trial.—The fact that a juror has been impan-

eled in a cause by consent of the parties, the jury being thereafter discharged without verdict, will not affect the right to challenge him when called on another trial of the same cause. *Phelps v. Hall*, 2 Tyler (Vt.) 401.

A Party Cannot Resume a right of challenge waived. *Wenrick v. Hall*, 11 S. & R. (Pa.) 153; *Patton v. Ash*, 7 S. & R. (Pa.) 116.

3. People v. Price, 53 Hun (N. Y.) 185; *Ford v. Umatilla County*, 15 Oregon 313.

4. The Texas statutes contemplate that challenges for cause shall be made after the names of the jurors are drawn by the clerk and the jury lists are delivered to the party. *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650.

The Proper Time for challenging is between the appearance and swearing of the jury. *McClure v. State*, 1 Verg. (Tenn.) 206.

Discretion of Court.—Where the time that objections should be made to the competency of a juror is a matter of practice, and is discretionary with the court, its action in that behalf will not be interfered with unless the rights of the parties are cut off altogether. *Funkhouser v. Pogue*, 13 Ark. 295.

5. Smith v. State, 61 Miss. 754; *Thompson v. State*, 58 Miss. 62; *State v. Williams*, 2 Hill L. (S. Car.) 381.

In *California*, where a challenge for implied bias is not taken before the examination of the juror, the proper course is to make the challenge immediately after the preliminary examination is closed. *People v. Reynolds*, 16 Cal. 129; and see *People v. Hamilton*, 62 Cal. 377.

In *Minnesota*, under the General Statutes (c. 116), all challenges by either party to a proposed juror, whether for cause or peremptory, are required to be interposed and determined when he is called, and in the prescribed order, before proceeding further with the call. *State v. Armington*, 25 Minn. 29.

is accepted as a juror.¹ But where a juror is disqualified, and the disqualification was not known at the time of his acceptance, although due diligence was exercised to ascertain his competency, he may be challenged at any time before he is sworn.²

Before Swearing. — It is undoubtedly the rule that the challenge must be interposed when the jurors "come to the book," as it was formerly called,³ and that after they have been sworn and charged with the case, the right of challenge for existing cause is lost;⁴ especially is such the case where the incompetency or

1. *State v. Potter*, 18 Conn. 176.

2. *Smith v. State*, 55 Ala. 1; *Sparks v. State*, 59 Ala. 82; *Spigener v. State*, 62 Ala. 383; *Roberts v. State*, 68 Ala. 515; *State v. Groome*, 10 Iowa 308; *Murphy v. State*, 9 Lea (Tenn.) 373.

Cause Which Will Authorize Challenge.

— To authorize the allowance of a challenge for cause after the juror has been accepted, the cause must be one which arose after the opportunity for challenge, or one not ordinarily discoverable on the *voir dire*, and the application must disclose the cause. *Baker v. State*, 3 Tex. App. 525.

Separation After Acceptance. — In *Spencer v. De France*, 3 Greene (Iowa) 216, a jury was accepted in the evening, but not sworn, after which the court adjourned until next morning, and the jury separated. It was held to be error to refuse to allow a challenge by the plaintiff when the court convened in the morning.

In *Georgia*, after a jury is made up, if it is discovered that an incompetent person has been selected, the statutory provisions as to the mode of procedure are available as well to the state as to the defendant. *Eberhart v. State*, 47 Ga. 598.

3. *State v. Williams*, 2 Hill L. (S. Car.) 381.

In *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70, Chief Justice Tindal said: "The rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby."

In *North Carolina* the challenge *propter defectum* should be made as the juror is brought to the book to be sworn, and before he is sworn. *State v. Davis*, 80 N. Car. 412; *State v. Per-*

kins, 66 N. Car. 126; *State v. Griffice*, 74 N. Car. 316; *State v. Patrick*, 3 Jones L. (N. Car.) 443; *State v. Lamon*, 3 Hawks (N. Car.) 175; *State v. Seaborn*, 4 Dev. L. (N. Car.) 305.

Pennsylvania Practice. — In *Com. v. Marra*, 8 Phila. (Pa.) 440, the practice is stated as follows: "In capital cases, where the jurors are sworn separately, challenges may be made at any time before the book has been tendered to the juror or the formula of affirmation has been commenced. In cases not capital our uniform practice has been to swear or affirm the jurors together."

Administration of Oath Entered Upon. — The right cannot be exercised after the juror has lifted up his right hand, or taken the book in obedience to the directions of the officer, or after the form of the affirmation has been commenced. *McFadden v. Com.*, 23 Pa. St. 12.

In *Com. v. Marra*, 8 Phila. (Pa.) 440, which was a prosecution for felony, when seven jurors had been sworn, and those who wished to affirm had been directed to rise, it was held that after they were on their feet and the clerk was in the act of affirming them, a challenge came too late.

Unauthorized Administration of Oath. — The *Tennessee Code*, § 3988, forbids the appointment of any person to serve as a juror "who has an action pending in the court at the term to which he is nominated." In *Murphy v. State*, 9 Lea (Tenn.) 373, the clerk proceeded to swear the entire jury, without direction of the court, before the attorney-general had heard an announcement that one of the number had a suit in court, whereupon he objected, and almost simultaneously the last juror kissed the book. The action of the court in setting aside the juror over the objection of the defendant was not disturbed.

4. *Alabama.* — *Ripley v. Coolidge*, Minor (Ala.) 11; *State v. Morea*, 2 Ala. 275; *McCauley v. State*, 26 Ala. 135; *Stalls v. State*, 28 Ala. 25; *Murray v.*

disqualification was known to the complaining party.¹

State, 48 Ala. 675; *Drake v. State*, 51 Ala. 30; *Battle v. State*, 54 Ala. 93; *Smith v. State*, 55 Ala. 1; *Sparks v. State*, 59 Ala. 82; *Rash v. State*, 61 Ala. 89; *Roberts v. State*, 68 Ala. 515; *Henry v. State*, 77 Ala. 75.

Arkansas. — *Hurley v. State*, 29 Ark. 17; *Whitehead v. Wells*, 29 Ark. 99; *Williams v. State*, 63 Ark. 527.

California. — *People v. Kohle*, 4 Cal. 198; *People v. Rodriguez*, 10 Cal. 59; *People v. Reynolds*, 16 Cal. 128; *People v. Jenks*, 24 Cal. 11; *People v. Ah You*, 47 Cal. 121; *Silcox v. Lang*, 78 Cal. 124.

Connecticut. — *State v. Potter*, 18 Conn. 166.

District of Columbia. — *U. S. v. Cross*, 20 D. C. 365.

Florida. — *Ellis v. State*, 25 Fla. 702; *O'Connor v. State*, 9 Fla. 216; *Mann v. State*, 23 Fla. 610.

Georgia. — *Glover v. Woolsey*, *Dudley* (Ga.) 85; *Epps v. State*, 19 Ga. 102; *Costly v. State*, 19 Ga. 614; *Statham v. State*, 84 Ga. 17.

Illinois. — *Sterling Bridge Co. v. Pearl*, 80 Ill. 251.

Indiana. — *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Morris v. State*, 7 Blackf. (Ind.) 607; *Jackson v. Pittsford*, 8 Blackf. (Ind.) 194.

Iowa. — *Spencer v. De France*, 3 *Greene* (Iowa) 216.

Kentucky. — *Bratton v. Bryan*, 1 A. K. Marsh. (Ky.) 212; *Combs v. Com.*, 97 Ky. 24.

Louisiana. — *State v. Diskin*, 34 La. Ann. 920; *State v. Dubord*, 2 La. Ann. 732.

Maine. — *State v. Bowden*, 71 Me. 89.

Maryland. — *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479.

Massachusetts. — *Com. v. Gee*, 6 Cush. (Mass.) 174.

Michigan. — *People v. Dolan*, 51 Mich. 610; *Thorp v. Deming*, 78 Mich. 124; *Ayres v. Hubbard*, 88 Mich. 155; *Hunter v. Parsons*, 22 Mich. 96; *Jhons v. People*, 25 Mich. 499; *Scripps v. Reilly*, 38 Mich. 10; *Matter of Bennett*, 51 Mich. 71.

Minnesota. — *State v. Thomas*, 19 Minn. 484.

Mississippi. — *Watson v. Pipes*, 32 Miss. 453.

Missouri. — *Harding v. Brown*, 1 Mo. App. Rep. 13.

New York. — *People v. Carpenter*, 38 Hun (N. Y.) 490, *affirmed* 102 N. Y. 238; *Lindsley v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 233.

North Carolina. — *State v. Perkins*, 66 N. Car. 126; *State v. Adair*, 66 N. Car. 298; *State v. Cunningham*, 72 N. Car. 469; *State v. Jones*, 80 N. Car. 415; *State v. Boon*, 80 N. Car. 461; *State v. Green*, 95 N. Car. 611.

Pennsylvania. — *Com. v. Leshner*, 17 S. & R. (Pa.) 164; *McFadden v. Com.*, 23 Pa. St. 12; *Hartzell v. Com.*, 40 Pa. St. 462; *Jordan v. Meredith*, 3 Yeates (Pa.) 318.

South Carolina. — *State v. Haines*, 36 S. Car. 504; *State v. Quarrel*, 2 Bay L. (S. Car.) 150; *State v. Williams*, 2 Hill L. (S. Car.) 381.

Tennessee. — *Bloodworth v. State*, 6 Baxt. (Tenn.) 614; *Ward v. State*, 1 Humph. (Tenn.) 253; *Gillespie v. State*, 8 Yerg. (Tenn.) 507.

Texas. — *Munson v. State*, 34 Tex. Crim. Rep. 498; *Cooley v. State*, 38 Tex. 636.

Virginia. — *Montague v. Com.*, 10 Gratt. (Va.) 767; *Thompson v. Com.*, 8 Gratt. (Va.) 637; *Hendrick v. Com.*, 5 Leigh (Va.) 707.

United States. — *U. S. v. Morris*, 1 Curt. (U. S.) 23; *U. S. v. Watkins*, 3 Cranch (C. C.) 441; *Queen v. Hepburn*, 7 Cranch (U. S.) 290.

England. — Archb. Crim. Pr. 510; *Morris's Case*, 4 How. St. Tr. 1255; *Reg. v. Sullivan*, 8 Ad. & El. 831, 35 E. C. L. 539; *Reg. v. Wardle*, C. & M. 647, 41 E. C. L. 351.

Allowing Withdrawal of Juror. — In *Gearhart v. Jordan*, 11 Pa. St. 325, it was held that it is erroneous to challenge a juror after he has been sworn, for a cause existing when he was called to the book, but that the proper course would be to direct a juror to be withdrawn and to call a fresh jury.

Effect of Permitting Prosecution to Challenge. — In *Ward v. State*, 1 Humph. (Tenn.) 253, the court permitted the attorney-general, not only after the jury had been sworn, but after the prisoner had been put upon his deliverance, to challenge ten of the jurors *propter defectum*, and they were set aside against the prisoner's consent, thus compelling him to select ten others, who, in conjunction with the remaining two, returned a verdict of conviction. This was held to be such error as could not be corrected by reversing and remanding the cause, and therefore required the discharge of the prisoner.

1. *California*. — *People v. Stonecipher*, 6 Cal. 405; *People v. Coffman*, 24 Cal.

Ignorance of Disqualification. — It has also been held that it is immaterial that the complaining party was ignorant of the disqualification at the time the objectionable juror was sworn.¹

Discretion of Court. — However, under certain circumstances, as where the disqualification of a juror was unknown though due effort was made to ascertain his competency, or where a cause of challenge arises after the administration of the oath, or for any other good cause, it has been decided that the court, in its discretion, may entertain an objection.²

230; *People v. Sanford*, 43 Cal. 32.

Connecticut. — *Parmele v. Guthery*, 2 Root (Conn.) 185; *Bellows v. Williams*, Kirby (Conn.) 166; *Woodbridge v. Raymond*, Kirby (Conn.) 279; *Selleck v. Sugar Hollow Turnpike Co.*, 13 Conn. 453; *Quinebaug Bank v. Leavess*, 20 Conn. 89; *Groton v. Hurlburt*, 22 Conn. 193; *Andrews v. Wheaton*, 23 Conn. 117; *Bailey v. Trumbull*, 31 Conn. 582; *State v. Tuller*, 34 Conn. 280; *Manion v. Flynn*, 39 Conn. 330; *State v. Hoyt*, 47 Conn. 518.

Georgia. — *Glover v. Woolsey*, Dudley (Ga.) 85; *Keener v. State*, 18 Ga. 194; *Cannon v. Bullock*, 26 Ga. 431; *Moore v. State*, 68 Ga. 687; *Danielly v. Colbert*, 71 Ga. 218.

Illinois. — *Swarnes v. Sitton*, 58 Ill. 155; *Fitzpatrick v. People*, 98 Ill. 269; *Mackin v. People*, 115 Ill. 312.

Indiana. — *Barlow v. State*, 2 Blackf. (Ind.) 114; *Rice v. State*, 16 Ind. 298; *Croy v. State*, 32 Ind. 384; *Douthitt v. State*, 144 Ind. 397.

Iowa. — *State v. Grooms*, 10 Iowa 308.

Kansas. — *Lane v. Scoville*, 16 Kan. 402.

Kentucky. — *O'Brian v. Com.*, 9 Bush Ky. 333; *Bickel v. Kraus*, (Ky. 1897) 39 S. W. Rep. 414.

Louisiana. — *State v. Shay*, 30 La. Ann. 114.

Maine. — *Wallace v. Columbia*, 48 Me. 436; *Tilton v. Kimball*, 52 Me. 500; *Jameson v. Androscoggin R. Co.*, 52 Me. 412; *Fessenden v. Sager*, 53 Me. 531; *State v. Bowden*, 71 Me. 89; *Brown v. Reed*, 81 Me. 158.

Maryland. — *Busey v. State*, 85 Md. 115; *Green v. State*, 59 Md. 123; *Johns v. Hodges*, 60 Md. 221.

Massachusetts. — *Halloek v. Franklin County*, 2 Met. (Mass.) 558; *Davis v. Allen*, 11 Pick. (Mass.) 468; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 471; *Fox v. Hazleton*, 10 Pick. (Mass.) 175; *Wassum v. Feeney*, 121 Mass. 93.

Michigan. — *Bourke v. James*, 4 Mich.

336; *Sleight v. Henning*, 12 Mich. 371; *Bronson v. People*, 32 Mich. 34.

Mississippi. — *Parker v. State*, 55 Miss. 414.

Missouri. — *Lisle v. State*, 6 Mo. 426.

Nebraska. — *Palmer v. People*, 4 Neb. 68; *Tomer v. Densmore*, 8 Neb. 384; *Ogden v. State*, 13 Neb. 436; *Murphey v. State*, 43 Neb. 34.

Nevada. — *State v. Anderson*, 4 Nev. 265; *State v. Pritchard*, 16 Nev. 101; *State v. Hartley*, 22 Nev. 342.

New Hampshire. — *Rollins v. Ames*, 2 N. H. 349; *Pittsfield v. Barnstead*, 40 N. H. 478.

Pennsylvania. — *Irvine v. M. & M. Bank*, 1 Pittsb. (Pa.) 422; *Koenig v. Bauer*, 1 Brews. (Pa.) 304; *Bakman v. Sheaffer*, 48 Pa. St. 176.

South Carolina. — *State v. O'Driscoll*, 2 Bay L. (S. Car.) 153.

Tennessee. — *Booby v. State*, 4 Verg. (Tenn.) 111.

United States. — *U. S. v. Smith*, 1 Sawy. (U. S.) 277.

See Bac. Abr., tit. Juries, 365, 366.

1. *Smith v. State*, 55 Ala. 1; *State v. Williams*, 3 Srew. (Ala.) 454; *State v. Morea*, 2 Ala. 275; *Stalls v. State*, 28 Ala. 25; *Burns v. State*, 80 Ga. 544; *Central R., etc., Co. v. Kent*, 87 Ga. 402; *McFadden v. Com.*, 23 Pa. St. 12; *Draper v. State*, 4 Baxt. (Tenn.) 246; *Calhoun v. State*, 4 Humph. (Tenn.) 477; *Ward v. State*, 1 Humph. (Tenn.) 259; *Gillespie v. State*, 8 Verg. (Tenn.) 507; *M'Clure v. State*, 1 Verg. (Tenn.) 206.

2. *Haynes v. Crutehfield*, 7 Ala. 189; *Adams v. Olive*, 48 Ala. 551; *Murray v. State*, 48 Ala. 675; *Henry v. State*, 77 Ala. 75; *Wright v. State*, 35 Ark. 639; *People v. Rodriguez*, 10 Cal. 59; *People v. Reynolds*, 16 Cal. 128; *State v. Moncla*, 39 La. Ann. 868; *State v. Diskin*, 34 La. Ann. 919; *State v. Perkins*, 66 N. Car. 126; *State v. Davis*, 80 N. Car. 412; *State v. Lambert*, 93 N. Car.

J. ORDER OF INTERPOSITION.—The order in which challenges should be interposed, or the order in which the parties should exercise the right of challenge, is a matter of statutory regulation or of local practice as to which no rule of general application can be stated. References are made simply to the subjoined notes.¹

618; *Spicer v. Fulghum*, 67 N. Car. 18; *Brakefield v. State*, 1 Sneed (Tenn.) 219.

In California, and under the provisions of the Penal Code (§ 1068) that for cause the court may permit a challenge to be taken after a juror is sworn, a challenge is not a matter of right to either party, but may be permitted in the exercise of a sound discretion. *People v. Durrant*, 116 Cal. 179 [citing *People v. Reynolds*, 16 Cal. 128; *People v. Montgomery*, 53 Cal. 576; *People v. Bemmerly*, 87 Cal. 117.]

Disqualification Unknown.—In *State v. Ross*, 29 Mo. 32, it was held that a statutory provision that "no exception to a juror on the ground of his citizenship, nonresidence, * * * or other disability shall be allowed after the jury are sworn," did not apply to the objection that a juror had prejudiced the case and had answered untruthfully on his examination, which facts were unknown to the objectant until after verdict.

When facts tending to show the incompetency of a juror come to the knowledge of the counsel for the defendant after the juror has been sworn, but before any further step is taken on the trial, the question of competency must be then raised. *Lampkin v. State*, 87 Ga. 516.

In *Wharton's Case*, Yelv. 23, a challenge to a juror who had been accepted and sworn for a cause that was *in esse* when he was sworn, but which was unknown at the time to the queen's counsel, was denied.

Cause Arising After Administration of Oath.—When a tales is returned parties have the right to challenge any of the original panel already sworn in chief, but it must be for a cause arising after the jurors were sworn. *U. S. v. Watkins*, 3 Cranch (C. C.) 441.

Long Separation of Jury After Being Sworn.—In *People v. Evans*, 72 Mich. 367, after the jury had been sworn the case was continued for some weeks, and the jury were allowed to separate. At the convening of the court on the return day the defendant was permitted to challenge jurors for cause, the

court stating that owing to the unusual length of time since the adjournment the defendant should have the right to challenge, notwithstanding the fact that the jurors had been sworn.

1. Following Statutory Order.—Where one challenge has no connection with another, and the grounds for each are equally independent of others, the proper practice requires the disposition of each challenge in the order named in the statute. *State v. Davis*, 14 Nev. 439.

Before Challenging Peremptorily.—Challenge for cause may be interposed before exercising the right of peremptory challenge. *U. S. v. Butler*, 1 Hughes (U. S.) 457.

Compelling Exhaustion of Peremptory Challenges.—It is error to require a defendant to exhaust his peremptory challenges before challenging for cause. *State v. Fuller*, 39 Vt. 74.

In Criminal Cases.—In *Jones v. State*, 2 Blackf. (Ind.) 475, wherein it was held that challenges to the jurors should be made first by the prisoner, and afterwards by the prosecuting attorney, it was said: "If this were a new question and we had it to settle, we should say that the state ought first to make her challenges; but as all the English authorities establish a different doctrine, and no American cases have been seen by us to sanction a different practice, we are bound for the present to sanction what the Circuit Court has done."

New York Rule.—In *People v. McGonegal*, (Supreme Ct.) 17 N. Y. Supp. 147, affirmed (Ct. App.) 48 N. Y. St. Rep. 900, 136 N. Y. 62, it was held that section 385 of the Code of Criminal Procedure, which provides that challenges to individual jurors must be taken first by the people and then by the defendant, was applicable to the different classes of challenges which are enumerated in section 386, which provides that the challenges of either party must be taken first to the panel, second to the individual juror for general disqualification, third to the individual juror for implied bias, fourth to the

g. FORM AND SUFFICIENCY — (1) *Generally*. — Unless otherwise required by statute, challenges for cause are made orally, and usually are required to be entered on the record, the object of the record entry being to afford an opportunity to review the decision on the challenge, where such a decision is reviewable.¹

(2) *Specification of Grounds*. — A party exercising the right of challenge should designate the ground upon which he relies with reasonable certainty, and should not interpose a challenge of such an indefinite character that it cannot be ascertained whether it is for principal cause or to the favor, or, as termed in some jurisdictions, for actual or implied bias.² The question as to the sufficiency of a challenge must, of course, be governed by the facts of each case,³ but there are decisions to the effect that a

individual juror for actual bias, and fifth peremptorily.

1. In *Utah* challenges to individual jurors may be oral, but must be entered in the minutes of the court or of the reporter. *Laws of Utah* (1884), p. 124. See also *Mann v. Glover*, 14 N. J. L. 195; *People v. Bodine*, 1 Den. (N. Y.) 281; *Cooley v. State*, 38 Tex. 636.

2. *California*. — *Paige v. O'Neal*, 12 Cal. 483; *People v. Reynolds*, 16 Cal. 128; *People v. Dick*, 37 Cal. 277; *People v. Hardin*, 37 Cal. 258; *People v. Walsh*, 43 Cal. 447; *People v. Renfrow*, 41 Cal. 38; *People v. McGungill*, 41 Cal. 429; *People v. Cotta*, 49 Cal. 166; *People v. Cochran*, 61 Cal. 549.

Idaho. — *State v. Gorden*, (Idaho, 1897) 48 Pac. Rep. 1061.

Iowa. — *Davis v. Anchor Mut. F. Ins. Co.*, 96 Iowa 70; *Bonney v. Cocke*, 61 Iowa 303; *State v. Munchrath*, 78 Iowa 268.

Maine. — *State v. Knight*, 43 Me. 11. *Massachusetts*. — *Provident Sav. Inst. v. Burnham*, 128 Mass. 458.

Mississippi. — *Powers v. Presgroves*, 38 Miss. 227.

Missouri. — *State v. Taylor*, 134 Mo. 109; *State v. Reed*, 137 Mo. 125; *State v. Dyer*, 139 Mo. 199.

Nebraska. — *Fillion v. State*, 5 Neb. 351.

Nevada. — *State v. Squaires*, 2 Nev. 226; *Estes v. Richardson*, 6 Nev. 128; *State v. Chapman*, 6 Nev. 320; *State v. Raymond*, 11 Nev. 98; *State v. Gray*, 19 Nev. 212; *State v. Vaughan*, 22 Nev. 285; *State v. Hartley*, 22 Nev. 342.

New Jersey. — *Mann v. Glover*, 14 N. J. L. 195; *Drake v. State*, 53 N. J. L. 23; *Jones v. Butterworth*, 3 N. J. L. 48.

New York. — *Freeman v. People*, 4

Den. (N. Y.) 9; *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 71; *Lowenberg v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 414.

Pennsylvania. — *Com. v. Valsalka*, 181 Pa. St. 17.

Texas. — *Gulf, etc., R. Co. v. Keith*, 74 Tex. 287.

Utah. — *People v. Hopt*, 3 Utah 396; *People v. Thiede*, 11 Utah 241, 159 U. S. 510.

Virginia. — *Montague v. Com.*, 10 Gratt. (Va.) 767.

Wisconsin. — *Schoeffler v. State*, 3 Wis. 823.

United States. — *Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 696; *U. S. v. Wilson*, 1 Baldw. (U. S.) 78; *Hopt v. Utah*, 120 U. S. 430, *affirming* *People v. Hopt*, 4 Utah 247.

Challenge to Favor in Form for Cause. — A conviction will not be reversed because the challenge was in form for cause, though had it been made by the prosecution for favor it would have been sustained. *Reynolds v. U. S.*, 98 U. S. 145.

A Challenge for Relationship must show how related and to whom. *Stevenson v. Stiles*, 3 N. J. L. 310.

The Facts Alleged for Principal Cause ought to be definitely stated, so that they may be demurred to, leaving only a question of law to be pronounced upon, the facts being admitted. *Schoeffler v. State*, 3 Wis. 823.

3. Challenge to Favor After Overruling Principal Challenge. — In *Carnal v. People*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 272, after a challenge for principal cause had been tried and overruled a challenge was made "to the favor," and it was held that the challenge was sufficient without

challenge which merely expresses the reason for making it,¹ or a general challenge, or a challenge for a general statutory ground which embraces several distinct causes of challenge,² is insufficient.

specifically stating the grounds of challenge.

A Challenge for Actual Bias must allege that the bias is against the party challenging, and, if predicated upon alleged bias on the part of the attorney against the attorney for the defendant, should not be entertained. *State v. Gorden*, (Idaho, 1897) 48 Pac. Rep. 1061. And see *People v. Dick*, 37 Cal. 279.

Under the California Criminal Practice Act a party interposing a challenge for actual bias was required to allege that the juror was biased against him; the challenge was then entered on the minutes of the court, and an application for triers was made. *People v. Renfrow*, 41 Cal. 37.

Particular Instance.—In *Howell v. Howell*, 59 Ga. 145, it was held that a demand that "said jurors be put upon their *voir dire* and questioned as to their competency and impartiality as jurors, to try said cause, as contained in *Justices v. Griffin*, etc., Plank Road Co., 15 Ga. 41; said cause having, before that time, undergone two investigations in said court, both of defendants being residents of said county, while all of the complainants were non-residents, and the principal defendant, Singleton G. Howell, belonging to said panel of jurors, and having been relieved by a substitute when said case was called," amounted in substance to a challenge of the whole panel, and a demand that each juror be sworn as a witness to testify as to his impartiality; and that the decision in *Justices v. Griffin*, etc., Plank Road Co., 15 Ga. 41, controlled the case.

1. **"I Challenge."**—In the case of challenges to the polls the intention of challenge is verbally intimated by such words as "I challenge him," or "challenged," and when the challenge is peremptory these words will suffice, but when the challenge is for cause the defendant must immediately show the ground of objection. See *State v. Knight*, 43 Me. 110.

"For Favor."—In *Jones v. Butterworth*, 3 N. J. L. 48, a challenge to jurors "for favor, for that they were neighbors to the plaintiff," was held insufficient because it failed to state a case raising a suspicion of bias; as that

the juror and the party were in habits of great intimacy, or the like.

Challenge for Unindifference.—A statement that a party challenges a juror because "he does not stand indifferent between the parties" does not constitute a challenge, but expresses only the reason for making a challenge, or the judgment and conclusion of law consequent upon finding the ground of challenge to be true. The challenger must go further and state why the juror does not stand indifferent; he must state some facts or circumstances which if true will show either that the juror is positively disqualified, or will create a probability that he is not or may not be impartial. In the former case the challenge would be a principal one, triable by the court; in the latter it would be to the favor and submitted to triers. *Mann v. Glover*, 14 N. J. L. 195.

2. **For "Cause."**—A challenge simply stating that it is "for cause" is insufficient. *Bonney v. Cocke*, 61 Iowa 303; *State v. Chapman*, 6 Nev. 320; *State v. Squaires*, 2 Nev. 226; *People v. Dick*, 37 Cal. 279.

In *State v. Munchrath*, 78 Iowa 268, a challenge in form that "the defendant challenges the juror on his answers for cause" was held to be too general under a statutory provision that a challenge for cause "must distinctly specify the facts constituting the causes of challenge."

For "Implied Bias."—Where the term "implied bias" covers numerous different grounds of challenge, a simple challenge for "implied bias" is insufficient. *People v. Buckley*, 49 Cal. 241; *People v. Walsh*, 43 Cal. 447; *People v. McGungill*, 41 Cal. 429; *People v. Reynolds*, 16 Cal. 128; *State v. Vaughan*, 22 Nev. 285.

"We Challenge."—In *People v. Renfrow*, 41 Cal. 37, a challenge in the words "we challenge the juror" was held insufficient.

A Challenge "for Such Bias as Disqualifies Him," and for having such a fixed and positive opinion as to the question of defendant's guilt or innocence as would disqualify him from serving on the jury," is sufficient under a statute which prescribes but two causes of

A. NUMBER OF CHALLENGES. — Necessarily, a party is not limited from challenging for cause, but may insist on his right until the completion of the jury.¹ But whether a proposed juror may be challenged a second time will depend on whether or not the cause is different and triable in a different mode, or whether the grounds might have been proven on the trial of the first challenge.²

1. WITHDRAWAL. — No good reason is apparent why a challenge which has been interposed may not be withdrawn by the party by whom it was made, where no injury can result to the adverse party by the withdrawal.³

2. PROVINCE OF TRIAL JUDGE. — It is the duty of the trial judge to see that a fair and impartial jury is obtained, and to that end to endeavor, so far as his power extends, to prevent the service of incompetent or disqualified persons as jurors.⁴ In the exercise of his discretion and before the jury is completed, he may exclude incompetent and disqualified jurors, though no challenge or objection is interposed.⁵ Where the competency of a

challenge, namely, for implied bias and for actual bias, and which also defines them. *People v. Cotta*, 49 Cal. 166.

1. *Cooley v. State*, 38 Tex. 636.

In *Cluverius v. Com.*, 81 Va. 787, over nine hundred veniremen were examined before a jury was secured.

It is stated by Mr. Justice Edmonds, in an opinion to be found in *People v. Hayes*, 1 Edm. Sel. Cas. (N. Y. Oyer & T. Ct.) 583, that in the *People v. Bodine*, 1 Den. (N. Y.) 285, over six thousand jurors were summoned and more than four thousand were examined on challenge to the favor and set aside on account of bias.

3. Challenge Second Time. — A party may challenge a second time for any matter or cause constituting a different challenge and triable by a different forum; as if a challenge for a statutory disqualification is overruled, he may challenge for impartiality or the like. *Mann v. Glover*, 14 N. J. L. 195. See 21 Vin. Abr. 273.

A proposed juror cannot be challenged a second time for matter that might have been proved or given in evidence on the trial of the first challenge, and which if so proved would have sustained that challenge; that is, a party must prefer all his challenges of the same nature and triable by the same forum at once. *Mann v. Glover*, 14 N. J. L. 195; *Trials per Pais*, 198.

Challenge to Favor After Challenge for Principal Cause. — A juror may be challenged to the favor after a challenge to

him for principal cause has been tried and overruled. *Carnal v. People*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 272. But see to the contrary *People v. Donaldson*, 2 Edm. Sel. Cas. (N. Y. Oyer & T. Ct.) 78.

3. Admission of Cause of Challenge by Adverse Party. — It is discretionary with the trial judge to permit the withdrawal of a challenge after the cause of challenge has been admitted. *State v. Smith*, 56 Minn. 78.

Resumption of Challenge. — A challenge for actual bias which after being made has been withdrawn may be renewed at any time before the completion of the jury. *State v. Dunphey*, 4 Minn. 438.

4. *State v. Marshall*, 8 Ala. 306; *Walker v. State*, 40 Ala. 325; *Kurtz v. State*, 145 Ind. 119; *McCarty v. State*, 26 Miss. 299; *Pierce v. State*, 13 N. H. 536; *State v. Howard*, 17 N. H. 172; *State v. Boon*, 80 N. Car. 461; *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394; *Montague v. Com.*, 10 Gratt. (Va.) 767.

Challenge by Court. — In *New Hampshire* it is the duty of the court to challenge for cause. *Rowell v. Boston, etc., R. Co.*, 58 N. H. 514; *Rollins v. Ames*, 2 N. H. 349; *Pierce v. State*, 13 N. H. 536; *State v. Howard*, 17 N. H. 171.

8. *Alabama.* — *Gibson v. State*, 89 Ala. 121; *Fields v. State*, 52 Ala. 348; *Roberts v. State*, 68 Ala. 515; *Jackson v. State*, 76 Ala. 26.

proposed juror is in doubt, it should be resolved against him, and it is discretionary with the trial judge to exclude him;⁴ but the refusal of the court to exercise its discretion in this connec-

Louisiana.—*State v. Diskin*, 34 La. Ann. 919.

Michigan.—*People v. Carrier*, 46 Mich. 442; *People v. Thacker*, 108 Mich. 652.

Mississippi.—*Marsh v. State*, 30 Miss. 627; *McGuire v. State*, 37 Miss. 369; *Lewis v. State*, 9 Smed. & M. (Miss.) 115; *Williams v. State*, 32 Miss. 389. See *Guice v. State*, 60 Miss. 714.

Nevada.—*State v. Larkin*, 11 Nev. 314.

New York.—*People v. Damon*, 13 Wend. (N. Y.) 351; *Petrie v. Williams*, 88 Hun (N. Y.) 292; *People v. Bodine*, 1 Edm. Sel. Cas. (N. Y. Cir. Ct.) 36.

North Carolina.—*State v. Adair*, 66 N. Car. 298; *State v. Boon*, 80 N. Car. 461; *State v. Jones*, 80 N. Car. 415; *State v. Barber*, 113 N. Car. 711.

Vermont.—*State v. Ward*, 39 Vt. 225.

Virginia.—*Tooele v. Com.*, 11 Leigh (Va.) 749.

United States.—*U. S. v. Morris*, 1 Curt. (C. C.) 23; *McFadden v. Com.*, 23 Pa. St. 12.

Excuse for Cause Other than That Assigned.—A juror may be excused by the court for good cause, and for a cause other than that for which the challenge is made. *State v. Thomas*, 41 La. Ann. 1088.

Exclusion After Acceptance.—After a juror has stated that he has formed an opinion and has been accepted by the defendant, it is reversible error on the part of the court to order him to stand aside before he has been presented to the people. *Van Blaricum v. People*, 16 Ill. 364.

In *Greer v. State*, 14 Tex. App. 179, after the jury had been completed the district attorney, over objection, questioned the members thereof whereby four became disqualified and were excused by the court, the defendant objecting. Subsequently the district attorney withdrew the challenge, the jurors excused were reimpaneled, and the jury so formed was accepted by both parties, and it was held error for the court to set the four jurors aside of its own motion.

Disclosure of Disqualification After Acceptance.—After a juror has been passed on the part of the state and put upon the prisoner, he may be excused

by the presiding judge on its appearing that he is not a citizen, when that fact is brought out by an additional question on the part of the state. *Johnson v. State*, 58 Ga. 491.

A Juror Who Has Been Sworn may be excused when his detention upon the jury would defeat the ends of public justice. *U. S. v. Morris*, 1 Curt. (U. S.) 23; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364; *State v. Allen*, 46 Conn. 531.

Excusing Absent Juror.—The court may excuse a person summoned in his absence where it appears from the sheriff's return on an attachment that he is over the age limit and decrepit. *Livar v. State*, 26 Tex. App. 115.

Waiver of Exclusion.—By consenting to go to trial with ten jurors, objection to the exclusion of a juror by the court of its own motion is waived. *Corbett v. Troy*, 53 Hun (N. Y.) 228.

1. *California.*—*Asevado v. Orr*, 100 Cal. 293.

Kansas.—*Missouri, etc., R. Co. v. Munkers*, 11 Kan. 223.

Maine.—*Snow v. Weeks*, 75 Me. 105.

Massachusetts.—*Com. v. Livermore*, 4 Gray (Mass.) 18.

Michigan.—*Holt v. People*, 13 Mich. 224.

New York.—*Doherty v. Lord*, 8 Misc. Rep. (N. Y. C. Pl.) 227.

Tennessee.—*Henry v. State*, 4 Humph. (Tenn.) 270; *Conatser v. State*, 12 Lea (Tenn.) 436.

Texas.—*Black v. State*, 42 Tex. 378.

Virginia.—*Dejarnette v. Com.*, 75 Va. 867.

Even Where, by His Formal Answer, the juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of unfairness or prejudice he should be rejected. So that a fair and impartial jury is secured, error cannot be predicated on the rejection of persons who may have been qualified. *Omaha, etc., R. Co. v. Cook*, 37 Neb. 435.

Unfamiliarity with English—Possible Distraction of Attention.—The court may exclude a juror because of possible unfamiliarity with the English language and because the situation of his business is such that his attention would be distracted. *People v. Spiegel*, 75 Hun (N. Y.) 161.

tion, and in requiring a challenge or objection to be interposed, will not constitute error.¹

8. Examination — Trial of Challenges — a. RIGHT TO EXAMINE. — A party to a civil action, or a person accused of crime, has the right to submit a proposed juror to such reasonable examination as will enable the court to see that the juror stands indifferent and that he is possessed of the requisite qualifications,² or as will enable him intelligently to exercise the right of peremptory challenge, when that course may be deemed necessary or advisable.³

1. It is not a ground for a new trial, that after the impaneling of a jury the presiding judge, of his own motion, did not dismiss a juror whom he offered to allow to be withdrawn if counsel for the defendant would move therefor, which counsel declined. *State v. Coleman*, 8 S. Car. 237.

A simple suggestion to the court that the defendant will agree to excuse a juror is not sufficient. If the juror is obnoxious to the defendant, and legal grounds exist for excluding him, the defendant should move to set him aside. *Roberts v. State*, 30 Tex. App. 291.

In *Jackson v. State*, 94 Ala. 85, the court declined to exclude a juror who, it appeared, was an unpardoned felon, unless he was challenged for that cause, and there was held to be no error in retiring him on a challenge for cause upon that ground, the challenge not having been charged to the defendant as peremptory.

2. *Alabama*. — *State v. Williams*, 3 Stew. (Ala.) 454.

California. — *Watson v. Whitney*, 23 Cal. 375; *People v. Car Soy*, 57 Cal. 102.

Colorado. — *Union Pac. R. Co. v. Jones*, 21 Colo. 340.

Georgia. — *Howell v. Howell*, 59 Ga. 145.

Illinois. — *Donovan v. People*, 139 Ill. 412; *O'Hare v. Chicago, etc., R. Co.*, 139 Ill. 151; *Lavin v. People*, 69 Ill. 304.

Indiana. — *Pearcy v. Michigan Mut. L. Ins. Co.*, 111 Ind. 59.

Michigan. — *Stephens v. People*, 38 Mich. 739; *People v. Evans*, 72 Mich. 367.

Missouri. — *State v. Mann*, 83 Mo. 589.

Nebraska. — *Basye v. State*, 45 Neb. 261.

New York. — *People v. Vermilyea*, 7 Cow. (N. Y.) 108.

Ohio. — *Ohio v. Ankrim, Tappan (Ohio)* 112.

Pennsylvania. — *O'Mara v. Com.*, 75 Pa. St. 424.

Vermont. — *State v. Godfrey*, 1 Brayt. (Vt.) 170.

Virginia. — *Com. v. Stockley*, 10 Leigh (Va.) 712.

See *State v. Norris*, 1 Hayw. (N. Car.) 429.

After Exhaustion of Peremptory Challenges. — It is discretionary with the trial court to allow interrogatories by the defendant, after he has exhausted his peremptory challenges, as to the qualifications of a proposed juror. *State v. Smith*, 56 Minn. 78.

In the United States Courts the state laws control with respect to the qualifications and examination of jurors. *St. Clair v. U. S.*, 154 U. S. 134.

Examination of Discharged Juror — Peremptory Challenges Not Exhausted. —

There is no error in refusing to allow the defendant to question a juror, who has testified as to a fixed opinion, and in consequence thereof is discharged, where it does not appear that the defendant exhausted his peremptory challenges. *State v. West*, 46 La. Ann. 1009.

3. *California*. — *Watson v. Whitney*, 23 Cal. 375; *People v. Car Soy*, 57 Cal. 102.

Colorado. — *Union Pac. R. Co. v. Jones*, 21 Colo. 340.

Illinois. — *Donovan v. People*, 139 Ill. 412; *O'Hare v. Chicago, etc., R. Co.*, 139 Ill. 151; *Lavin v. People*, 69 Ill. 304.

Indiana. — *Pearcy v. Michigan Mut. L. Ins. Co.*, 111 Ind. 59.

Michigan. — *Stephens v. People*, 38 Mich. 739.

Missouri. — *State v. Mann*, 83 Mo. 589; *State v. Taylor*, 64 Mo. 358.

Nebraska. — *Basye v. State*, 45 Neb. 261.

Pennsylvania. — *Comfort v. Mosser*, 121 Pa. St. 455.

Texas. — *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650.

b. WAIVER OF RIGHT. — The failure of a party to an action, or of one accused of crime, to ask to have the impartiality of the jurors tested or to propose an examination is a waiver of the right.¹

c. RE-EXAMINATION. — Usually when a juror has been accepted without having been examined, or has taken his seat after having been examined, no further examination is permissible.² The trial judge, however, in his discretion, may permit a

Examination on Ground Which Is Not Ground for Challenge for Cause. — In a capital case the proposed juror may be examined by the state as to his prejudice, for the purpose of ascertaining the advisability of peremptory challenge, although such prejudice is not a ground of challenge for cause. *State v. Dooley*, 89 Iowa 584.

After a Trial as to the Existence of Actual Bias, and a finding of competency, it is the duty of the court that information should be given to the challenging party sufficient to enable him to exercise his right of peremptory challenge, if he so desires. *People v. Hamilton*, 62 Cal. 377, explaining *Watson v. Whitney*, 23 Cal. 379; *People v. Car Soy*, 57 Cal. 102.

Duty to Allow Examination. — There is no duty resting on the court to go into an inquisition the sole purpose of which is to aid the defendant in determining whether he will challenge a juror peremptorily. *Hawes v. State*, 88 Ala. 37.

After Acceptance by State. — After an examination of a juror by the court, by whom he is declared competent, and acceptance by the state, the defendant cannot go into the further examination for the purpose of ascertaining the propriety of a peremptory challenge. *Lundy v. State*, 91 Ala. 100.

1. *Smith v. State*, 63 Ga. 168; *Dokes v. Soards*, 9 Ohio W'kly L. Bul. 76.

Where a Jury Is Accepted Without Objection, the failure of the judge to examine the individual jurors as to the qualifications prescribed by statute will not invalidate the verdict. *Skinner v. State*, 53 Miss. 399.

Acceptance Without Questioning. — Where a juror who is neither a freeholder nor a householder is accepted without questioning him as to his qualifications, the objection is waived. *Gillooley v. State*, 58 Ind. 182 [citing *Croy v. State*, 32 Ind. 384; *Kingen v. State*, 46 Ind. 132].

Presumption of Qualification. — A person presented as a juror is presumed

to be qualified, and the burden of proving the contrary is on the party challenging. *Holt v. People*, 13 Mich. 224.

2. *State v. Donelon*, 45 La. Ann. 744; *State v. Mangrum*, 35 La. Ann. 619.

After Acceptance. — In *People v. Stonecipher*, 6 Cal. 405, wherein a defendant might have successfully challenged a juror for the formation and expression of an opinion, but instead passed him, whereupon the prosecution accepted him, there was held to be no error in refusing to allow the defendant further to question the juror.

Jury Uncompleted. — In *Vaughan v. State*, 58 Ark. 353, there was held to be no error in permitting the prosecuting attorney, after the selection of a juror, again to examine him as to his relationship to the accused, in the presence of jurors who had been accepted and talesmen who had been summoned — the juror afterwards sitting without objection.

Where after examination on his *voir dire* a juror is found competent, the failure to permit his re-examination as to matters which it appears would not show incompetency is no ground for reversal, especially where it appears that the juror in question did not serve. *State v. Mangrum*, 35 La. Ann. 619.

After Acceptance and Before Swearing. — After a juror who has been accepted, but not sworn, has made a statement of his disqualification, as to which he had been questioned, he may be re-examined as to the disqualification, and if found disqualified may be set aside. *State v. West*, 46 La. Ann. 1009.

After a juror is put upon the prisoner, but before he is sworn, the state may be permitted to question him as to his citizenship, information as to that fact having just come to the solicitor general. *Johnson v. State*, 58 Ga. 491. See *Williams v. State*, 3 Ga. 453.

After Allowance of Challenge. — Where a juror has been challenged on behalf of the people, on the ground of conscientious scruples against the infliction

venireman, before the panel is completed, to correct mistaken statements made by him as to his qualifications when he was first called;¹ and under special circumstances, and for the purpose of removing any doubt as to the competency or the qualification of members of the jury, the court, within its discretion, may permit the re-examination of a juror who has been accepted.² But after jurors are accepted and sworn, it is usually too late to go into an examination or a further examination as to their competency.³

of the death penalty, and a challenge is allowed, there is no abuse of discretion in refusing permission to the accused further to examine the juror. *People v. Collins*, 105 Cal. 504.

After Trial of Special Plea and Before Trial on Plea of Not Guilty.—Where a plea of not guilty and a special plea of former trial and conviction may be directed to be tried separately before the same jury, and where the special plea is first tried and determined, there is no error in refusing permission to examine a juror as to any bias formed from the trial of the special plea which might disqualify him from serving on the trial of the general issue. *People v. Connor*, 142 N. Y. 130.

After Trial Begun.—Before any member of a jury to which the case has been submitted in part can be re-examined as to his competency, the submission must be set aside, that the jury will be in the same position as before the acceptance and swearing. *Kurtz v. State*, 145 Ind. 119.

After Admonition by Court.—In *State v. Rose*, 92 Mo. 201, after the jury had been admonished and the defendant allowed a certain time within which to make his peremptory challenges, the defendant requested the right to re-examine the panel for the purpose of ascertaining whether any had become disqualified because of reading newspapers. It did not appear that there was any evidence that the admonition of the court had been disregarded, nor that anything prejudicial to the defendant had been published in the newspapers, and it was held that the motion was properly overruled.

1. *Com. v. Twitchell*, 1 Brews. (Pa.) 551; *Hendrick v. Com.*, 5 Leigh (Va.) 707.

2. *Belt v. People*, 97 Ill. 461; *State v. Buxton*, 89 Iowa 573; *State v. Donelson*, 45 La. Ann. 744; *State v. Mangrum*, 35 La. Ann. 619.

Acceptance Without Questions.—Not-

withstanding the acceptance of a juror by both sides without questioning, there is no error arising from the fact that the prosecuting attorney subsequently questioned him as to his qualifications and again accepted him. *Seals v. State*, 35 Tex. Crim. Rep. 138.

Suspicious Circumstances After Juror Sworn.—In *Ochs v. People*, 124 Ill. 399, there was held to be no error in allowing a re-examination of jurors who had been accepted and sworn, upon an affidavit on behalf of the state that they were improper persons, setting out suspicious circumstances, and that they had been proved to have been placed on the jury by outside influences.

In a Capital Case the proposed juror may be re-examined as to his opinion relative to capital punishment. *State v. Foster*, 91 Iowa 164.

Correction of Answer.—In *People v. Wilson*, 3 Park. Cr. Rep. (Westchester Oyer & T. Ct.) 199, it was held that after a juror decided to be competent has been sworn, he may be re-examined, if no evidence has been taken in the case. In that case it appeared that the juror misunderstood a question and gave a wrong answer, and that he desired to make a correction.

3. *Rash v. State*, 61 Ala. 89; *Smith v. State*, 55 Ala. 1; *People v. Golden-son*, 76 Cal. 328; *Schell v. State*, 92 Ga. 459; *Kurtz v. State*, 145 Ind. 119; *Com. v. Knapp*, 10 Pick. (Mass.) 477.

In *West Virginia*, in a felony case, and after the jury is sworn, the presiding judge, at the instance of the prosecuting attorney, may examine one of the jurors on oath for the purpose of ascertaining whether or not he is a citizen of the state. *State v. Henderson*, 29 W. Va. 147.

Peremptory Challenge—California.—Where the court is empowered, for cause, to allow a challenge to a juror after he has been sworn and before the completion of the jury, it is not error

d. CHALLENGING BEFORE OR AFTER EXAMINATION. — The usual practice is first to interpose the challenge, and then to interrogate the proposed juror to ascertain the existence of the grounds to support it, or to prove it on oath;¹ but in one state at least, and probably in others, it has been held that the examination should precede the challenge, and that the defendant cannot be required first to challenge before questioning the juror as to the formation or expression of an opinion as to the guilt or innocence of the accused.²

e. OATH. — Although it may not be improper to conduct the examination without administration of the oath to the proposed juror, especially where no request is made therefor,³ yet the more convenient and better practice requires the examination to be under oath, or at least makes it desirable that the examination should be so conducted.⁴

to permit the re-examination of a juror after his acceptance but before the jury is completed, upon matters coming to the knowledge of the party requesting the right to re-examine before the complete formation of the jury. *People v. Durrant*, 116 Cal. 179; *People v. Bemmerly*, 87 Cal. 117.

1. *Alabama*. — *Lundy v. State*, 91 Ala. 100; *Bales v. State*, 63 Ala. 38; *Kansas City, etc., R. Co. v. Whitehead*, 109 Ala. 495; *Hawes v. State*, 88 Ala. 37.

Connecticut. — *State v. Wilson*, 38 Conn. 127.

Georgia. — *Schnell v. State*, 92 Ga. 459.

Michigan. — *Crippen v. People*, 8 Mich. 117.

Mississippi. — *King v. State*, 5 How. (Miss.) 730; *State v. Flower*, Walk. (Miss.) 318.

New Jersey. — *State v. Zellers*, 7 N. J. L. 220.

New Mexico. — *Territory v. Lopez*, 3 New Mex. 104.

England. — *Reg. v. Dowling*, 3 Cox, C. C. 509.

See also *Burr's Trial* (Carpenter's ed.), p. 70 *et seq.*; and see *infra*, IX. 8. *i.* *Trial of Challenges*.

Discretion of Court. — The allowance of preliminary interrogatories to a proposed juror as to his qualifications without first interposing a challenge is purely discretionary with the court. *State v. Lautenschlager*, 22 Minn. 514; *State v. Smith*, 56 Minn. 78.

2. *People v. Backus*, 5 Cal. 275; *People v. Reynolds*, 16 Cal. 129.

It is the better practice to permit Preliminary Inquiries, which if answered

satisfactorily may relieve the defendant of the necessity of challenging; but admitting it to be the rule that the examination may be exhausted before the challenge, the examination, or any ruling during its continuance, cannot be made the foundation for alleged error unless the challenge is taken at some stage of the proceedings in the court below. *People v. Hamilton*, 62 Cal. 377, explaining *People v. Backus*, 5 Cal. 277.

3. *State v. Hoyt*, 47 Conn. 518.

Unless so Authorized by Law a court or a justice of the peace has no right to require jurors to be sworn to answer questions whether they have declared opinions on the case. *Bracken v. Preston*, 1 Pin. (Wis.) 365.

Failure to Request. — The state may challenge jurors for cause for reason of answers by them, not made under oath, where no request was made that they be sworn on their *voir dire* and no objection made to their examination without it. *Zell v. Com.*, 94 Pa. St. 258.

4. *State v. Hoyt*, 47 Conn. 518; *Goodwin's Case*, 5 C. H. Rec. (N. Y.) 11; *Respublica v. Dennie*, 4 Yeates (Pa.) 267; *Anonymous*, 1 Salk. 153.

In *Zell v. Com.*, 94 Pa. St. 258, Mr. Justice Trunkey said: "Though it may not be erroneous to omit the oath, unless it be requested to be taken, yet, so far as advised, it is the more general practice, and we think the better one, to examine the juror under his oath."

Waiver of Oath. — While a party may object to the examination of a juror without the oath, if he permits such an examination, and afterwards requires

f. **PRESENCE OF PARTY.** — The parties have a right to be present during an examination of the proposed jurors, but mere temporary absence from the court room during a portion of the proceedings will furnish no ground for reversal, where no injury has resulted.¹

g. **STATUTORY PROVISIONS** — (1) *Legislative Power.* — While legislatures cannot deprive persons accused of crime of the right to trial by a fair and impartial jury, there is no doubt that, unless controlled by constitutional provisions, they may direct the mode of ascertaining the competency of proposed jurors by prescribing the questions to be propounded to them.²

the juror to be sworn, he will waive his objection on that ground. *Trullinger v. Webb*, 3 Ind. 198.

Recalling Unsworn Jurors. — Where veniremen were asked the statutory questions without first having been sworn, and an application made by the state to have them recalled and sworn was granted, it was held that the defendant was not entitled to a new trial for that reason, where he failed to show that any injury had resulted from the procedure. *Wilson v. State*, 69 Ga. 225.

Sufficiency of Oath. — The oath tendered to a juror on a *voir dire* need not specify the ground of challenge, unless so required by counsel. *Foster's Case*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 372, note.

Where no particular form of oath is prescribed by statute, the fact that the oath administered to the jurors on their *voir dire* was: "You and each of you do solemnly swear you shall give to such questions as may be propounded to you, touching your competency as jurors, as shall be the truth, the whole truth, and nothing but the truth, so help you God," was held not to constitute error, no objection to the form of the oath having been interposed. *Denham v. State*, 22 Fla. 664.

Sufficiency of Record to Show Administration of Oath. — A recital in a journal entry that "the jury was impaneled, tried, and sworn" is not sufficient to show that the jurors were examined on oath as to their competency. *State v. Funck*, 17 Iowa 365.

1. **The Voluntary Absence of the Defendant** from the court room during the examination of a juror furnishes no ground for reversal, where it appears that the juror was peremptorily challenged. *Van Houton v. People*, 22 Colo. 53.

Absence of Prosecuting Attorney. — The

fact that the court examined proposed jurors as to their competency in the momentary absence of the prosecuting attorney will furnish no ground of reversal. *State v. Ludwig*, 70 Mo. 413.

Conclusiveness of Record of Presence. — Where the record shows that the defendant was present during the formation of the jury, affidavits will not be received to show his absence during the examination of a particular juror. *Van Houton v. People*, 22 Colo. 53.

Laches in Presenting Objections. — The appellate court will not consider an affidavit made out to decide a statement of facts after the settlement of the statement, and some seven months after the trial of the cause, to the effect that the defendant was compelled to proceed to trial with a jury which had been partially examined during his absence, where there is nothing in the record to show such absence. *State v. Holmes*, 12 Wash. 169.

2. *State v. Marks*, 15 Nev. 33; *Stagner v. State*, 9 Tex. App. 440. See *Matilda v. Mason*, 2 Cranch (C. C.) 343.

In Arkansas the power of the legislature to prescribe the mode of determining the qualifications of proposed jurors is unaffected by the provisions of the Constitution of 1868, and the statute prescribing the mode does not conflict with the Constitution, nor was it any wise affected by the Code of Practice prior to the amendments of 1871. *Whitehead v. Wells*, 29 Ark. 99.

In Georgia it was held that the common-law right of challenge to a juror was not taken away by a statute prescribing certain questions to be propounded to the proposed juror, and providing that if he answered in the negative he might be put upon triers and his incompetency shown. *Robinson v. State*, 1 Ga. 563.

The requirements of the *Georgia* Volume XII,

(2) *Province of Judge*—(a) *Generally*.—The examination of a proposed juror may be and sometimes is required to be conducted in its entirety by the presiding judge, as where that duty is cast upon the judge by statute, and after the juror is found competent he is required to be tendered to the parties or to the accused for acceptance or rejection.¹

Code, § 4682, as to questions to be asked a juror on his *voir dire*, and the provision that when these are properly answered the juror shall be adjudged competent, do not impair the constitutional right to a trial by an impartial jury. *Woolfolk v. State*, 85 Ga. 69.

Statutory Prescription After Offense.—The *Alabama* Act of 1843, prescribing certain questions to be propounded to jurors to test their competency for the trial of capital offenses, was held applicable to any case which arose previous to its passage. *Reynolds v. State*, 1 Ga. 222.

1. *State v. Coleman*, 20 S. Car. 441.

By the Alabama Code of 1876, § 4760, it is made the imperative duty of the court, before administering the oath to a petit juror, to ascertain whether he is competent to discharge the duties required of him, with honesty, impartiality, and intelligence, and is esteemed in the community for integrity, fair character, and sound judgment. See *Bales v. State*, 63 Ala. 30.

Right of Counsel.—In investigating the competency of jurors, counsel themselves have no right to interpose and interrogate jurors, except by direction of the court, to which the whole matter must be left for the exercise of sound judgment and discretion. *Powers v. Presgroves*, 38 Miss. 227.

Conclusiveness of Decision of Court.—After a juror has been pronounced competent on his *voir dire* no error is committed in refusing to allow further examination, with a view to showing a cause of challenge not brought to light by the statutory interrogatories. *Carr v. State*, 104 Ala. 4. See also *Bales v. State*, 63 Ala. 30; *Hawes v. State*, 88 Ala. 37; *Lundy v. State* 91 Ala. 100.

Failure to Question.—In forming a jury to try an indictment for a capital offense, the presiding judge may require an exhaustive examination of a proposed juror before passing on his competency, and if a defendant, after due opportunity, declines to propound questions until after announcement of the juror's competency, he is precluded

from examining further. *Penn v. State* 62 Miss. 450.

After Acceptance by State.—The refusal of the court to allow the defendant further to examine a juror, after the court has examined him and declared him competent and he has been accepted by the state, is not the subject of review. *Lundy v. State*, 91 Ala. 100.

By the Massachusetts Public Statutes, c. 170, § 35, upon motion of either party, the court is required to examine the proposed juror, "to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein;" and under this the whole matter relative to the examination of jurors, beyond the provisions of the statute, must be left to the sound judgment and discretion of the presiding judge. *Com. v. Gee*, 6 Cush. (Mass.) 175; *Com. v. Thrasher*, 11 Gray (Mass.) 55.

Continuation of Examination by Counsel.—After a juror has been examined and found competent by the judge, the prosecuting attorney may continue the examination as to his competency. *Williams v. State*, 32 Miss. 389.

In Mississippi the judge in the first instance should examine a venireman. The district attorney and the prisoner may pursue the examination, so as to elicit all the facts, if they so choose, and the court then should decide, as a question of law, whether the person is competent. *White v. State*, 52 Miss. 216.

In *Story v. State*, 68 Miss. 609, it was announced as a proper rule that the court should examine the jurors on their *voir dire* as to their competency, permitting and inviting counsel to suggest questions, but not permitting them to interrogate the jurors directly upon the subject of their competency, and after each juror has been found competent by him, to allow the counsel to examine directly with a view to peremptory challenge, but for no other purpose.

In Georgia, as each juror is presented

(b) *Nonobservance of Statute.* — The omission of the court to test the persons presented for jury duty as to their competency, in the mode prescribed by statute, may constitute error,¹ but where no request is made that the statutory inquiries be put, or no objection is made to proceeding to trial with a jury which has not been questioned, the error, if any, is waived.²

(3) *Statutory Questions.* — Though questions prescribed by statute to test the competency of jurors are the only proper questions to ask, yet they may be so varied in form as to enable the jurors properly to understand them.³ On the examination of

to the accused in such a manner that he can distinctly be seen, he may be objected to for any of the causes prescribed by the statute, whereupon it becomes the duty of the court immediately to hear such evidence as may be submitted in relation to the truth of the objections, and, if satisfied of their truth, to set aside the juror for cause. *Simmons v. State*, 73 Ga. 609.

Allowance of Further Examination. — Where a juror upon his *voir dire* had answered that he was opposed to capital punishment in cases of extreme youth, and by consent of counsel for the accused was put upon the court as a trier, and then stated that he was not opposed to capital punishment, the court did not err in allowing counsel for the state, over objection, to interrogate him further, nor in setting him aside for cause, the juror finally explaining that he was conscientiously opposed to such punishment though it might be shown that the accused was over the age of fourteen. *Bell v. State*, 91 Ga. 15.

Refusal of Further Examination. — Where by answers to the statutory questions the juror appears to be competent, and is put upon the presiding judge for further trial as to his competency, the latter may decline to allow the juror to be further examined, and may confine the investigation to evidence *aliunde* and its effect. *Cox v. State*, 64 Ga. 374.

After a juror has shown himself competent by answering questions, any further objection to his competency must be tried. *Dumas v. State*, 63 Ga. 601.

Right of Counsel to Examine. — The allowance of an examination by counsel is an indulgence on the part of the court. *State v. Coleman*, 8 S. Car. 237.

Option of Court. — In *Mississippi*, when a proposed juror is on his *voir dire*, it

is optional with the presiding judge to allow counsel to propound the questions or to propound them himself. *Guice v. State*, 60 Miss. 714.

Under the Florida Statute it was held that while the better practice is to permit examination of veniremen upon their *voir dire* by counsel in the case, there is nothing to prohibit the court from exclusively burdening itself with the entirety of the examination if it sees fit so to do. *Jones v. State*, 35 Fla. 289; *Pinder v. State*, 27 Fla. 370.

Right to Preclude Defendant. — In *Michigan* an examination of the jurors on the prosecution by the judge will not preclude an examination on the part of the defendant. *Stephens v. People*, 38 Mich. 739.

It Is the Duty of a Justice to admonish jurors that if they do not feel indifferent, or have prejudged the case or disclosed their opinions, they should disclose the facts. *Respublica v. Denie*, 4 Yeates (Pa.) 267. And see *Bracken v. Preston*, 1 Pin. (Wis.) 365.

1. *Lester v. State*, 2 Tex. App. 432.
2. *Young v. State*, 23 Ohio St. 577; *State v. Merriman*, 34 S. Car. 16.

Failure to Request Inquiry by Court. — Where the defendant neither inquires himself nor asks the court to make inquiries respecting qualifications of jurors, but accepts some of them and objects to others, an objection after completion of the jury that the court did not, as required by statute, ascertain that the jurors were qualified is unavailable, especially where there is no suggestion that any disqualification existed in fact. *James v. State*, 53 Ala. 380.

3. *Pinder v. State*, 27 Fla. 370; *King v. State*, 21 Ga. 220; *Simmons v. State*, 73 Ga. 609.

Necessity of Reading Indictment. — In examining bystanders as to their qualifications, it is sufficient to state in gen-

proposed jurors after their qualification, the court may restrict counsel to the questions prescribed by statute,¹ but it is discretionary with the presiding judge when acting as a trier to propound questions other than those prescribed by statute.²

eral terms the offense and the party charged therewith, without reading the indictment. *Com. v. Gee*, 6 Cush. (Mass.) 174.

1. Under the Georgia Practice, only the statutory questions can be asked by counsel in the first instance, and after the juror is pronounced *prima facie* competent, evidence may be introduced to show incompetency, and then it is the province of the court to examine the juror further. *Woolfolk v. State*, 85 Ga. 69; *Jones v. State*, 90 Ga. 616. See also *King v. State*, 21 Ga. 220; *Pines v. State*, 21 Ga. 227; *Guilford v. State*, 24 Ga. 315; *Monday v. State*, 32 Ga. 672; *Nesbit v. State*, 43 Ga. 238; *Carter v. State*, 56 Ga. 467; *Dumas v. State*, 63 Ga. 600; *Cox v. State*, 64 Ga. 404; *Johnson v. State*, 65 Ga. 94; *Simmons v. State*, 73 Ga. 609; *Bishop v. State*, 9 Ga. 121.

In Texas, under a statute providing that if a juror affirmatively answers that the opinion he has formed will influence his verdict he must be discharged, but if negatively he may be further questioned, an affirmative answer concludes the investigation and constitutes the answer conclusive as to his qualifications. *Stagner v. State*, 9 Tex. App. 440; *Shannon v. State*, 34 Tex. Crim. Rep. 5, *overruling* *Suit v. State*, 30 Tex. App. 319.

Examination as to Causes of Challenge Favorable Aliunde.—The court need not examine a proposed juror on his *voir dire* as to causes of challenge which are not required to be proved by the oath of the juror alone, but which may be established by other testimony. *Bridges v. State*, 110 Ala. 15.

Right to Question Juror Found Competent.—When a juror, after answering the prescribed statutory questions so as to appear *prima facie* competent, is put upon the presiding judge for further trial of his competency, the judge may decline to allow any other question to be propounded to the juror, and may confine the investigation to evidence *aliunde* and its effect. *Cox v. State*, 64 Ga. 374; *Davis v. Hunter*, 7 Ala. 135.

Right of State to Ask Question Solely Allowed to Defendant.—According to

the Delaware practice the waiver by the accused of his right to put a question to a juror as to his formation or expression of an opinion confers no right on the state to ask the question, but it is restricted to asking its own questions. *State v. Rhodes*, 1 Houst. Cr. Cas. (Del.) 476.

2. *Simmons v. State*, 73 Ga. 609; *Fogarty v. State*, 80 Ga. 450; *Com. v. Gee*, 6 Cush. (Mass.) 174; *Pierce v. State*, 13 N. H. 536. And see *State v. Mann*, 83 Mo. 589.

The Massachusetts Act of 1887, c. 149, which empowered the parties to examine jurors as to their interest or bias "under the direction of the court," did not affect the prior statutory provisions vesting a discretion in the judge on such an examination beyond the inquiries expressly provided for. *Com. v. Poisson*, 157 Mass. 510. See also *Com. v. Trefethen*, 157 Mass. 180.

Passing Juror.—The fact that a juror is passed by not because of disqualifying statements made by him, but to afford the prisoner the greatest chance of an impartial jury, will not preclude the court from subsequently ruling that the statements made by the juror were not because of challenge. *State v. Howard*, 17 N. H. 171; *Boardman v. Wood*, 3 Vt. 577.

Unusual Questions.—The presiding judge is not required at the request of counsel to ask unusual questions of jurors, nor to address them, after the panel is made up, as to matters tending to disqualify them because of bias or the formation of an opinion. *Simmons v. State*, 73 Ga. 609.

Explanation of Statutory Questions.—It is the right and the duty of the trial court, when it is apparent that a juror does not understand the statutory questions, to explain them to him so that he may answer them intelligently, and it is always discretionary with the judge whether he will change or vary the questions, so that the juror may the better understand them. *Woolfolk v. State*, 85 Ga. 69. See also *Fogarty v. State*, 80 Ga. 460; *Henry v. State*, 33 Ga. 441; *Mitchell v. State*, 22 Ga. 212; *King v. State*, 21 Ga. 220; *Dumas v. State*, 65 Ga. 475.

h. SCOPE OF EXAMINATION—(1) *Latitude and Limitation of Inquiry*.—Where the scope of the inquiry is not limited by statute, a full and exhaustive examination should be allowed, that the juror may be thoroughly tested.¹ It is the duty of counsel to pursue their inquiries to the fullest extent, otherwise they cannot complain of the disqualification of jurors for causes of challenge which might have been discovered by the exercise of due diligence, and to which timely objection might have been made.²

1. *Union Pac. R. Co. v. Jones*, 21 Colo. 340; *Donovan v. People*, 139 Ill. 412; *Smith v. Eames*, 4 Ill. 76; *Zimmerman v. State*, 56 Md. 536; *People v. Evans*, 72 Mich. 367; *Basye v. State*, 45 Neb. 261; *State v. Chapman*, 1 S. Dak. 414.
2. *Arkansas*.—*Meyer v. State*, 19 Ark. 156; *Collier v. State*, 20 Ark. 36; *Daniel v. Guy*, 23 Ark. 50.
- California*.—*Lawrence v. Collier*, 1 Cal. 37; *Thompson v. Paige*, 16 Cal. 77.
- Connecticut*.—*Gilbert v. Rider*, Kirby (Conn.) 184.
- Georgia*.—*Gormley v. Laramore*, 40 Ga. 253; *Baker v. Moor*, 84 Ga. 186; *Glover v. Woolsey*, Dudley (Ga.) 85.
- Illinois*.—*Sellers v. People*, 4 Ill. 412; *Vennum v. Harwood*, 6 Ill. 659; *Byars v. Mt. Vernon*, 77 Ill. 467.
- Indiana*.—*Buck v. Hughes*, 127 Ind. 46; *Rice v. State*, 16 Ind. 298; *Lamphier v. State*, 70 Ind. 317; *Adams v. State*, 99 Ind. 244; *Block v. State*, 100 Ind. 357.
- Iowa*.—*Stewart v. Ewbank*, 3 Iowa 191; *Pelton v. Jones*, 1 Morr. (Iowa) 491.
- Kansas*.—*State v. Jackson*, 27 Kan. 581.
- Louisiana*.—*State v. Magee*, 48 La. Ann. 901; *State v. Kennedy*, 8 Rob. (La.) 590.
- Maryland*.—*Green v. State*, 59 Md. 123; *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722; *Leffler v. Brandt*, 3 Har. & M. (Md.) 101, note *b*.
- Massachusetts*.—*Wassum v. Feeney*, 121 Mass. 93; *Jeffries v. Randall*, 14 Mass. 205.
- Michigan*.—*Johr v. People*, 26 Mich. 427, which was debt on an official bond, *distinguishing Hill v. People*, 16 Mich. 351, which was a felony case, and was decided otherwise.
- Minnesota*.—*State v. Thomas*, 19 Minn. 484; *State v. Madigan*, 57 Minn. 425.
- Mississippi*.—*Wood v. State*, 62 Miss. 220; *George v. State*, 39 Miss. 570; *Brown v. State*, 60 Miss. 447; *Seal v. State*, 13 Smed. & M. (Miss.) 286; *Childress v. Ford*, 10 Smed. & M. (Miss.) 25.
- Missouri*.—*Lisle v. State*, 6 Mo. 426.
- Nebraska*.—*Wilcox v. Saunders*, 4 Neb. 569; *Clough v. State*, 7 Neb. 320; *Hickey v. State*, 12 Neb. 490; *Everton v. Esgate*, 24 Neb. 235.
- New Hampshire*.—*Harrington v. Manchester*, etc., R. Co., 62 N. H. 77; *Rollins v. Ames*, 2 N. H. 349; *State v. Hascall*, 6 N. H. 352; *Wilcox v. School Dist. No. 1*, 26 N. H. 303; *Bodge v. Foss*, 39 N. H. 406; *Pittsfield v. Barnstead*, 40 N. H. 477; *State v. Daniels*, 44 N. H. 383.
- New Mexico*.—*Anderson v. Territory*, 4 N. Mex. 108; *Territory v. Baker*, 4 N. Mex. 117.
- New York*.—*Stedman v. Batchelor*, 49 Hun (N. Y.) 390.
- North Carolina*.—*State v. White*, 68 N. Car. 158; *State v. Davis*, 80 N. Car. 412; *State v. Crawford*, 2 Hayw. (N. Car.) 298.
- Ohio*.—*Shoemaker v. State*, 12 Ohio 43; *Simpson v. Pitman*, 13 Ohio 365; *Brown v. State*, 18 Ohio St. 509; *Hayward v. Calhoun*, 2 Ohio St. 164; *Parks v. State*, 4 Ohio St. 234; *Beck v. State*, 20 Ohio St. 229; *Kenrick v. Reppard*, 23 Ohio St. 333; *Fouts v. State*, 8 Ohio St. 98; *Wilder v. State*, 25 Ohio St. 555; *Watts v. Ruth*, 30 Ohio St. 32.
- Oregon*.—*State v. Powers*, 10 Oregon 145.
- Rhode Island*.—*Ryan v. Riverside*, etc., Mills, 15 R. I. 436.
- South Carolina*.—*State v. Quarrel*, 2 Bay (S. Car.) 150.
- Tennessee*.—*M'Clure v. State*, 1 Yerg. (Tenn.) 206; *Booby v. State*, 4 Yerg. (Tenn.) 111; *Gillespie v. State*, 8 Yerg. (Tenn.) 507; *Ward v. State*, 1 Humph. (Tenn.) 253; *Calhoun v. State*, 4 Humph. (Tenn.) 477; *Draper v. State*, 4 Baxt. (Tenn.) 253; *Cartwright v. State*, 12 Lea (Tenn.) 620.

The examination should be confined to legitimate inquiry as to the particular matter under investigation, and should take enough range to put the court and counsel in possession of such material matters affecting the proposed juror as will enable them to act intelligently in selecting a jury;¹ but a limitation of the inquiry will not be deemed erroneous if it is apparent that the complaining party sustained no injury by the action of the court.²

(2) *Questioning*. — Any proper questions framed to elicit the condition of mind of the jurors respecting the parties or the general subject-matter of the action may be addressed to the panel

Texas. — *Armstrong v. State*, 34 Tex. Crim. Rep. 248; *McGehee v. Shafer*, 9 Tex. 20; *Roseborough v. State*, 43 Tex. 570; *Franklin v. State*, 2 Tex. App. 8; *Yanez v. State*, 6 Tex. App. 429; *Seals v. State*, 35 Tex. Crim. Rep. 138; *Mills v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 270; *Aud v. State*, 36 Tex. Crim. Rep. 76.

Utah. — *People v. Lewis*, 4 Utah 42.

Vermont. — *Orcutt v. Carpenter*, 1 Tyler (Vt.) 250.

Virginia. — *Com. v. Jones*, 1 Leigh (Va.) 598; *Bristow v. Com.*, 15 Gratt. (Va.) 646; *Com. v. Hailstock*, 2 Gratt. (Va.) 564; *Curran's Case*, 7 Gratt. (Va.) 622; *Poindexter v. Com.*, 33 Gratt. (Va.) 792; *Simmons v. McConnell*, 86 Va. 494; *Poore v. Com.*, 2 Va. Cas. 474; *Brown v. Com.*, 2 Va. Cas. 516.

West Virginia. — *Zickefoose v. Kuykendall*, 12 W. Va. 23; *Beck v. Thompson*, 31 W. Va. 459.

Wisconsin. — *Bonneville v. State*, 53 Wis. 680.

United States. — *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Hollingsworth v. Duane*, 4 Dall. (U. S.) 353; *U. S. v. Baker*, 3 Ben. (U. S.) 68.

England. — *Lovedaye's Case*, 8 Coke 66; *Aylett v. Stellam*, Styl. 100; *Cotton v. Daintry*, 1 Vent. 29.

Mere Reticence, when jurors are inquired of generally as to their opinion of the guilt or innocence of the accused, is not sufficient to relieve a party from further inquiry, and this is especially so if there was no statement to the juror of the facts set forth in the indictment as constituting the alleged offense. *People v. Lewis*, 4 Utah 42.

Insufficient Questions. — While proposed jurors should answer truthfully as to their qualifications and competency, and should not attempt equivocation or evasion, yet they are not required to know or to guess that something more is intended than is fairly expressed by the terms of the

questions. *Missouri, etc., R. Co. v. Munkers*, 11 Kan. 224.

Where a Defendant Who Has Been Put on Guard by the juror himself fails to avail himself of the privilege of examining the juror touching statements on the *voir dire*, it is too late after verdict to inquire of others what the purport of such statements was, and then insist upon a disqualification by reason of them. *Werner v. State*, 44 Ark. 122; *Casat v. State*, 40 Ark. 515; *Meyer v. State*, 19 Ark. 156.

Failure of Juror to Testify. — Though a juror challenged may be heard by the court in reply, the fact that he was not heard is not an error where it does not appear that he offered to testify. *McFadden v. Com.*, 23 Pa. St. 12.

1. *Donovan v. People*, 139 Ill. 412; *Smith v. Eames*, 4 Ill. 76; *Stagner v. State*, 9 Tex. App. 440.

In *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139, it is said that the court, in the early impaneling of jurors, where the numbers unchallenged are yet great, or in particular trials, or in particular circumstances, as where public opinion has been abused by the party press, or where there is reason to suppose that the opinion of the neighborhood from which the jurors came may be biased, will allow more searching and particular questions to be put to the persons summoned as jurors than it would afterwards, where it appears that a jury such as would be entirely desirable cannot be had, or where the case has not excited public interest.

2. *Burgess v. Singer Mfg. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1110.

Refusal to Allow Repetition of Question. — Where a juror has once answered that he is opposed to capital punishment, there is no error in the refusal of the trial judge to allow counsel for the defendant to repeat the question. *State v. Alphonse*, 34 La. Ann. 9.

or to the individual members thereof;¹ but where an answer one way or another to a question propounded will not have a disqualifying effect, the court may properly refuse to allow the question.² The right to cross-examine exists, and when availed of it is governed by the rules respecting cross-examination of witnesses generally.³ Unless the rule of the common law has been abrogated, jurors may not be examined as to matters tending to their infamy and disgrace.⁴

(3) *Reliance on Statements of Juror.* — A defendant examining is ordinarily justified in relying upon the statements of the juror made in the course of the examination, and is not required to pursue his investigation after positive answers showing due qualification.⁵ It has been held that though due diligence was exer-

1. *State v. Foster*, 91 Iowa 164; *Burgess v. Singer Mfg. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1110; *Com. v. Burroughs*, 145 Mass. 242; *Powers v. Presgroves*, 38 Miss. 227; *State v. Munch*, 57 Mo. App. 207; *State v. Howard*, 17 N. H. 171; *Fortune v. Trainor*, (Supreme Ct.) 19 N. Y. Supp. 598, *affirmed* 141 N. Y. 605.

Questions in Good Faith. — The presiding judge should permit any question to be answered which seems to be asked in good faith to sift the truth and search the consciences of the jurors as to competency. *Polk v. State*, 45 Ark. 165; *Casey v. State*, 37 Ark. 67.

In Louisiana. — The state has the right to ascertain the fact of a juror's fitness and impartiality by other than the stereotyped questions on the *voir dire*, and may interrogate the juror in such manner and form as will best serve to show whether he has been subjected, knowingly or not, to influences that would unfit him for the discharge of his functions. *State v. Brown*, 35 La. Ann. 340.

In Nevada questions appertaining alone to general disqualification should be asked first, and a challenge for that cause interposed or waived; next, questions competent in view of a challenge for implied bias only should be propounded, and a challenge for that cause interposed or waived; and last, the same course should be pursued for actual bias. *State v. Davis*, 14 Nev. 439.

2. *Collins v. State*, 31 Fla. 574; *State v. Wilson*, 8 Iowa 407; *State v. Hanley*, 34 Minn. 430; *State v. Thomas*, 19 Minn. 484; *Josephine v. State*, 39 Miss. 613; *Keegan v. Kavanaugh*, 62 Mo. 230; *Fortune v. Trainor*, (Supreme Ct.)

19 N. Y. Supp. 598, *affirmed* 141 N. Y. 605; *Kelley v. People*, 55 N. Y. 565; *Armsby v. People*, 2 Thomp. & C. (N. Y.) 157; *State v. Williams*, 2 Hill L. (S. Car.) 381; 2 Hawk. P. C., c. 43, § 13.

3. *Before Acceptance or Rejection by State.* — In *Texas*, after the state has examined all the special veniremen as to their qualifications, the accused is required to cross-examine them before their acceptance or rejection by the state. *Hardin v. State*, 4 Tex. App. 355; *Grissom v. State*, 4 Tex. App. 374.

Challenge Not Withdrawn. — If the prisoner challenges, and does not withdraw the challenge, the juror may be cross-examined on behalf of the commonwealth. *Com. v. Berger*, 3 Brews. (Pa.) 247.

Challenge Withdrawn. — After the prosecuting attorney has withdrawn a challenge made after propounding the two customary questions for the purpose of sustaining the challenge, the juror cannot be cross-examined by the defendant, who himself must challenge if he desires to examine. *Com. v. Berger*, 3 Brews. (Pa.) 247.

4. *Epps v. State*, 19 Ga. 102; *Hudson v. State*, 1 Blackf. (Ind.) 317; *Powers v. Presgroves*, 38 Miss. 227; *State v. Mann*, 83 Mo. 589; *Mechanics, etc., Bank v. Smith*, 19 Johns. (N. Y.) 115; *Burt v. Panjaud*, 99 U. S. 180.

Abrogation of Common-law Rule. — If the common-law rule of evidence is changed by statute, the juror challenged may be examined to prove the cause of challenge, though the examination tend to his own disgrace. *State v. Fox*, 25 N. J. L. 566.

5. *State v. Ready*, 44 Kan. 700; *Lane v. Scoville*, 16 Kan. 402.

Relief from Further Examination by Answers of Juror. — An express, un-

cised to ascertain the qualifications of a juror who was in fact disqualified and served, there should be a new trial.¹ Likewise a new trial should be granted where a disqualified or incompetent juror makes misstatements on the *voir dire*, and takes his seat, and the facts are not discovered until after the trial.² But where a disqualified juror has participated in the trial, no relief will be granted unless it is shown that the disqualification was unknown³ to the complaining party and his counsel in time properly to object; but it is not enough that one is ignorant — the ignorance must be that of both.⁴

(4) *Province of Court* — (a) *Generally*. — Where the competency of the persons presented as jurors may be inquired into by counsel, the court is vested with power to supervise the inquiry, to direct and control the examination and keep it within proper bounds, and to question the proposed jurors when necessary to ascertain their competency.⁵

qualified answer that a juror is a citizen, or that he has not formed and expressed an opinion of the guilt or innocence of the prisoner, is sufficient to relieve the defense from further investigation, unless there is something to put the party upon further inquiry. *People v. Lewis*, 4 Utah 42.

1. *Connecticut*. — *Tweedy v. Brush*, Kirby (Conn.) 13.

Florida. — *Kelly v. State*, 39 Fla. 122.

Georgia. — *Doyal v. State*, 73 Ga. 72; *Monroe v. State*, 5 Ga. 85.

Illinois. — *Nomaque v. People*, 1 Ill. 145, 12 Am. Dec. 157.

Indiana. — *Rhodes v. State*, 128 Ind. 189.

Kentucky. — *McKinley v. Smith*, Hard. (Ky.) 174; *Pierce v. Bush*, 3 Bibb (Ky.) 347; *Presbury v. Com.*, 9 Dana (Ky.) 203. And see *Siller v. Cooper*, 4 Bibb (Ky.) 90; *Vance v. Haslett*, 4 Bibb (Ky.) 191.

Mississippi. — *Brown v. State*, 60 Miss. 447.

Texas. — *O'Mealy v. State*, 1 Tex. App. 180; *Roseborough v. State*, 43 Tex. 570.

2. *Mississippi*. — *Childress v. Ford*, 10 Smed. & M. (Miss.) 25; *Sam v. State*, 31 Miss. 484; *Cannon v. State*, 57 Miss. 147; *Jeffries v. State*, 74 Miss. 675; *Cody v. State*, 3 How. (Miss.) 27.

Missouri. — *State v. Gonce*, 87 Mo. 627.

New York. — *McGarry v. Buffalo*, (Supreme Ct.) 24 N. Y. Supp. 16.

Ohio. — *Busick v. State*, 19 Ohio 198.

Tennessee. — *Brakefield v. State*, 1

Sneed (Tenn.) 215; *Howerton v. State*, Meigs (Tenn.) 262.

Texas. — *Hanks v. State*, 21 Tex. 526; *Henrie v. State*, 41 Tex. 574; *Wade v. State*, 12 Tex. App. 358; *Ray v. State*, 4 Tex. App. 450; *Gardenhire v. State*, 6 Tex. App. 147; *Page v. State*, 22 Tex. App. 551; *Long v. State*, 32 Tex. Crim. Rep. 140.

Utah. — *U. S. v. Christensen*, 7 Utah 26.

3. *Indianapolis, etc.*, *R. Co. v. Pitzer*, 109 Ind. 179; *Kennegar v. State*, 120 Ind. 176; *McKinney v. Simpson*, 51 Iowa 662; *State v. Ready*, 44 Kan. 700; *Busey v. State*, 85 Md. 115; *People v. Scott*, 56 Mich. 154; *Jenkins v. Mitchell*, 40 Neb. 664; *McGehee v. Shafer*, 9 Tex. 20.

4. *Townsend v. Briggs*, (Cal. 1893) 32 Pac. Rep. 307; *Edmondson v. Wallace*, 20 Ga. 660; *Achey v. State*, 64 Ind. 56; *State v. Labauve*, 46 La. Ann. 548; *State v. Whitesides*, 49 La. Ann. 352; *Com. v. Stokes*, 4 York Leg. Rec. (Pa.) 187.

5. *Arkansas*. — *Casey v. State*, 37 Ark. 67; *Polk v. State*, 45 Ark. 165.

Louisiana. — *State v. Barnes*, 34 La. Ann. 395.

Mississippi. — *Natchez, etc.*, *R. Co. v. Bolls*, 62 Miss. 50.

Missouri. — *State v. David*, 131 Mo. 380; *State v. Brooks*, 92 Mo. 542.

Nebraska. — *Gandy v. State*, 27 Neb. 707.

New Hampshire. — *State v. Howard*, 17 N. H. 171.

North Carolina. — *State v. Matthews*, 80 N. Car. 417.

(b) **Unwarranted Action.** — The competency of the proposed juror is to be determined from the whole examination and from all the statements made by him thereon; consequently it is improper for the court to interfere with or to limit the examination and thus deprive a party of the full exercise of his right,¹ or to impair the

South Carolina. — *State v. Coleman*, 8 S. Car. 237.

Texas. — *Shaw v. State*, 32 Tex. Crim. Rep. 155.

United States. — *Connors v. U. S.*, 158 U. S. 408.

The Allowance of Leading Questions in an examination on the *voir dire* is discretionary with the court. *People v. Ah Lee Doon*, 97 Cal. 171; *Clark v. Com.*, 123 Pa. St. 555.

Interrogation by Sheriff. — The sheriff is not the proper officer to interrogate the jurors as to their competency, but if no competent person was rejected by him, and his action was not prompted by improper motives, and no prejudice resulted, there is no error calling for reversal. *Joy v. State*, 14 Ind. 139.

The Rule Stated. — Unless restricted by statute the court may conduct the examination on the *voir dire*, but the better practice seems to be to let the examination be conducted by counsel, the court judicially supervising, directing, supplementing, and rectifying the same. *Pinder v. State*, 27 Fla. 370.

Failure to Request Interference by Court. — There is no error in the failure of the trial court to interfere where unauthorized questions were put by the state, but no objection was made at the time, nor any decision on the point asked for or made. *Mercer v. State*, 17 Ga. 146.

Limitation of Inquiry. — How far inquiry should be made of a proposed juror concerning his opinion of the morality of any pursuit or business of the accused in the conduct of which the alleged offense may have been committed, and for what opinions in that respect he may be set aside, must be left in the first instance to the discretion of the presiding judge, and his decision on such matters will not be overruled unless there has been an abuse of the discretion. *Elliott v. State*, 73 Ind. 10; *Pemberton v. State*, 11 Ind. App. 297; *Howell v. State*, 4 Ind. App. 154; *Chandler v. Ruebels*, 83 Ind. 139; *Shields v. State*, 95 Ind. 299; *Dolan v. State*, 122 Ind. 141, which in effect overrule *Swigart v. State*, 67 Ind. 287, on this point.

1. *Pemberton v. State*, 11 Ind. App. 297 [*distinguishing* *Fletcher v. Crist*, 139 Ind. 121]; *Butler v. State*, 97 Ind. 378; *State v. Foster*, 91 Iowa 164; *Burlington, etc., R. Co. v. Beebe*, 14 Neb. 463; *Smith v. Com.*, (Ky. 1896) 37 S. W. Rep. 586.

Interference with Examination. — In *Heath v. Com.*, 1 Rob. (Va.) 796, the judgment was reversed because the court arrested the examination of the juror by counsel for the prisoner, and decided that he was a competent juror, and that no further question should be put.

Limitation of Examination. — It is improper to limit counsel in his examination as to the competency of a juror who states that he has formed and expressed an opinion, when by statute it is expressly provided that counsel may examine such a juror as to the grounds of his opinion. *Limerick v. State*, 14 Ohio Cir. Ct. Rep. 207.

Refusal to Answer Questions — Juror Rejected. — Where a juror, who declined to answer whether or not he aided or abetted the late rebellion, was told that it was optional whether or not he should answer the question, whereupon a motion that he be excluded for cause was overruled, there was held to be no ground of complaint, it appearing affirmatively that he was not sworn as one of the jurors, no reason being given therefor. *Burt v. Panjaud*, 99 U. S. 180.

Incompetency Apparent. — Under a statute (Penal Code Cal., § 1074) allowing challenges for implied bias, the court, when satisfied that a juror has conscientious scruples against the infliction of the death penalty, may excuse him and refuse to allow further examination. *People v. Goldenson*, 76 Cal. 328.

Where a person examined on his *voir dire* states that he has an opinion in regard to the guilt or innocence of the accused, it is not error in the court to exclude him as a juror without pressing the examination further for the purpose of ascertaining upon what the opinion is based. *Zimmerman v. State*, 56 Md. 536.

rights of the parties or of the accused by unwarranted action.¹ Thus the refusal to allow an examination of proposed jurors by a party, or a refusal to allow him to propound pertinent and proper questions to them for the purpose of testing their competency and qualifications, is such an impairment of his right as will constitute error.²

Justice's Court.—In view of the liberality with which proceedings in justices' courts are regarded, an informal method of ascertaining the competency of a proposed juror will not be deemed sufficient to reverse. *McNall v. McClure*, 1 Lans. (N. Y.) 32.

1. Refusal to Allow Examination by Counsel.—In *Donovan v. People*, 139 Ill. 412, it was held error on the part of the court, on an application by counsel for the defendant for permission to examine proposed jurors, to announce as a ruling that "except you examine the jurors for cause through the mouth of the court, you cannot examine them at all." See also *Stephens v. People*, 38 Mich. 739.

Asking Improper Questions.—The utmost care should be exercised by trial judges, especially in capital cases, not to let any expression fall, either by questions or otherwise, that is capable of being considered as an opinion in reference to the prisoner or to his cause. Thus, on examining a juror on the *voir dire*, it is improper to ask if the prisoner's counsel, expressly naming them, had any communication with him about the case. *Hubbard v. State*, 37 Fla. 156.

Gratuitous Remarks of Judge.—In *State v. George*, 62 Iowa 682, it was held that gratuitous remarks by the trial judge made during the examination of proposed jurors as to their qualifications and competency, and relative to the legislative intent, the fact of statutory provisions respecting homicide, etc., though not consonant with the practice, were not enough to warrant reversal.

2. U. S. v. Alexander, 2 Idaho 354; *Donovan v. People*, 139 Ill. 412; *Pearcy v. Michigan Mut. L. Ins. Co.*, 111 Ind. 59; *Paducah, etc., R. Co. v. Muzzell*, 95 Tenn. 200; *Williams v. Godfrey*, 1 Heisk. (Tenn.) 299; *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650.

Examination as to Opinion Respecting Codefendant.—On the separate trial of one jointly indicted for murder, the defendant anticipating that he would be tried on the theory that he was an

accessory before the fact and had advised and procured the killing by his codefendant, who previously had been convicted, the judgment was reversed because of the refusal to allow the defendant to examine the jurors as to their opinion of the codefendant's guilt, that he might determine as to the advisability of exercising his right of peremptory challenge. *State v. Steeves*, 29 Oregon 85.

In *Hale v. State*, 72 Miss. 140, the jurors were found competent and were accepted by the state, and the court refused to permit the defendant to question each juror respecting his attitude towards the codefendant of the accused. The judgment was reversed because of the refusal to permit the examination of the jurors when a full panel was presented to the defendant for his acceptance or peremptory challenge. *Hale v. State*, 72 Miss. 140.

Extrajudicial Conduct of Justice.—A justice of the peace commits a gross irregularity when challenging jurors on the return of the first venire, merely on the ground of his own extrajudicial exceptions. *Cross v. Moulton*, 15 Johns. (N. Y.) 469.

Acceptance of Jurors' Statements.—In *Ogden v. Parks*, 16 Johns. (N. Y.) 180, which was an action in a justice's court, two talesmen, summoned to complete the jury, were objected to as not being freeholders, and it was held error on the part of the justice to refuse a request to examine them upon oath as to the fact and to allow them to take their seats on their mere statement that they were freeholders.

Failure to Exercise Right of Challenge.—Although error is committed in refusing to allow a competent and relevant question to a juror on his *voir dire*, yet the judgment will not be reversed if the record shows that the juror was finally sworn and sat in the case, and fails to show that the juror was challenged, either peremptorily or for cause, or that any peremptory challenge was made on behalf of the objecting party. *State v. Furbeck*, 29

(c) **Waiver of Irregularities.** — By the failure to except to irregular action on the part of the court in conducting examinations, objections thereto will be deemed waived,¹ and cannot be urged after verdict and judgment thereon.²

Kan. 532; *Morton v. State*, 1 Kan. 468; *Wiley v. Keokuk*, 6 Kan. 94.

Cure of Error by Nonsuit. — The refusal of the court to permit the plaintiff to show disqualification of a juror because of interest in the result of the action is harmless error, where it appears that the court properly sustained a demurrer to the plaintiff's evidence. *Corlett v. Leavenworth*, 27 Kan. 673.

Cure by Withdrawal of Objection to Examination. — In *State v. Jones*, 29 S. Car. 201, the objection of the state to an examination of a proposed juror by the defendant on the *voir dire* was sustained. On a peremptory challenge by the defendant, the state waived the objection, and the juror being then examined was again challenged by the defendant, and excluded. It was held that there was no prejudicial error.

By Recall of Juror. — Error in refusing to hear testimony as to the formation and expression of opinion by a venireman is cured where, upon suggestion of the court, and after the exhaustion by the objectant of his peremptory challenges, the juror is recalled and then peremptorily challenged by the adverse party. *Ellis v. State*, 25 Fla. 702.

By Statement Embracing Substance of Question. — In *Loeffler v. Keokuk Northern Line Packet Co.*, 7 Mo. App. 186, the court refused to allow on the *voir dire* a question intended to test the competency of a juror, but subsequently made a statement to the jury which in effect presented the test to the jury, to which no exception was taken nor was any objection made to the swearing of the jury, and there was held to be no reversible error.

Sufficiency of Record on Appeal to Show Refusal of Examination. — Where it does not appear to the reviewing court that any particular juror was challenged, or that any cause of challenge was assigned, or at what stage of the proceedings the request was made to examine jurors upon their *voir dire*, the refusal of the court to put each and every one of the jurors on his *voir dire* at the request of counsel for the accused cannot be held erroneous, the onus of showing error being upon the

party who alleges it. *Schnell v. State*, 92 Ga. 459.

1. Counsel Remaining Silent. — It will be presumed that counsel, by remaining silent, acquiesced in the understanding of the presiding judge as to an answer given by a proposed juror in response to a question as to the length of his residence in a certain locality. *Boyd v. State*, 17 Ga. 194.

Diligence in Passing on Juror. — Where, on the trial of a defendant charged with assault with intent to murder, one of the jurors was put upon the defendant by the state, and after the defendant's counsel had occupied a minute and a half in consultation the court ordered the juror to be sworn, and no objection or protest thereto was made by the defendant or his counsel, nor further time asked, no ground was furnished for a new trial, although the defendant's counsel had not consumed, on an average, one minute in passing on each juror. *Carr v. State*, 76 Ga. 592.

The Failure to Examine a Juror as to his knowledge of the English language is not neglect, since the party may presume that a person possessing this qualification was summoned. *Lafayette Plankroad Co. v. New Albany, etc.*, R. Co., 13 Ind. 90; *Hogshead v. State*, 6 Humph. (Tenn.) 59.

Testimony of Juror Removing Disability. — Where a juror is permitted without objection to testify to facts which remove a disability previously apparent, there is no error in retaining him. *State v. Barrett*, 40 Minn. 65.

2. Bronson v. People, 32 Mich. 34; *State v. David*, 131 Mo. 380; *Territory v. Bryson*, 9 Mont. 32.

Questioning at Improper Time. — An objection that questions were propounded to the proposed jurors at an improper time cannot be taken for the first time on appeal. *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650.

Improper Line of Questioning. — Where the questions to be propounded to proposed jurors by the trial judge are not prescribed by law, but the points upon which the judge is to be satisfied are alone indicated, counsel must object at the time if dissatisfied with the line of

i. TRIAL OF CHALLENGES — (1) *To the Array* — (a) *Generally*. — After joining issue on a challenge to the array,¹ questions thereby raised may be tried and determined in such a manner as required by the practice.²

(b) *Who May Try*. — Anciently the trial might be by the court or by such officers or persons as it might designate.³ The mode of trying challenges of this nature is now probably prescribed by statute in most jurisdictions, but where not so prescribed the main features of the common-law practice will control.⁴

(c) *Proof*. — A challenge must, of course, be sustained by competent testimony,⁵ and where proof to sustain it may be made orally or by affidavits, the better practice is to introduce affidavits.⁶

questioning. *State v. Nance*, 25 S. Car. 168.

Saving Exceptions. — Where the court refuses to allow proper questions to test the qualification of a proposed juror, the remedy is to submit a challenge to the juror for actual bias, specifying the ground; then, if there is an exception to the challenge, and the court decides that it is insufficient, an appeal will lie from that decision. *Ford v. Umatilla County*, 15 Oregon 313.

1. **Under the Idaho Practice** an exception to a challenge and the denial of the ground bear the same relationship to each other as a demurrer to the complaint and denials in the answer do in the civil practice; hence an exception to a challenge to the array admits the facts stated in the challenge. *People v. Armstrong*, 2 Idaho 275.

Questions Raised by Demurrer. — A demurrer to a challenge to the array will not raise the question of want of verification. *Cox v. People*, 80 N. Y. 500.

Verification of Answer. — The prosecuting attorney need not verify his answer to a challenge to the array. *Gardiner v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155.

2. **Right to Trial Because Insufficient Ground Denied.** — The court is not obliged to try a challenge to the array simply because the ground is denied by the state, where the ground assigned is not one of the causes prescribed by statute for which a challenge to the array will lie. *People v. Wallace*, 101 Cal. 281.

3. *Lloyd v. Williams*, 2 Rolle 363; 2 Hale P. C. 275; Bac. Abr., Juries, E, 12; 7 Dane Abr. 331. See also *Com. v. Walsh*, 124 Mass. 35.

By the Ancient Practice, on trial of a challenge to the array, the clerk stated to the jurors the cause of challenge,

and concluded: "And so your charge is, to inquire whether it be an impartial array or a favorable one." If the triers affirmed it, the clerk entered underneath the challenge "*affirmatur*," but if the triers found it favorable, the entry was "*calumnia vera*." *Trials per Pais* 165.

Public Trial. — By the ancient practice, challenges to the array were tried publicly. *Trials per Pais* 165. See *Epps v. State*, 19 Ga. 117.

4. **In Massachusetts and Elsewhere in New England**, a challenge to the array is usually tried by the court, and not by a jury or by triers. *Com. v. Walsh*, 124 Mass. 32; *Com. v. Knapp*, 9 Pick. (Mass.) 496; *State v. Jewell*, 33 Me. 583; *State v. Howard*, 17 N. H. 191; *State v. Clark*, 42 Vt. 629; *State v. Potter*, 18 Conn. 171. See also argument in *Borden v. Borden*, 5 Mass. 71, 2 Swift's System (Conn.) 233.

Trial by Attorneys. — If the array be challenged it lies in the discretion of the court how it shall be tried, and sometimes the trial may be by two attorneys. See *Copenhagen v. State*, 14 Ga. 26.

5. *People v. Brown*, 48 Cal. 253.

Right to Examine Summoning Officer on Delivery of Venire. — A constable who has served a venire may be examined as to his indifference on a challenge to the array, and there is no error in refusing such an examination at the time of the delivery of the venire to him. *Prussia v. Guenther*, 16 Abb. N. Cas. (Orleans County Ct.) 230.

6. *Borrelli v. People*, 164 Ill. 549.

Under the Iowa Statutes the court may determine in what form evidence shall be presented on trial of a challenge to the array, and in *State v. Linde*, 54 Iowa 139, the Supreme Court declined to interfere with the action of the pre-

(2) *To the Polls* — (a) *For Principal Cause*. — At common law challenges for principal cause were tried by the court on the testimony of the juror, to the exclusion of other evidence, and if found true, the juror was incompetent *per se*. This mode of trying challenges has been generally followed.¹

(b) *To the Favor* — *aa. BY THE COURT*. — In the federal courts and the courts of many of the states, the common-law mode of determining challenges to the favor does not exist, but the court may try all challenges, whether for principal cause or to the favor.²

siding judge on the trial of a challenge to the array in refusing to allow the challenging party to prove the grounds of the challenge by oral evidence, leave having been given to introduce affidavits showing the facts.

1. *Arkansas*. — *Milan v. State*, 24 Ark. 348.

California. — *People v. Woods*, 29 Cal. 635.

Connecticut. — *State v. Potter*, 18 Conn. 166.

Minnesota. — *State v. Hanley*, 34 Minn. 430.

New Jersey. — *Vanauken v. Beemer*, 4 N. J. L. 416; *Mann v. Glover*, 14 N. J. L. 195.

New York. — *People v. Bodine*, 1 Den. (N. Y.) 281; *Pringle v. Huse*, 1 Cow. (N. Y.) 432.

South Dakota. — *Haugen v. Chicago*, etc., R. Co., 3 S. Dak. 394.

Wisconsin. — *Schoeffler v. State*, 3 Wis. 823.

Cause Resting on Disputed Facts. — A challenge for principal cause resting upon a disputed question of fact should be tried by the court, though like a challenge for favor it may be referred to triers. *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 71.

Juror's Knowledge of English Language. — The court may decide as to the qualifications of a juror who has an imperfect knowledge of the English language. *People v. Davis*, (Cal. 1894) 35 Pac. Rep. 96.

In *South Carolina*, under section 2261 of the code, the circuit judge is trier of the competency of jurors challenged for cause. *State v. Nance*, 25 S. Car. 168; *State v. Dodson*, 16 S. Car. 460.

Failure to Submit Challenge to Court. — A party challenging for cause must submit the matter to the court for investigation, otherwise he will be taken to have waived the grounds of his challenge. *Crider v. Lifsey*, 10 Heisk. (Tenn.) 456.

Effect of Decision. — When a challenge for principal cause is pronounced insufficient, the action of the court is tantamount to a decision on demurrer and joinder, and should be so entered by the clerk on the record. *People v. Vermilyea*, 7 Cow. (N. Y.) 108.

2. *Alabama*. — *Calhoun v. Hannan*, 87 Ala. 277.

Arkansas. — *Polk v. State*, 45 Ark. 165.

Colorado. — *Babcock v. People*, 13 Colo. 515.

Georgia. — *Johnson v. State*, 65 Ga. 94.

Iowa. — *State v. Munchrath*, 78 Iowa 268.

Maine. — *State v. Knight*, 43 Me. 14.

Michigan. — *Stephens v. People*, 38 Mich. 739.

New Hampshire. — *Rowell v. Boston*, etc., R. Co., 58 N. H. 514; *Rollins v. Ames*, 2 N. H. 349; *Pierce v. State*, 13 N. H. 536; *State v. Howard*, 17 N. H. 171.

New York. — *Balbo v. People*, 80 N. H. 484; *People v. Otto*, 101 N. Y. 690; *Butler v. Glens Falls*, etc., St. R. Co., 121 N. Y. 112; *Young v. Johnson*, 123 N. Y. 226.

Ohio. — *Serviss v. Stockstill*, 30 Ohio St. 418.

South Carolina. — *State v. Coleman*, 20 S. Car. 441; *State v. Prater*, 26 S. Car. 198.

Tennessee. — *McGowan v. State*, 9 Yerg. (Tenn.) 194; *Crider v. Lifsey*, 10 Heisk. (Tenn.) 456; *Isham v. State*, 1 Sneed (Tenn.) 111.

United States. — *Press Pub. Co. v. McDonald*, 73 Fed. Rep. 440, 38 U. S. App. 557; *Brewer v. Jacobs*, 22 Fed. Rep. 242; *Reynolds v. U. S.*, 98 U. S. 145.

Legislative Power. — A statute providing that challenges shall be tried and determined by the court alone is not in derogation of the common-law right of trial by jury, which secured a tribunal other than the court alone for

Challenge Admitted. — If a challenge interposed is admitted to be true, the challenger is bound by it, and cannot have it tried; consequently there is no occasion for the appointment of triers.¹

Waiver of Triers. — On a challenge to the favor where triers are not requested or demanded by either party, and the matter is submitted to the court, its determination will have the same force and effect as the finding by triers;² and the waiver of the right to triers, and the agreement that the court shall act, may be implied from the course taken by the parties in respect to the mode of trial.³

Province of Court. — The fact, however, that all challenges are determinable by the court will not destroy the distinction between principal challenges and challenges to the favor. In the first case the court inquires into the truth of the facts alleged, while upon a challenge to the favor it is required to determine whether the juror stands indifferent.⁴

the disposition of such challenges, namely, triers appointed for the purpose. *Weston v. People*, 6 Hun (N. Y.) 140.

In Louisiana the appointment of triers is not a matter of right. *State v. Porter*, 45 La. Ann. 661, *overruling State v. Bunker*, 11 La. Ann. 607.

Election of Challenger. — Under the *Arkansas* statute challenges to the polls, whether for principal cause or to the favor, may be tried by the court or by triers, at the election of the party challenging. *Milan v. State*, 24 Ark. 348; *Stewart v. State*, 13 Ark. 721.

1. *State v. Smith*, 56 Minn. 78; *State v. Lautenschlager*, 22 Minn. 514; *Morrison v. Lovejoy*, 6 Minn. 319; *State v. Creasman*, 10 Ired. L. (N. Car.) 395; *Com. v. Gross*, 1 Ashm. (Pa.) 281.

2. *O'Connor v. State*, 9 Fla. 215; *State v. Gray*, 19 Nev. 212; *O'Brien v. People*, 36 N. Y. 276; *People v. Mather*, 4 Wend. (N. Y.) 230; *People v. Rathbun*, 21 Wend. (N. Y.) 542; *People v. Mallon*, 3 Lans. (N. Y.) 224; *Com. v. Gross*, 1 Ashm. (Pa.) 281; *Schoeffler v. State*, 3 Wis. 823.

By Consent, parties may waive the appointment of triers and submit the question of fact to the court. *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 132.

Presumption of Consent. — A judge may act as trier upon a challenge to the favor, and it will be presumed that he so acted by consent of the parties, in the absence of all objections or requests to submit the matter to triers. *O'Brien v. People*, 36 N. Y. 276.

Revocation of Consent. — Where, on a trial for felony, the accused, by his counsel, consents that the court act as trier of challenges, he cannot thereafter revoke the consent and demand that a challenge shall be passed upon by triers after it has been passed upon by the court. *People v. Rathbun*, 21 Wend. (N. Y.) 509.

Construction of Statute. — In *Milan v. State*, 24 Ark. 348, the court, in construing a statute, said: "It is said [in *Stewart v. State*, 13 Ark. 720] that 'unless it be made to appear upon the record that the party challenging demanded triers, the presumption will be that he elected to have the cause of challenge tried by the court; and in challenges for favor, the finding of the court as to the fact whether the juror stands indifferently between the parties is equally conclusive as if found by triers,' thus abolishing in form, though not in substance, two distinctions which existed at common law between challenges to the polls for principal cause and to the favor."

3. *People v. Mather*, 4 Wend. (N. Y.) 229; *People v. Rathbun*, 21 Wend. (N. Y.) 509.

The Production of Evidence to the Judge without asking for triers will be considered as a substitution of him in the place of triers, and his decision will be treated in like manner as would the decision of triers. *People v. Mather*, 4 Wend. (N. Y.) 229.

4. *State v. Howard*, 17 N. H. 171; *Butler v. Glens Falls, etc., St. R. Co.*, 121 N. Y. 112.

§6. BY TRIERS — Generally. — As before stated, challenges to the favor involve questions of fact, but of themselves do not necessarily disqualify the juror; but they may do so according to the state or condition of mind produced by them. Formerly they were, and in some jurisdictions they still are, triable by triers,¹ whose function it is to ascertain as a fact the competency of the proposed juror to whom objection is made,² and who are the judges as to whether or not he stands indifferent between the parties.³

Cover of Both Grounds by Ruling. — Where there is no practical distinction between a challenge for principal cause and a challenge to the favor, in ruling upon a challenge a judge should make his ruling cover both grounds. *Stephens v. People*, 38 Mich. 739.

1. *Milan v. State*, 24 Ark. 348; *State v. Potter*, 18 Conn. 166; *Mann v. Glover*, 14 N. J. L. 195; *Vanauken v. Beemer*, 4 N. J. L. 416; *People v. Bodine*, 1 Den. (N. Y.) 281; *Schoeffler v. State*, 3 Wis. 823.

After Answering the Statutory Questions the jury may be put on triers at the instance of the prisoner. *Boon v. State*, 1 Ga. 618.

At Common Law, the right in respect to the challenge of jurors to the favor and the mode of hearing and determining the question of indifference in civil suits by triers did not essentially differ from the right of the crown and that of one accused of crime. See 3 Black. Com. 364.

The Province of Triers is merely to pass upon questions of fact incidental to challenges to the favor. They were an established feature of the common law, and although at the present day the practice of appointing them is gradually being abolished, yet the fact upon which they are required to pass was never considered as necessarily and peculiarly a proper subject for the consideration of the court. *Carter v. Territory*, 3 Wyoming 193.

Massachusetts. — The common-law practice in England in relation to triers in a challenge to the jury for favor has been superseded by statute under the different forms of government in Massachusetts. *State v. Knight*, 43 Me. 14.

Legislative Power to Provide for Triers. — A statutory provision for the appointment of triers in capital cases, they to be the sole judges of the impartiality of the persons presented as jurors, is not an infringement upon the prerogative and duty of the court. *Carter v. Territory*, 3 Wyoming 193.

In Minnesota a challenge for implied bias (the indictment being for a capital offense) must be determined by triers. *State v. Hanley*, 34 Minn. 430.

Question of Fact on Principal Challenge. — In the absence of consent to a different mode of trial, a question of fact on a principal challenge is triable before triers. *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 132.

Challenge to Favor on Ground of Principal Cause. — If a prisoner challenge for favor, though the fact proved on the trial of the challenge could have been ground for challenge for principal cause, the determination of the question of competency is for the triers and not for the court. *People v. Allen*, 43 N. Y. 28.

A Bill of Exceptions Will Lie for Refusing Triers upon any question arising upon a challenge to jurors in a case where triers may be demanded. *People v. Rathbun*, 21 Wend. (N. Y.) 509.

Refusal of Triers, Competency Appearing. — In *McNall v. McClure*, 1 Lans. (N. Y.) 32, which was a trial before a justice of the peace, the defendant asked that all the jurors summoned be tried by triers, but there was held to be no error on the part of the court in examining them separately, and no legal objection to their competency appearing, in refusing to submit their testimony to triers.

2. *People v. Johnson & Wheel*, Cr. Cas. (N. Y. Oyer & T. Ct.) 361; *People v. Welch*, (Supreme Ct.) 1 N. Y. Crim. Rep. 486.

Extent of Inquiry. — When triers are appointed, it does not follow that they must determine all exceptions to the proposed jurors. It is only on challenge for favor, where the court may be in doubt whether partiality does exist or not, that references to triers are made. *Berry v. Wallen*, 1 Overt. (Tenn.) 186.

3. *People v. Reyes*, 5 Cal. 347; *Mechanics, etc., Bank v. Smith*, 19 Johns. (N. Y.) 115.

Appointment.—At common law, when no juror had been sworn, if the first man called were challenged, two indifferent persons were named by the court, and after they had tried one man and found him indifferent, he was sworn. Then he and the two triers tried the next juror, and when another was found indifferent and sworn, the two original triers were superseded and the two jurymen first sworn tried the rest. This mode is still followed where there has been no modification of the practice.¹ Under this prac-

The Question for the Triers is whether a juror is altogether indifferent as he stands unsworn. *Thompson v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 467.

In *People v. Bodine*, 1 Den. (N. Y.) 281, it is said that the causes for challenge are very various, and not subject to precise definition, but the question whether the juror is indifferent or not is to be submitted, as a question of fact, upon all the evidence, to the conscience and discretion of the triers.

Indifference at Time of Trial.—Where a juror is challenged to the favor the question to be decided by the triers is whether he is altogether indifferent at the time of the trial, and the inquiry is not confined to the state of the juror's mind before coming into court. *Thompson v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 467.

Character of Opinion.—The trier is called upon to determine whether the opinion entertained is of that fixed or permanent character which disqualifies the juror from coming to the case in a fair, candid, and impartial frame of mind, unaffected with prejudice or favor to either party. *Holt v. People*, 13 Mich. 228; *Stephens v. People*, 38 Mich. 739; *Ulrich v. People*, 39 Mich. 245; *People v. Barker*, 60 Mich. 277.

Local Custom.—On a challenge for favor because of the formation of an opinion as to the existence of a local custom, where a witness testifies that he has formed an opinion against the custom, the question to be determined is, Was the alleged ground of challenge true? and next, if true, Was its effect upon the mind of the juror such as to produce bias or favor? *Smith v. Floyd*, 18 Barb. (N. Y.) 522.

Truth of Facts and Effect.—The truth of the facts alleged as ground of challenge to the favor, as well as their effect upon the mind of the juror, is to be determined by triers. *Schoeffler v. State*, 3 Wis. 823.

Duty to Reject Unindifferent Juror.—

If a juror is challenged to the favor he must be rejected unless he is found to be indifferent. *Smith v. Floyd*, 18 Barb. (N. Y.) 522.

A Juror May Be Rejected if the Triers Have Doubts of his entire impartiality, though he is not disqualified as a conclusion of law by the facts shown. *People v. Reynolds*, 16 Cal. 128.

1. 1 Chitty's Crim. Law 549; Co. Litt. 158; Bac. Abr., title Juries, E, 12; 4 Black. Com. 363; *McGuffie v. State*, 17 Ga. 497; *State v. Knight*, 43 Me. 11; *M'Cormick v. Brookfield*, 4 N. J. L. 77; *People v. Dewick*, 2 Park. Cr. Rep. (Suffolk Oyer & T. Ct.) 230.

The Two Jurors First Sworn are the proper triers of a challenge for favor. *Joice v. Alexander*, 1 Cranch (C. C.) 528.

In *Den v. Evalul*, 1 N. J. L. 328, it was held that triers must come in the first instance from the panel, but if there were special objections other persons might be appointed.

If Several Jurors Are Sworn, when another is challenged the court may assign any two of them to try the challenge. *McGuffie v. State*, 17 Ga. 497.

Examination of Jurors Called as Original Triers.—In *Hook v. Page*, 1 Overt. (Tenn.) 250, on a challenge for favor, the first two on the sheriff's list were sworn on the jury and as triers, and the court permitted these two, when called, to be asked if they had formed any settled opinion. See also *Berry v. Wallen*, 1 Overt. (Tenn.) 186.

Trial of Tales Juror.—If, after eight jurors have been sworn in chief, a tales is challenged for favor, the challenge should be tried by the jurors already sworn. *Reason v. Bridges*, 1 Cranch (C. C.) 477.

Objection to the Competency of a Trier must be made at the time of the appointment, and the grounds of the objection brought to the attention of the court, when if it be overruled an exception must be reserved. *People v. Voll*, 43 Cal. 166.

tice more than two triers or more than two jurors can in no case be sworn to try a challenge to a juryman, except that the first juror sworn acts with triers until another juryman is procured;¹ but a statutory designation of any number of triers will not be an impairment of the right of trial by jury nor an infringement of the powers of the trial court.²

Oath. — Triers are sworn, as other triers of fact, to find the truth or falsity of the challenge, upon evidence submitted to them,³ but it has been held that they need not be sworn as to every challenge submitted.⁴

Trial Public. — Unless otherwise prescribed by statute, trials of

Challenge to Trier. — In *People v. Dewick*, 2 Park. Cr. Rep. (Suffolk Oyer & T. Ct.) 230, it was said that whether a challenge can be interposed to a trier does not seem to have been decided, but that objections may be urged by either party to any one called as a trier, and in such cases the matter should be summarily investigated and decided by the court.

Failure to Urge Ineligibility of Trier. — Objection that one of the triers was on the jury, and therefore ineligible under a statute providing that the triers shall be impartial persons, not on the jury panel, etc., comes too late when made for the first time on motion for a new trial. *People v. Voll*, 43 Cal. 166.

Effect of United States Statutes in Territories. — In the appointment of triers in territories the territorial statutes control, when there is no conflict with the statutes of the United States. *U. S. v. Miles*, 2 Utah 19.

Disagreement of Triers. — In *People v. Dewick*, 2 Park. Cr. Rep. (Suffolk Oyer & T. Ct.) 230, after eleven jurors had been drawn and sworn, the next juror was challenged for favor, and the two jurors first admitted, having been sworn as triers and having heard the evidence, the argument of counsel, and the charge of the court, after consultation reported to the court that they could not agree in deciding upon the challenge, whereupon the court selected the third and fourth jurors to act as triers and had the challenge retried.

1. Three Triers. — In *M'Cormick v. Brookfield*, 4 N. J. L. 77, the judgment was reversed because three jurors were sworn to try a challenge.

"**Lord Hale Puts a Case** where the triers are appointed by the parties, and not by the court; for he lays it down that if the plaintiff challenges ten and

the prisoner one, then he that remains shall have added to him one chosen by each party, and they three shall try the challenge. But if several be sworn and the rest be challenged, the court may assign any two of those sworn to try the challenge. And when six jurors are sworn and the rest challenged, the court may appoint any two of the six sworn to try the challenges. Co. Litt. 189; 7 Dane's Abr. 334." *State v. Knight*, 43 Me. 110.

2. Statutory Designation. — A statute authorizing challenges in criminal cases to be passed on by three triers is not void as an infringement of the powers of the trial court. *Carter v. Territory*, 3 Wyoming 193.

3. Oath at Each Challenge. — Challenges should be tried by triers, who should be sworn at each challenge. *U. S. v. Watkins*, 3 Cranch (C. C.) 441.

Sufficiency of Oath. — In *Freeman v. People*, 4 Den. (N. Y.) 9, it was held that there was error in swearing triers to find whether the jury was indifferent upon the issue joined, but that the oath should be binding not only as to the issue, but also as to the impartiality between the parties.

Failure to Administer Oath — Waiver of Error. — In *Malone v. State*, 8 Ga. 408, after a juror had been found competent by triers who had not been specially sworn, and the juror had been accepted and sworn in chief, the court to cure the irregularity, again put the juror on the prisoner, who objected on the ground that he had already been sworn in chief, which was understood by the judge to be equivalent to an insistence that the juror should sit in the case, and it was held that there was no reversible error.

4. State v. Brown, 12 Minn. 538. But see *U. S. v. Watkins*, 3 Cranch (C. C.) 441, cited in the preceding note.

challenges to the favor by triers must be public¹ and in the presence of the accused,² who is entitled to the aid of counsel to assist him in the selection of the jury.³

Province of Court. — The province of the court is that which it has on ordinary trials of questions of fact,⁴ and it may determine the admissibility of evidence, that improper testimony may be excluded from the consideration of the triers,⁵ and may instruct them as to their province and duty in connection with the determination of the matters submitted to them.⁶

1. *Baker v. State*, 15 Ga. 498.

Examination Out of Court Room. — In *Epps v. State*, 19 Ga. 102, it was held objectionable practice that after a juror challenged had been asked such questions in open court as the solicitor general and the counsel for the defendant saw fit to propound, the triers were allowed to retire with the juror for further examination.

Retirement to Secluded Part of Court Room. — In *Baker v. State*, 15 Ga. 498, there was held to be no reversible error arising from the fact that the judge refused to permit the triers to go outside the court room, as requested by the accused, and allowed them to retire to a vacant corner of the room.

2. Where the statutes do not authorize the trial of challenges by triers, apart from the court and in the absence of the defendant, the presence of the accused cannot be dispensed with. *Hopt v. Utah*, 110 U. S. 574.

3. *State v. Cummings*, 5 La. Ann. 330.

Right of Counsel to Argue. — Upon the trial of a challenge for favor, counsel are not permitted to argue to the triers. *Joice v. Alexander*, 1 Cranch (C. C.) 528.

4. **After Finding by Triers.** — Where the question of competency of a juror is determined by triers, the court cannot be called upon to rule, as a matter of law, that the juror in question was incompetent upon facts proven. *People v. Allen*, 43 N. Y. 28.

Disagreement of Triers. — In *Com. v. Fitzpatrick*, 6 Pa. L. J. 201, two triers disagreed as to the indifference of a proposed juror, and the court said that he was *prima facie* competent and directed him to be sworn.

5. **Determination of Admissibility.** — It is within the province of the court to show what evidence is admissible on the question of indifference, but the strength and influence of such evidence in establishing the allegation of favor

or bias are for the triers to determine. *Smith v. Floyd*, 18 Barb. (N. Y.) 522.

Rejection of Weak and Inconclusive Evidence. — In *People v. Honeyman*, 3 Den. (N. Y.) 123, the court said that unwarrantable use had been made of the decision in *People v. Bodine*, 1 Den. (N. Y.) 281, in which case the court failed to distinguish between challenges for principal cause and those to the favor. In that case all of the challenges were for favor, and, the court rejecting weak and inconclusive evidence tending to show that the juror did not stand indifferent, it was held that the question of indifference should have been submitted to triers for what it was worth.

Restriction to Statutory Questions. — Where a juror is put upon triers, counsel cannot ask him questions other than those prescribed by statute. *Bishop v. State*, 9 Ga. 121.

Objection and Exceptions to evidence may be taken. *Stewart v. State*, 13 Ark. 721.

Review. — When the fact of competency is found by triers, the opinion of the court as to what evidence should be admitted may be reviewed. *State v. Potter*, 18 Conn. 166. See also *People v. Bodine*, 1 Den. (N. Y.) 281.

6. **Ancient Form of Instruction.** — In the Year Book, 7 Henry VI., fol. 25, Babington charged the triers upon a challenge *propter affectum*: "You will inquire on your oaths whether the cause be for partiality or affection (*pour l'affection*) that he has to the party, or for the knowledge he has of the matter in issue. If the cause is partiality for the party, then he is favorable; otherwise not; and if he has more affection to one than to the other. But if he has a full knowledge of the matter in issue, and if he be sworn he will speak the truth notwithstanding the affection he hath for the party, then he is not favorable."

This appears to have been the earli-

(c) *Proof*. — Proof must be introduced to support the ground of the challenge.¹ At common law a challenge for principal cause was tried by the court on the testimony of the juror, to the exclusion of other evidence, and if found true the juror was incompetent *per se*.² If the challenge was to the favor, as for undue influence and prejudice, the challenge was tried by two triers under the direction of the court, on testimony other than that of the juror, and where the common-law practice prevails, substantially the same distinction is preserved.³

est doctrine on the subject, and though in part overruled by subsequent decisions, was recognized in *Rex v. Edmunds*, 4 B. & Ald. 472, 6 E. C. L. 565.

Necessity of Instructing Jurors in Court. — When a jury has been put upon triers, who have retired to consider the evidence, it is improper to move the court to send written instructions to the triers to propound a particular interrogatory for the purpose of establishing the disqualification of the juror, but the proper course is to have the triers brought into the court room and instructed in the presence of both parties. *Whaley v. State*, 11 Ga. 123.

Instruction that Challenge Was in Nature of Appeal. — In *Freeman v. People*, 4 Den. (N. Y.) 35, a challenge on the ground of the formation and expression of opinion was overruled after proof to sustain it, and a challenge to the favor being then interposed and submitted to triers, an instruction that the challenge to the favor was in the nature of an appeal from the judgment of the court on the facts was held erroneous.

Objections and Exceptions to Instructions given by the court may be taken. *Stewart v. State*, 13 Ark. 721. See also *Milan v. State*, 24 Ark. 348.

1. Duty of Challenging Party — Issue in Doubt. — Where a juror states that he has formed and expressed an opinion as to a matter which is claimed to be one of the principal questions at issue, if it is impossible for the presiding judge to determine from the pleadings or facts whether such issue was a material one, it is the duty of the party claiming the disqualification to offer to prove that the issue in question was material. *Weill v. Lucerne Min. Co.*, 11 Nev. 200.

Conclusion by Preliminary Interrogatories. — Neither the court nor counsel are to be concluded by preliminary interrogatories put to the jurors where the question of competency is to be de-

termined by triers. *People v. Johnson*, 2 Wheel. Cr. Cas. (N. Y. Oyer & T. Ct.) 361.

Oath to Juror. — The oath on the *voir dire* need not be readministered to a juror before he is examined by the triers. *Griffin v. State*, 15 Ga. 476.

2. Milan v. State, 24 Ark. 348; *People v. Christie*, 2 Park. Ct. Rep. (N. Y.) 579; *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *Ohio v. Ankrim*, Tappan (Ohio) 112.

3. Milan v. State, 24 Ark. 348; *Robinson v. State*, 1 Ga. 563; *Jones v. State*, 1 Ga. 610; *State v. Aaron*, 4 N. J. L. 263; *Respublica v. Dennie*, 4 Yeates (Pa.) 267; *State v. Baldwin*, 3 Brev. (S. Car.) 309; *State v. Sims*, 2 Bailey L. (S. Car.) 29; *Rex v. Edmunds*, 4 B. & Ald. 476, 6 E. C. L. 567. See *State v. Aaron*, 4 N. J. L. 263.

Restriction to Either Class of Evidence. — A party challenging on suspicion of bias or partiality may either examine the juror on oath or produce other evidence to support his challenge; he cannot do both. *Ohio v. Ankrim*, Tappan (Ohio) 112.

In *Arkansas*, under a statute providing for the trial of all challenges for cause on the oath of the person challenged or by triers by other evidence, it was held that where the competency of a juror was tried by the court the trial should be upon the testimony of the juror on his *voir dire*, but that if the trial was by triers other evidence might be introduced to the exclusion of the oath of the juror challenged. *Stewart v. State*, 13 Ark. 721.

Impeachment of Juror. — In *Den v. Pissant*, 1 N. J. L. 254, it was resolved that if a jurymen challenged on account of his interest in the case is examined on his *voir dire*, and does not disclose any interest, the party challenging is not precluded, as in the case of a witness, from establishing the fact of interest by other testimony.

A Juror Objecting to for Partiality can-

The tendency of the modern practice, however, to submit the whole question of the qualification or competency of the proposed jurors to the court, has in a great measure abolished this distinction, so that witnesses may be called in addition to the examination of the juror in all trials for the ascertainment of his unindifferency.¹ In proving the grounds of challenge the law of evidence is the same as in other cases.²

not prove his own impartiality. *Vance v. Haslett*, 4 Bibb (Ky.) 191.

A Challenged Juror Cannot Be Examined as a witness to the triers. *Joice v. Alexander*, 1 Cranch (C. C.) 528.

A Proposed Juror Cannot Be Compelled to Disclose Guilt of any crime, or any act which will disgrace him, in order to test his qualifications as a juror, but his incompetency must be established, if at all, by other evidence. *Burt v. Panjaud*, 99 U. S. 180.

A challenge on the ground that a proposed juror is under indictment, or charged with crime, which is made by law a positive disqualification, must be sustained by evidence *aliunde* on the *voir dire* examination of the proposed juror. *Sewell v. State*, 15 Tex. App. 56.

1. Allowance of Time to Procure Witnesses.—In *Hodge v. State*, 26 Fla. 11, the Supreme Court sustained the action of the court below in refusing a request for time to procure witnesses to show the bias of a juror, counsel failing to show how long it would require to procure the witnesses, their residence, or the facts to be proved.

Loches.—Although by statute witnesses may be examined on a challenge for actual bias, yet the defendant has no right to require that all proceedings be suspended and the compulsory process of the court issued to compel the attendance of a witness whose presence might have been procured had due diligence been exercised. *State v. Barrett*, 40 Minn. 65.

Refusal to Hear Other Testimony.—The trial of a challenge for cause in a criminal case is summary in its character, and while the court may receive evidence other than that of the challenged juror, the judgment will not be reversed because of the refusal of the judge to hear the testimony of other witnesses, where the juror's own testimony shows him to be competent. *State v. Lowe*, 56 Kan. 594.

It Is Error to Refuse to Hear a Witness as to the fact that the venireman had formed and expressed an opinion.

Ellis v. State, 25 Fla. 702; *Barber v. State*, 13 Fla. 675.

Right to Witnesses in Addition to Juror.—For the purpose of discovering who are qualified, a rigid and searching inquiry is allowed previous to the acceptance of the juror. This is usually done by the examination of the juror himself under oath on his *voir dire*, but witnesses can be called in addition to testify to any fact tending to show incompetency. *People v. Evans*, 72 Mich. 367.

The rule as to the method of trials of challenges to the polls is not well settled by the older authorities, but in *Epps v. State*, 19 Ga. 102, it was said to be everywhere agreed that the truth of the matter alleged as cause of challenge might be made out by witnesses, and that the juror challenged on his *voir dire* might be asked such questions as would test the state of his feelings.

Further Examination.—Where issue is joined on the truth of the averment of a challenge for cause, after a proposed juror has been examined, he may be further examined, other witnesses called, and the matter submitted. *People v. Reynolds*, 16 Cal. 128.

In the Examination of the Qualifications of a Juror the parties are not confined to an interrogation of the juror himself, but may introduce other evidence. *Shaw v. State*, 27 Tex. 750.

2, State v. Fox, 25 N. J. L. 566; *State v. Spencer*, 21 N. J. L. 197.

Proof of Cause on Trial to Favor.—Where the court is the trier of the challenge for principal cause and also of the challenge to the favor, and the latter immediately succeeds the other, the court may, in determining the challenge for favor, take into account what has been said by the proposed juror on the former challenge. *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. Cas. (N. Y.) 1.

Challenges Not Exhausted.—Where improper evidence is received on the

(d) **Conclusiveness of Findings** — *aa.* BY THE COURT. — Where the trial of a challenge for cause requires either a trial of a question of law or the trial of mixed questions of law and of fact, the determination of the legal questions involved is reviewable unless otherwise prescribed;¹ but where the trial involves mere disputed questions of fact, the court is vested with a large discretion, and a decision based upon evidence to sustain it is usually conclusive,²

trial of a challenge to the favor, and it appears that the prisoner did not exhaust all his peremptory challenges, he cannot avail himself of exceptions taken to the alleged error in admitting evidence. *People v. Knickerbocker*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 302.

1. *Illinois*. — *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465; *Plummer v. People*, 74 Ill. 361; *Wilson v. People*, 94 Ill. 299; *Spies v. People*, 122 Ill. 1.

North Carolina. — *Baker v. Harris*, 1 Winst. L. (N. Car.) 277.

Oregon. — *Ford v. Umatilla County*, 15 Oregon 313.

Tennessee. — *Conatser v. State*, 12 Lea (Tenn.) 436.

Mistake of Law. — The decision of a judge who acts as trier of challenges is reviewable only when he makes a mistake in principle in determining whether the challenge shall prevail. *Patterson v. State*, 48 N. J. L. 381. See *People v. Bodine*, 1 Den. (N. Y.) 281.

A Challenge Propter Defectum involves a question of law, and though by consent the judge takes the place of the triers, his decision on the question of law is revisable. *Sehorn v. Williams*, 6 Jones L. (N. Car.) 575.

In Illinois the competency of a juror is a judicial question to be determined by the court from the evidence, and may be reviewed. *Coughlin v. People*, 144 Ill. 140.

In Massachusetts a motion for a new trial founded on the partiality of a juror, who had before the trial been interrogated by the court and adjudged to stand indifferent, was refused, the principal questions in the trial being mere questions of law. *Borden v. Borden*, 5 Mass. 67.

Where There Is No Conflict of Evidence upon the trial of a challenge the question is one of law and may be reviewed. *People v. Mallon*, 3 Lans. (N. Y.) 224; *Stout v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 71.

Objection Must Be Specific. — Objection to a ruling as to the competency

of a talesman must be specific. *Central R., etc., Co. v. Gamble*, 77 Ga. 585.

In California the provisions of the Penal Code allowing an exception to the disallowance of a challenge for implied bias do not authorize an exception to the disallowance of a challenge for actual bias. *People v. Boling*, 83 Cal. 380.

2. *Arkansas*. — *Milan v. State*, 24 Ark. 348; *Lavender v. Hudgens*, 32 Ark. 763; *Benton v. State*, 30 Ark. 328; *Maclin v. State*, 44 Ark. 115.

California. — *People v. Boling*, 83 Cal. 380; *People v. Brown*, 72 Cal. 390; *People v. Murphy*, 45 Cal. 143; *People v. Henderson*, 28 Cal. 466; *Trenor v. Central Pac. R. Co.*, 50 Cal. 222; *People v. Fong Ah Sing*, 70 Cal. 11; *People v. Ward*, 77 Cal. 113; *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, 49 Cal. 560; *People v. Riley*, 65 Cal. 107; *People v. Goldenson*, 76 Cal. 328; *People v. Bemmerly*, 87 Cal. 117; *People v. Atherton*, 51 Cal. 495; *People v. Taing*, 53 Cal. 602.

Colorado. — *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Babcock v. People*, 13 Colo. 515.

District of Columbia. — *U. S. v. Schneider*, 21 D. C. 381.

Georgia. — *Williams v. State*, 69 Ga. 11; *Cato v. State*, 72 Ga. 747; *Eberhart v. State*, 47 Ga. 598; *Westmoreland v. State*, 45 Ga. 279; *Galloway v. State*, 25 Ga. 596; *Moon v. State*, 68 Ga. 687; *Simmons v. State*, 73 Ga. 609; *Vann v. State*, 83 Ga. 44; *Fogarty v. State*, 80 Ga. 450.

Indiana. — *Hart v. State*, 57 Ind. 103; *Guetig v. State*, 66 Ind. 94; *Elliot v. State*, 73 Ind. 10; *Stout v. State*, 90 Ind. 1; *Butler v. State*, 97 Ind. 378; *Dugle v. State*, 100 Ind. 259; *Stephenson v. State*, 110 Ind. 358; *Walker v. State*, 102 Ind. 502; *Epps v. State*, 102 Ind. 539.

Iowa. — *Sprague v. Atlee*, 81 Iowa 1.

Kansas. — *State v. Bancroft*, 22 Kan. 170.

Kentucky. — *Rutherford v. Com.*, 13 Bush (Ky.) 608.

or at least it will not be revised unless there has been an abuse of the discretion to the injury of the party complaining, or there has

Louisiana. — State *v.* Ford, 42 La. Ann. 255; State *v.* Waggoner, 39 La. Ann. 919; State *v.* Shay, 30 La. Ann. 114; State *v.* Tazwell, 30 La. Ann. 884; State *v.* Shields, 33 La. Ann. 1410; State *v.* Ford, 37 La. Ann. 443; State *v.* Lewis, 41 La. Ann. 591; State *v.* Thomas, 41 La. Ann. 1088; State *v.* Farrar, 35 La. Ann. 317; State *v.* Simmons, 38 La. Ann. 41; State *v.* Creech, 38 La. Ann. 480; State *v.* Redmond, 37 La. Ann. 774.

Massachusetts. — Kinnicutt *v.* Stockwell, 8 Cush. (Mass.) 73; Borden *v.* Borden, 5 Mass. 79.

Minnesota. — State *v.* Mims, 26 Minn. 183; Perry *v.* Miller, 61 Minn. 412.

Missouri. — Baldwin *v.* State, 12 Mo. 223; Eckert *v.* St. Louis Transfer Co., 2 Mo. App. 36.

Nebraska. — Hill *v.* State, 42 Neb. 503; Basye *v.* State, 45 Neb. 261.

Nevada. — State *v.* Vaughan, 22 Nev. 285; State *v.* Crutchley, 19 Nev. 368; State *v.* Hing, 16 Nev. 307; State *v.* Larkin, 11 Nev. 325.

New Hampshire. — Rowell *v.* Boston, etc., R. Co., 58 N. H. 514; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372; State *v.* Pike, 49 N. H. 399.

New Jersey. — Johnson *v.* State, 59 N. J. L. 271; Clawson *v.* State, 59 N. J. L. 434; Patterson *v.* State, 48 N. J. L. 381.

New York. — Sanchez *v.* People, 22 N. Y. 147; People *v.* Mallon, 3 Lans. (N. Y.) 224; Stout *v.* People, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 132; People *v.* McGonegal, 136 N. Y. 62.

North Carolina. — State *v.* Ellington, 7 Ired. L. (N. Car.) 61; State *v.* Collins, 70 N. Car. 241; State *v.* Wincroft, 76 N. Car. 38; State *v.* Carland, 90 N. Car. 669; Branton *v.* O'Briant, 93 N. Car. 99; State *v.* Kilgore, 93 N. Car. 533; State *v.* Cole, 94 N. Car. 958; State *v.* Green, 95 N. Car. 611; Davenport *v.* McKee, 98 N. Car. 590; State *v.* Potts, 100 N. Car. 457.

Ohio. — Dew *v.* McDivitt, 31 Ohio St. 139; Serviss *v.* Stockstill, 30 Ohio St. 418.

Pennsylvania. — Wirebach *v.* Easton First Nat. Bank, 97 Pa. St. 543.

South Carolina. — State *v.* Coleman, 20 S. Car. 444; State *v.* Nance, 25 S. Car. 171; State *v.* Prater, 26 S. Car. 198; State *v.* Wyse, 32 S. Car. 45; State *v.* Haines, 36 S. Car. 504.

South Dakota. — Haugen *v.* Chicago, etc., R. Co., 3 S. Dak. 394.

Tennessee. — State *v.* Collins, 15 Lea (Tenn.) 434.

Texas. — Pierson *v.* State, 18 Tex. App. 524; Mason *v.* State, 15 Tex. App. 534.

Utah. — People *v.* O'Loughlin, 3 Utah 133.

Vermont. — State *v.* Meaker, 54 Vt. 112; State *v.* Ward, 39 Vt. 225.

Washington. — White *v.* Territory, 3 Wash. Ter. 397.

United States. — Hopt *v.* Utah, 120 U. S. 430 [affirming People *v.* Hopt, 4 Utah 247]; U. S. *v.* McHenry, 6 Blatchf. (U. S.) 503; Southern Pac. Co. *v.* Rauh, 49 Fed. Rep. 696.

Where the Degree of Consanguinity which disqualifies is not prescribed by statute, it is for the court to determine whether such relationship exists as would be likely to render the juror indifferent. State *v.* Merriman, 34 S. Car. 16.

Province of Court as to Appearance, etc., of Juror. — It is for the trial court to determine from the whole examination of the juror, including his appearance and demeanor, his competency to serve. People *v.* Carolin, 115 N. Y. 658, 24 N. Y. St. Rep. 595.

Where No Exception Is Allowed by Statute to an order overruling a challenge to a jury for general cause, the order is not erroneous. Territory *v.* Evans, 2 Idaho 627.

The California Penal Code, § 1170, subd. 2, allowing exceptions to the admission or rejection of testimony on trials of challenges for actual bias, will not authorize an exception to a ruling denying the challenge, nor a review of the ruling thereon. People *v.* Wong Ark, 96 Cal. 125.

Where by Consent a Challenge for Actual Bias is tried by the court, its finding is conclusive. Morrison *v.* Lovejoy, 6 Minn. 319; State *v.* Mims, 26 Minn. 183; Hawkins *v.* Manston, 57 Minn. 323; Wirebach *v.* Easton First Nat. Bank, 97 Pa. St. 543, *distinguishing* Cummings *v.* Gann, 52 Pa. St. 484, wherein the challenge was *propter affectum*.

Whether a Juror Is Sufficiently Intelligent is a matter resting in the discretion of the court. Jefferson County *v.* Lewis, 20 Fla. 980.

been manifest error or some infringement of the law.¹

bb. BY TRIERS. — Triers being merely judges of fact, at common law their findings, like those of trial jurors, were conclusive,

New York Doctrine. — In *Press Pub. Co. v. McDonald*, 38 U. S. App. 557, 73 Fed. Rep. 440, it is said that the tendency of modern decisions by the New York Court of Appeals is to regard the question arising under a challenge to the favor as one of fact in the majority of cases, and depending upon the circumstances of the particular case, and therefore to give proper weight to the opinion of the trial judge, who had an opportunity to see the juror. Citing *Thomas v. People*, 67 N. Y. 218; *Young v. Johnson*, 123 N. Y. 226.

In *South Carolina* a statute providing that "if it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called," vests in the trial court, which has the power of determining it, the question of fact as to whether the proposed juror is indifferent or not. *State v. Dodson*, 16 S. Car. 453; *State v. Williams*, 31 S. Car. 238; *State v. Merriman*, 34 S. Car. 16; *State v. Summers*, 36 S. Car. 479; *State v. McIntosh*, 39 S. Car. 97; *Sims v. Jones*, 43 S. Car. 91.

In *Utah*, if a juror is challenged for actual bias, an issue of fact is raised, and where no exception is taken to the admission or rejection of evidence upon the *voir dire*, the action of the trial court is conclusive. *People v. Thiede*, 11 Utah 241, 159 U. S. 510.

1. *Florida*. — *Jefferson County v. Lewis*, 20 Fla. 980.

Indiana. — *Howell v. State*, 4 Ind. App. 148; *Elliott v. State*, 73 Ind. 10; *Shields v. State*, 95 Ind. 299; *Stephenson v. State*, 110 Ind. 358; *Dolan v. State*, 122 Ind. 141.

Iowa. — *Davenport Gas Light, etc., Co. v. Davenport*, 13 Iowa 229; *Anson v. Dwight*, 18 Iowa 241; *May v. Elam*, 27 Iowa 365.

Missouri. — *State v. Chatham Nat. Bank*, 80 Mo. 626; *Montgomery v. Wabash, etc., R. Co.*, 90 Mo. 446; *McCarthy v. Cass Ave., etc., R. Co.*, 92 Mo. 536.

Nebraska. — *Basye v. State*, 45 Neb. 261.

New Hampshire. — *March v. Portsmouth, etc., R. Co.*, 19 N. H. 373.

New York. — *People v. Willett*, 36 Hun (N. Y.) 500.

Oregon. — *Kumli v. Southern Pac. Co.*, 21 Oregon 505.

Texas. — *Ray v. State*, 4 Tex. App. 450; *Gardenhire v. State*, 6 Tex. App. 147; *Heacock v. State*, 13 Tex. App. 97.

Washington. — *White v. Territory*, 3 Wash. Ter. 397.

West Virginia. — *Thompson v. Douglass*, 35 W. Va. 337.

Wyoming. — *Carter v. Territory*, 3 Wyoming 193.

United States. — *Press Pub. Co. v. McDonald*, 73 Fed. Rep. 440, 38 U. S. App. 557.

Finding on Contradictory Testimony. — Notwithstanding inaccuracies and contradictions in the testimony of a witness on his *voir dire*, the action of the presiding judge will not be disturbed where there is no apparent abuse of discretion. *People v. Brotherton*, 47 Cal. 388.

Finding at Request of Complaining Party. — A defendant cannot complain of a finding by the court that a juror was disqualified, when the finding was made at his request. *State v. Allen*, 46 Conn. 531.

Where, by Statute, the question as to whether a proposed juror can and will act impartially and fairly is committed to the determination of the trial court as a question of fact, its decision on the question will be treated with great respect by the court of last resort, and will not be reversed unless that discretion has been abused. *State v. Church*, 6 S. Dak. 89, *overruled* on other grounds, 7 S. Dak. 289.

Doubts as to the Competency of a Juror should be resolved favorably to the finding below in that respect. *State v. Cunningham*, 100 Mo. 382.

Probable Competency of Excluded Juror. — Great latitude of discretion is allowed to the court in the trial of challenges for cause, and where, on examination for cause, a juror stated in substance that he had an opinion in favor of the defendant, but in spite of that opinion he could act upon the evidence and law of the case, and he was rejected, the appellate court refused to interfere with the discretion of the trial court, even though the members of the court should believe from the record

unless they were improperly instructed, and such is generally the law at present.¹

α. AS TO ALL CHALLENGES. — These principles as to the conclusiveness of determination and findings are applicable as well to the trial of challenges to the array as to the trial of challenges for cause.²

9. **Peremptory Challenges** — α. DEFINITION AND NATURE — (1) *Generally.* — Peremptory challenges are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning a reason, or being required to assign a reason, therefor.³ In criminal cases, peremptory challenges are allowed to the accused upon his own dislike to the individual juror challenged, that is, to protect him from bias or prejudice in the mind of the juror from personal dislike or hatred of the party being tried.⁴ In civil cases, peremptory challenges are allowed, to protect parties, not so much from the

that the juror excluded was competent.

U. S. v. Alexander, 2 Idaho 354.

1. *Milan v. State*, 24 Ark. 348; *Coughlin v. People*, 144 Ill. 164; *Canceml v. People*, 16 N. W. 501; *U. S. v. Miles*, 2 Utah 19; *Carter v. Territory*, 3 Wyoming 193; *Miles v. U. S.*, 103 U. S. 304.

2. *Jackson v. State*, 76 Ala. 26.

3. In *Kentucky*, by statute (code, § 281), the decision of the court on a challenge to the panel is not subject to exception. *Roberts v. Com.*, 9 Ky. 499; *Forman v. Com.*, (Ky. 1888) 6 S. W. Rep. 579.

4. 4 Black. Com. 353; Co. Litt. 156b; 1 Chitty's Crim. Law 534; *Donovan v. People*, 139 Ill. 412; *Christie v. State*, 44 Ind. 408; *State v. Knight*, 43 Me. 11; *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560; *Thurman v. State*, 27 Neb. 628; *Dupree v. Virginia Home Ins. Co.*, 92 N. Car. 417; *Capehart v. Stewart*, 80 N. Car. 101; *Com. v. Hand*, 3 Phila. (Pa.) 403; *Cooley v. State*, 38 Tex. 636; *Lamb v. State*, 36 Wis. 424; *Lewis v. U. S.*, 146 U. S. 376; *Pointer v. U. S.*, 151 U. S. 396; *Hayes v. Missouri*, 120 U. S. 71.

Peremptory Challenges Were So Called because the party might challenge without showing any cause, but only in treason or felony, in favor of life. *Thomas Coke*, § 673. Lord Hale, in his *Pleas of the Crown*, vol. 2, p. 267, states: "But if a man be indicted or appealed of treason, or felony, and plead not guilty, or plead any other matter of fact triable by the same jury, and plead over to the felony, because his life is now at stake he might chal-

lenge peremptorily and without cause any jurors under the number of three whole juries, namely, thirty-five of the jurors returned, and they are to be withdrawn out of the panel; and this was *in favorem vite*." See also *Com. v. Hand*, 3 Phila. (Pa.) 403.

Right to Require Disclosure of Reason.

— "A peremptory challenge is a privilege, the cause of which the parties may wish should not be known, and the court cannot compel them to make it known at any stage of the proceedings or for any purpose." *Gulf, etc., R. Co. v. Keith*, 74 Tex. 287.

The Failure to Show a State of Facts which will be sufficient to sustain a challenge for cause will not affect the right to challenge peremptorily. *Com. v. Knapp*, 9 Pick. (Mass.) 496.

A Juror Who Has Been Unsuccessfully Challenged for any cause may be challenged peremptorily; therefore it is obvious that all challenges for cause should be exhausted before any peremptory challenge is made. *Cooley v. State*, 38 Tex. 636.

Sufficiency of Challenge. — The action of counsel in ordering a juror to stand aside without judicial action as to the ground of objection is in effect a peremptory challenge. *Crider v. Lifsey*, 10 Heisk. (Tenn.) 456.

4. *State v. Skinner*, 34 Kan. 256.

In *Lamb v. State*, 36 Wis. 424, it was said that the object, among others, of allowing the accused to challenge peremptorily was that he might not be obliged to accept a jury apparently indifferent.

bias or prejudice which might arise in the mind of a juror from personal dislike or hatred of those who might happen to be plaintiffs or defendants in the action, but rather from that which might relate to or grow out of the subject-matter in controversy.¹

(2) *Right Is to Reject, Not to Select.* — The right to challenge peremptorily is not of itself the right to select, but the right to reject, jurors. It excludes from the panel, until the prisoner has exhausted his challenges, those to whom he objects, and leaves the residue to be drawn for his trial, according to the established order or usage of the court.²

b. RIGHT TO CHALLENGE PEREMPTORILY — (1) *Formerly.* — The right to challenge peremptorily was originally conferred *in favorem vitæ* in trials for crimes punishable capitally.³ At common law such challenges were allowed in no case except on the plea of not guilty, and never on the trial of a collateral issue.⁴

1. *State v. Skinner*, 34 Kan. 256. See also *Stone v. Segur*, 11 Allen (Mass.) 568.

2. *Alabama.* — *State v. Marshall*, 8 Ala. 302.

Arkansas. — *Hurley v. State*, 29 Ark. 22; *Mabry v. State*, 50 Ark. 492; *Williams v. State*, 63 Ark. 527.

Louisiana. — *State v. Carries*, 39 La. Ann. 931; *State v. Creech*, 38 La. Ann. 481; *State v. Shields*, 33 La. Ann. 1410; *State v. McCarthy*, 44 La. Ann. 323.

Maryland. — *Turpin v. State*, 55 Md. 468; *Biddle v. State*, 67 Md. 304.

Michigan. — *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560.

Minnesota. — *State v. Smith*, 56 Minn. 78.

Missouri. — *State v. Hays*, 23 Mo. 287; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36; *Hegney v. Head*, 126 Mo. 619; *State v. Holme*, 54 Mo. 153; *O'Brien v. Vulcan Iron-Works*, 7 Mo. App. 257.

Montana. — *Territory v. Roberts*, 9 Mont. 12.

Nevada. — *State v. Vaughan*, 22 Nev. 285.

New Hampshire. — *State v. Doolittle*, 58 N. H. 92.

New York. — *Malloy v. Pelham*, (Supreme Ct.) 4 N. Y. St. Rep. 828.

North Carolina. — *State v. Smith*, 2 Ired. L. (N. Car.) 402; *State v. Gooch*, 94 N. Car. 987; *Capehart v. Stewart*, 80 N. Car. 101; *State v. Arthur*, 2 Dev. L. (N. Car.) 217; *State v. Cockman*, 2 Winst. L. (N. Car.) 95; *State v. Hensley*, 94 N. Car. 1021; *State v. Jacobs*, 106 N. Car. 695.

South Carolina. — *State v. Wise*, 7 Rich. L. (S. Car.) 412; *State v. Cole-*

man, 8 S. Car. 237; *State v. Prater*, 26 S. Car. 198; *State v. Jackson*, 32 S. Car. 27; *State v. Jacob*, 30 S. Car. 131.

Texas. — *State v. Ezell*, 41 Tex. 35; *Heskey v. State*, 17 Tex. App. 161.

Vermont. — *State v. Fournier*, 68 Vt. 262; *State v. Meaker*, 54 Vt. 112.

United States. — *U. S. v. Marchant*, 12 Wheat. (U. S.) 480; *Hayes v. Missouri*, 120 U. S. 68; *Spies v. Illinois*, 123 U. S. 131; *Pointer v. U. S.*, 151 U. S. 396.

3. *Brown v. Rome*, etc., R. Co., 86 Ala. 206; *Wiley v. State*, 4 Blackf. (Ind.) 458; *State v. Knight*, 43 Me. 11; *State v. Davis*, 80 N. Car. 384; *Com. v. Hand*, 3 Phila. (Pa.) 403; *Co. Litt.* 153*b*; 4 Black. Com. 352.

Reason for Challenges. — In *Dowling v. State*, 5 Smed. & M. (Miss.) 664, it was said (*citing* Gilb. Com. Pl.; Bac. Abr., tit. Juries): "The origin of peremptory challenges shows that the reason for the common-law rule has ceased at this day. The trial by the petit jury was introduced to do away with the trial by ordeal, the jury of twelve being after the manner of the canonical purgation of accusation. Among the canonists the whole *pares* were not upon the jury, but only a select number was brought in and chosen by the accused himself. A middle way was therefore adopted, and the accused had liberty to challenge peremptorily any number under three juries, four juries being as many as generally appeared to make the total *pares* of the county."

4. *Brooks v. Com.*, 2 Rob. (Va.) 845; 1 Chitty's Crim. Law 535; Bac. Abr., tit. Juries, E, 9, p. 762.

(2) *Modern Practice.* — From what has been said it follows that in modern practice, unless the case is one in which the right to challenge existed at common law, *i. e.*, the trial of a felony punishable with death,¹ the right to challenge peremptorily does not exist² unless expressly conferred by statute.³ In civil cases or

Identity. — In *Rex v. Radcliffe*, 1 W. Bl. 6, the prisoner had been convicted of high treason, and upon a collateral issue that he was not the same person a peremptory challenge was refused.

Upon an inquiry in pursuance of the *Virginia* statutes (1 Rev. Code, c. 171, § 16), whether a convict received into the penitentiary was the same person mentioned in the record of a former conviction, the prisoner was held to have no right to challenge peremptorily persons called as jurors. *Brooks v. Com.*, 2 Rob. (Va.) 845.

Present Insanity. — On the preliminary trial as to a question of present insanity, the defendant is not entitled to peremptory challenges, though challenges for cause may be made. *Freeman v. People*, 4 Den. (N. Y.) 35.

1. Felonies Not of Death. — In *Com. v. Hand*, 3 Phila. (Pa.) 403, the court said that the class of crimes which by the law of England carried with them the right of peremptory challenge were not felonies merely, but felonies which worked a forfeiture of life, "and we have searched in vain for any law, common or statute, as it existed in England, which gave any right of challenge, without cause assigned, to felonies not of death, or to misdemeanors."

Casting Away Vessel. — In *U. S. v. Johns*, 4 Dall. (U. S.) 412, 1 Wash. (U. S.) 363, it was held that on an indictment under the Act of Congress of March 26, 1824, for casting away and destroying a vessel, the accused had the right of peremptory challenge as at common law on a capital charge. But see *U. S. v. Magill*, 1 Wash. (U. S.) 463.

In the District of Columbia, where the offense was punishable by death or was a felony in which the right to challenge was allowed, the accused was allowed to exercise the right, *U. S. v. Wood*, 2 Cranch (C. C.) 164, an indictment for counterfeiting a bank note, which was a felony, without benefit of clergy, by the *Virginia* Act; *U. S. v. McLaughlin*, 1 Cranch (C. C.) 444; *U. S. v. Craig*, 2 Cranch (C. C.) 36, indictments for manslaughter under the *Virginia* law; and in all cases which were

felonies by the *Virginia* laws, *U. S. v. Browning*, 1 Cranch (C. C.) 330.

2. Misdemeanors. — At common law there was no right to challenge peremptorily in a trial for a misdemeanor. *U. S. v. Devlin*, 6 Blatchf. (U. S.) 71; *State v. Skinner*, 34 Kan. 256; *Whart. Crim. Pl.* (8th ed.) 618.

Forgery was not a felony at common law, and though an Act of Congress declares an offense laid in an indictment to be a felony, the declaration will not carry with it the right of peremptory challenge as an incident. *U. S. v. Shive*, 1 Baidw. (U. S.) 510.

In *U. S. v. Smithers*, 2 Cranch (C. C.) 38, which was an indictment for forgery, the punishment for which was not death, the right was denied.

Horse Stealing in the District of Columbia was punishable as ordinary larceny under the Act of Congress, and not by death, and on a trial therefor the accused was not entitled to challenge peremptorily. *U. S. v. Toms*, 1 Cranch (C. C.) 607; *U. S. v. Black*, 2 Cranch (C. C.) 195; *U. S. v. Krouse*, 2 Cranch (C. C.) 252.

Larceny. — No peremptory challenge is allowed in larceny. *U. S. v. McPherson*, 1 Cranch (C. C.) 517. But in *U. S. v. Negro Peter*, 2 Cranch (C. C.) 98, a person indicted for larceny under the Act of Congress, April 30, 1790, was held entitled to challenge peremptorily twenty jurors under the *Virginia* law of November 13, 1792.

3. Possible Conviction for Offense on Trial for Which Challenges Are Allowed.

— Under a statute conferring the right of peremptory challenge on a prisoner on trial for an offense punishable with death or imprisonment in a state prison for ten years or longer, the right exists where the accused may be punished by imprisonment to ten years, though the case is one in which a shorter period of imprisonment may be imposed. *Dull v. People*, 4 Den. (N. Y.) 91.

Condemnation of Liquors. — A proceeding *in rem* to procure the condemnation and forfeiture of liquors illegally kept for sale is a criminal cause within a statute allowing challenges by the state

proceedings the right necessarily must be conferred by statute,¹ as it also must be when the right exists to exercise it in trials by juries other than the common-law trial jury.² Unless conferred by statute the state has no right to challenge peremptorily.³

in such cases. *Com. v. Certain Intoxicating Liquors*, 107 Mass. 216.

Georgia County Courts. — The right to challenge peremptorily in the county courts did not exist under the statutes in force in 1884, but an objectionable juror could only be got rid of by showing him to be subject to legal exceptions on his *voir dire*. *Memmler v. State*, 75 Ga. 576.

1. **Civil Cases.** — Peremptory challenges are given in civil cases by statute *ex gratia*, and a party is not entitled to them independently by the statute as a matter of right. *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560; *Convers's Appeal*, 18 Mich. 459.

An Action of Forcible Entry and Detainer is a civil action within the statute giving a right to a prescribed number of peremptory challenges in civil actions. *Quinebaug Bank v. Tarbox*, 20 Conn. 510.

In **Summary Proceedings for the Recovery of Land** the right to peremptory challenge does not exist. *Roberts v. Cone*, 3 Alb. L. J. 151. *Contra*, *Miner v. Brown*, 20 Conn. 519.

Special Proceedings not in the ordinary course of law are not within a statute allowing two peremptory challenges in "civil cases." *Convers's Appeal*, 18 Mich. 459.

Eminent Domain. — The *Pennsylvania* Act of April 4, 1809, authorizing peremptory challenges in civil cases, did not extend to viewers provided for by the Act of March 29, 1805. *Schwenk v. Umsted*, 6 S. & R. (Pa.) 351.

Inquisition of Damages. — A statute according the right to challenge peremptorily in "proceedings in court" will not authorize such a challenge on an inquisition of damages by a sheriff's jury. *Barrett v. Bangor*, 70 Me. 335.

Talesmen. — Under a statute providing that "in all civil cases in which a jury shall be charged with the trial of any issue, each party shall have the right to challenge without cause therein two of the jury so impaneled, and the place of jurors so challenged shall be supplied," etc., it was held that there was no right to challenge peremptorily talesmen called to fill a deficiency in the original panel.

Burckhalter v. Coward, 16 S. Car. 444 [citing to the same principle, *Charleston v. Kleinback*, 2 Spears L. (S. Car.) 418; *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184; *Huff v. Watkins*, 15 S. Car. 82; *Gunter v. Graniteville Mfg. Co.*, 15 S. Car. 443].

Appeal from Justice. — In *Kerschner v. Cullen*, 27 Ind. 184, it was held that a provision respecting justices' courts which conferred on each party the right to challenge peremptorily one of the jury had no application on the trial of an appeal from the justice.

2. **Right to Challenge Special Venire.** — The right to challenge peremptorily conferred by the *Wisconsin* Rev. Stat., § 2851, may be exercised as well to a special venire as to a regular panel. *Olson v. Solveson*, 71 Wis. 663.

Struck Juries. — Strictly speaking, the right to challenge peremptorily does not exist in the case of struck juries. *May v. Hoover*, 112 Ind. 455; *Branch v. Dawson*, 36 Minn. 193; *Cleveland, etc., R. Co. v. Stanley*, 7 Ohio St. 155; *State v. Moore*, 28 Ohio St. 595; *Blanchard v. Brown*, 1 Wall. Jr. (C. C.) 309. But see *contra*, *Schwenk v. Umsted*, 6 S. & R. (Pa.) 351; *McDermott v. Hoffman*, 70 Pa. St. 31. See the article SPECIAL AND STRUCK JURIES.

In *Cook v. State*, 24 N. J. L. 843, a contention that a statute giving to the state a prescribed number of peremptory challenges, except in cases of struck juries, applied not only to such juries but also to all special panels not summoned and arrayed in the ordinary mode, was held untenable as to the latter proposition.

3. *State v. Drake*, 59 N. H. 21; *Watson v. Walker*, 33 N. H. 131; *Walker v. Kennison*, 34 N. H. 259; *Corey v. Bath*, 35 N. H. 540; *People v. Aichinson*, 7 How. Pr. (N. Y. Oyer & T. Ct.) 241; *People v. Henries*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 579; *State v. Carver*, 2 West. L. J. (Ohio) 426.

Anciently, by the common law, any number of jurors might be peremptorily challenged by the crown, without alleging any other reason than that they were not good men for the king; but this power, being found liable to abuse and mischievous to the subject,

(3) *Impairment of Right.* — The right of peremptory challenge is one of the safeguards against possible injustice. Courts should permit the freest exercise of the right within the limits fixed by the legislature,¹ and where it is abridged or denied and the party thereby deprived of the full number of challenges to which he may be entitled,² or modes of impaneling are adopted which operate as an abridgment or denial of the right,³ or its complete

was taken away by the statute of 33 Edw. I., which in effect provided that when a juror was challenged for the king, those who sued on his behalf must show some cause of challenge, and that the truth of such cause should be inquired into according to the custom of the court. This statute was evaded, however, to some extent, by the construction of the courts, which permitted the prosecution to set aside a juror for the time being without assigning cause until the whole panel was gone through with and it appeared that a full jury could not be obtained without the juror challenged. 2 Hawk. P. C., c. 43, § 3; 1 Bish. New Crim. Pro., § 937 *et seq.*

See *infra*, IX. 10. *Standing Aside.*

In *State v. Miller*, 6 W. Va. 600, it was said that the privilege of peremptory challenge in any form by the state in a case of felony is unknown in the law of England, Virginia, or West Virginia.

Early Pennsylvania Practice. — In *Com. v. Addis*, 1 Browne (Pa.) 285, decided in 1811, it was said to have been the constant practice for twenty years to allow the commonwealth to challenge peremptorily in cases of felonies and misdemeanors.

1. *People v. Edwards*, 101 Cal. 543; *Lamb v. State*, 36 Wis. 424.

The Failure of the Accused to Claim Expressly the Number of peremptory challenges allowed him by statute will not be deemed a waiver of any part of them. *Cruce v. State*, 59 Ga. 83; *Horne v. State*, 37 Ga. 82.

By Standing Mute the defendant is not deprived of the right to challenge to the extent authorized by law. *Link v. State*, 3 Heisk. (Tenn.) 252.

Challenge of a Juror for Cause will not preclude the exercise thereafter of the right of peremptory challenge. *Barber v. State*, 13 Fla. 675; *Waterman v. State*, 13 Fla. 683.

2. Deprivation of Statutory Number. — The trial court cannot abridge or destroy the right to the statutory number

of peremptory challenges by any mode of impaneling the jury. *Schumaker v. State*, 5 Wis. 324.

For a Refusal to Allow the accused the number of peremptory challenges to which he is entitled, there should be a new trial. *State v. Pearis*, 35 W. Va. 320.

Compelling a party to challenge a number other than that to which he claims to be entitled is not material error, within a statute providing that a judgment shall not be revised except where error materially affecting the merits of the action has been committed. *Hegney v. Head*, 126 Mo. 619.

Misleading Information as to Number — Correction Before Exhaustion of Challenges. — A defendant cannot complain that he was compelled to accept an objectionable juror because misled by the clerk as to the number of his challenges, where it appears that the mistake of the clerk was corrected by the judge before exhaustion of the challenges. *Miller v. State*, 36 Tex. Crim. Rep. 47.

3. Impairment of Common-law Right. — Where there is no statute prescribing the mode of exercising the right of peremptory challenge, the practice should not conflict with or abridge the right as it existed at common law. *Lamb v. State*, 36 Wis. 424; *Schumaker v. State*, 5 Wis. 324.

Requiring Other than Authorized Mode. — If the trial judge requires the accused to challenge peremptorily in a manner other than that to which he is entitled, there is reversible error. *Thompson v. State*, 58 Miss. 62.

The Court Cannot Adopt Rules respecting peremptory challenges which conflict with the statutes on the subject. *People v. Jenks*, 24 Cal. 11.

Compelling Four Challenges at Once. — In *Schumaker v. State*, 5 Wis. 324, it was held that in the absence of any statutory requirements to that effect, it was error to compel the defendant either to exercise the right of four per-

enjoyment is impaired in any way, there is such prejudicial error as will require a reversal.¹ However, there is no error in refusing to allow peremptory challenges to a party after exhaustion of the right, or to allow him challenges to which he is not entitled.²

c. LEGISLATIVE POWER. — The legislature has power to confer the right to challenge peremptorily upon the parties litigant in civil actions and proceedings, and the state and the accused in criminal causes,³ and by reason of the power so vested, and so long as the right to trial by jury is preserved and means are provided whereby impartial jurors can be obtained, it may make changes in existing laws, and increase or decrease the number of challenges to which either the state or the defendant may be entitled.⁴

emptory challenges, or waive them, at one time.

Charging Challenges Made on Previous Attempt to Form Jury. — Where, because of inability to procure a jury, the trial is postponed to another term, before the jury for that term the defendant is entitled to the full number of peremptory challenges allowed by law, and cannot be charged with challenges previously made to the first jury. *State v. Briggs*, 27 S. Car. 81.

Requiring Exhaustion of Challenges by Prosecution. — There is no error of which the defendant can complain if due regard is had to the statutory provisions, and he is not compelled to challenge until after the prosecution has fully exhausted its right. *People v. Miles*, 143 N. Y. 384.

1. The Denial of a Statutory Right to challenge peremptorily requires the award of a new trial. *State v. Pearis*, 35 W. Va. 320.

Talesmen. — Where a statute plainly requires the same procedure in impaneling talesmen as in the case of regular jurors, it is error to refuse to allow a party to exercise his right of peremptory challenge as to talesmen. *Mitchell v. Mitchell*, 80 Tex. 101.

2. *State v. Thompson*, 28 La. Ann. 187; *Pierson v. State*, 21 Tex. App. 14; *Thompson v. State*, 19 Tex. App. 593.

Misleading Ruling. — If the accused is allowed the full number of challenges to which he is entitled, it is not a good cause of complaint that he was misled by an erroneous ruling of the judge declaring him entitled to a greater number, such ruling not having been corrected until he had exercised his supposed right to some extent. *State v. Jacob*, 30 S. Car. 131.

3. *Georgia.* — *Hudgins v. State*, 2 Ga. 174; *Boon v. State*, 1 Ga. 618.

Indiana. — *Beauchamp v. State*, 6 Blackf. (Ind.) 299.

Massachusetts. — *Com. v. Dorsey*, 103 Mass. 412.

Missouri. — *Mallison v. State*, 6 Mo. 399.

Nevada. — *State v. McClear*, 11 Nev. 39.

New Hampshire. — *State v. Blaisdell*, 49 N. H. 81; *State v. Wilson*, 48 N. H. 398.

New York. — *Walter v. People*, 32 N. Y. 147; *Stokes v. People*, 53 N. Y. 164.

Ohio. — *Fouts v. State*, 8 Ohio St. 98.

West Virginia. — *State v. Shores*, 31 W. Va. 491.

Impairment of Right to Trial by Jury.

— A statute allowing peremptory challenges to the commonwealth, in all cases, is not violative of the constitutional provision that "trial by jury shall be as heretofore, and the right thereof shall remain inviolate." *Hartzell v. Com.*, 40 Pa. St. 462; *Warren v. Com.*, 37 Pa. St. 45.

A Statute Giving to Each Party in Any Action in a court of record the right to challenge peremptorily a designated number of jurors will confer on the state the right to challenges to the prescribed number. *Wiley v. State*, 4 Blackf. (Ind.) 458.

4. *Alabama.* — *South v. State*, 86 Ala. 617; *Lore v. State*, 4 Ala. 173.

California. — *People v. Mortimer*, 46 Cal. 114; *People v. Campbell*, 59 Cal. 243.

Connecticut. — *State v. Hoyt*, 47 Conn. 518.

Georgia. — *Hudgins v. State*, 2 Ga. 173; *Jones v. State*, 1 Ga. 610; *Rafe v. State*, 20 Ga. 60.

Florida. — *Mathis v. State*, 31 Fla. 291.

Acts prescribing a different number of challenges within particular political divisions of the state are not objectionable as a denial of the equal protection of the laws.¹ Statutes passed after the commission of alleged offenses, which increase the number of challenges to which the state may be entitled, or which reduce the number allowed to the accused, are not *ex post facto*, but the number to be exercised will be controlled by the law in force at the time of the trial.²

d. NUMBER ALLOWED—(1) Generally.—At common law there were no peremptory challenges except for felonies of death and treason, for which a prisoner might challenge thirty-five, or one under three full juries. By the statute of 22 Henry VIII., c. 14, § 7, the number was reduced to twenty in petit treason, murder, and felony, and in treason the right of peremptory challenge was taken away altogether by the statute of 33 Henry VIII.; but by the statute of 1 & 2 Philip & Mary, c. 10, the right as it existed at common law was restored.³ Unquestion-

Kentucky.—Walston v. Com., 16 B. Mon. (Ky.) 15.

Massachusetts.—Com. v. Dorsey, 103 Mass. 412.

Minnesota.—State v. Ryan, 13 Minn. 370.

Mississippi.—Dowling v. State, 5 Smed. & M. (Miss.) 604.

New Hampshire.—State v. Wilson, 48 N. H. 398.

New York.—Stokes v. People, 53 N. Y. 164.

South Carolina.—State v. Wyse, 32 S. Car. 45.

Virginia.—Perry v. Com., 3 Gratt. (Va.) 602.

At Common Law the accused was entitled to thirty-five challenges, afterwards reduced to twenty (38 Hen. VIII., c. 3), but subsequently restored to thirty-five (1 & 2 Philip and Mary, c. 10).

1. Discretion of Legislature.—The matter of peremptory challenges is under the control, and must necessarily depend upon the discretion, of the legislature, and may vary according to the condition of different communities and the difficulties in them of securing intelligent and impartial jurors. *Hayes v. Missouri*, 120 U. S. 68.

Discrimination as to Cities.—A state statute providing that in capital cases, except in cities having a population over a prescribed number, the state shall be allowed a certain number of peremptory challenges, and in such cities shall be allowed fifteen, is not a

denial of the equal protection of the laws to a person on trial in such a city, nor is it error in refusing to limit the state on such a trial to a smaller number of challenges. *Hayes v. Missouri*, 120 U. S. 68.

On the Repeal of a Special Act concerning peremptory challenges, made applicable to a designated locality, the right will be governed by the general law. *Cable v. State*, 8 Blackf. (Ind.) 531.

2. South v. State, 86 Ala. 617.

Offenses Committed Before Change.—A change in the law relative to peremptory challenges will apply as well to a prosecution for offenses committed before the change as to trials for offenses committed thereafter. *Mathis v. State*, 31 Fla. 291.

In *State v. Shreves*, 81 Iowa 615, it was held that a defendant was entitled to the number of challenges prescribed by an amendment passed subsequently to the alleged commission of the offense for which he was on trial and the commencement of the prosecution therefor, and not to the larger number prescribed by the original act.

Additional Challenges to State.—Statutes giving additional challenges to the state are valid, though passed after the commission of the crime. *State v. Hoyt*, 47 Conn. 518.

3. Comyns's Dig., Challenge, C, 1; 4 Black. Com. 353. See *Com. v. Hand*, 3 Phila. (Pa.) 403; *State v. Aaron*, 4 N. J. L. 268; *Cooley v. State*, 38 Tex. 636.

ably there is no right to a greater number of challenges than the number prescribed by statute, or the number allowed by the common-law practice, where that practice still prevails.¹ As before stated, the right of the state to challenge peremptorily exists only by force of statutes, and necessarily the number of challenges which may be interposed by it are prescribed in the same manner.² In analogy to the rule of the common law, and

Effect of Challenging in Excess of Number Allowed — Common Law. — Prior to the statute 22 Hen. VIII., c. 14, a person arraigned for felony was entitled to challenge thirty-five jurors peremptorily, but if he challenged the thirty-sixth, and thereby avoided a trial by jury, he was treated as if he had stood mute, and he was doomed to the *peine forte et dure*, by which means he avoided a trial by jury. See *State v. Gayner*, Conf. Rep. (N. Car.) 305; 4 Black. Com. 353.

In this connection it is interesting to know the punishment awarded to an accused who thus dared the majesty of the courts. "The accused, nearly naked, was laid on his back, upon the ground, with arms and feet drawn apart by cords, and with as great a weight of iron or stone placed upon his chest as he could bear. The next day he had three morsels of bread, and the next day three draughts of the stagnant water nearest the prison; and so on, on alternate days, till he died or answered." By answering he was executed in the ordinary way, and his lands were forfeited to the crown; by perishing, his property was saved to his family. The practice was abolished in 1772. See Anderson's Law Dictionary, title *Peine forte et dure*.

"Felony" Contemplates Capital Felonies. — "It is clear that the right to twenty peremptory challenges in cases of felony was only incident to felonies of death." Com. v. Hand, 3 Phila. (Pa.) 403, wherein it is also said: "There appears to be somewhat of a contradiction in the statement that, by the law of England, twenty challenges without assigning cause are allowed for felonies, that law, except as changed by our statutes, being in force here [Pennsylvania], and yet to refuse that number of challenges to one indicted for a felony made so by an act of the Assembly of this commonwealth. But it is explained by the fact that the right to peremptory challenges was, by the common law of England, allowed

only in favor of life, and that therefore to all the felonies not of death, and to misdemeanors, the principle does not apply."

Clergyable Felony. — Upon trial of an indictment for a clergyable felony the defendant is entitled to the full peremptory challenge to thirty-five jurors *State v. Cadwell*, 1 Jones L. (N. Car.) 289.

Forgery Was Not a Felony Punishable by Death at common law, and therefore a defendant on trial for that offense is entitled to no more challenges than are allowed in trials for misdemeanor. *Shuster v. Com.*, 38 Pa. St. 206.

1. *State v. Ray*, 53 Mo. 345; *State v. Hargrave*, 100 N. Car. 484; *State v. Patrick*, 3 Jones L. (N. Car.) 443; *Martin v. State*, 16 Ohio 364.

Claim of Right Because of Improper Exclusion of Juror. — The trial court may refuse to permit a peremptory challenge to a defendant who has exhausted his right, but claims the challenge because unlawfully compelled to exhaust his challenge by the erroneous decision of the court respecting the competency of a proposed juror. *People v. Oyer & T. Ct.*, 83 N. Y. 436.

Nonappearance of Special Venireman. — A juror summoned on the special venire failing to answer, his name, by consent, was placed in the hat with the names of the other veniremen. Before completion of the jury his name was drawn, and being again called he again failed to answer. It was held that the defendant was not entitled to an additional challenge on this account. *State v. Powell*, 94 N. Car. 965.

2. In New York a limited right of peremptory challenge was given to the people, on trials of indictments for murder and other felonies, by c. 332 of the Laws of 1858; five on trials for murder and felonies punishable with imprisonment for more than ten years, and in other cases three. But the defendant was allowed twenty peremptory challenges in case of an indictment for murder or felony punishable with

in those jurisdictions where the number is fixed by statute, defendants accused of capital offenses, or offenses which may be punished capitally, are entitled to the maximum number of challenges allowed.⁴ Where a second conviction for the like offense

ten years or more imprisonment. 2 Rev. Stat. 734, § 97. By c. 427 of the Laws of 1873 it was provided that on the trial of all felonies or misdemeanors the prosecution should be entitled to the same number of peremptory challenges as are given to the defendant. *People v. McQuade*, 110 N. Y. 293.

In *Pennsylvania* the English statute was in force until the passage of the Act of March 29, 1813, wherein it was declared that the commonwealth, except in cases of felony, might challenge no greater number than the defendant or defendants, by which statute the commonwealth became entitled to challenge four jurors peremptorily, that being the number allowed to defendants by the Act of April 4, 1809. See *Com. v. Marra*, 8 Phila. (Pa.) 440.

In *Maine*, by the statutes in force in 1883, the state was entitled to five peremptory challenges. *State v. Chadbourne*, 74 Me. 506.

1. The *New Jersey* Act of March 6, 1795, followed the English statute in respect to granting to a person indicted for murder twenty peremptory challenges. *State v. Aaron*, 4 N. J. L. 268.

In *North Carolina*, on trial of a capital felony, there is a right to twenty-three peremptory challenges. *State v. Davis*, 80 N. Car. 384.

Nolle Pros. as to Charge of Murder.— Construing statutes, one giving a person indicted for a capital offense sixteen peremptory challenges, and, "except as otherwise provided," declaring that every defendant may challenge two of the panel, where, in a trial of an indictment for murder, the prosecuting attorney enters a *nolle prosequi* as to the charge of murder in the first degree, the defendant is entitled to no more than the lesser number of challenges, notwithstanding that a special jury had been summoned. *Goins v. State*, 46 Ohio St. 457.

In *State v. Talmage*, 107 Mo. 543, decided under a statute providing that the defendant in a criminal case shall be entitled to twenty peremptory challenges where the offense charged is punishable with death or imprisonment, and to only twelve challenges if the offense is pun-

ishable by imprisonment not less than a specified number of years, it was held that a defendant indicted for murder in the first degree, if only tried for murder in the second degree, which was not punishable with death, was entitled only to the number of twelve challenges.

Statutory Reduction of Punishment.— By the *Maine* Revised Statutes a person indicted for an offense punishable with death had ten peremptory challenges, and on trial of an indictment for other offenses, but two. By a subsequent act (1876, c. 114) the crime of murder was punishable with life imprisonment only, and it was held that by reducing the punishment the right of challenge to persons on trial for murder was reduced from ten peremptory challenges to two. *State v. Smith*, 67 Me. 328.

In *Alabama* it was held that a general act prescribing the number of peremptory challenges in capital cases repealed the provision of a special act describing the number of such challenges. *Maxwell v. State*, 89 Ala. 150.

Rape not being a crime punishable with death or imprisonment for life, the defendant on trial for such an offense cannot claim the number of challenges accorded to a defendant on trial for an offense so punishable. *People v. Fultz*, 109 Cal. 258.

Forgery.— Under a rule conferring on prisoners the right to twenty peremptory challenges when charged with any crime that was, on a certain specified date, a felony without benefit of clergy, and punishable with death, the right to the prescribed number of challenges cannot be claimed in a case of forgery, that crime not being such a felony. *Shuster v. Com.*, 38 Pa. St. 206.

Malicious Burning.— The statutory crime of maliciously, etc., burning haystacks and corn ricks in the night-time is not arson, on trial on an indictment for which the defendant is entitled to twenty peremptory challenges, but is within the last clause of section 3 of the *South Carolina* Revised Statutes, p. 743, which provides that a person on trial for any offense other than those

(c) *Proof*. — Proof must be introduced to support the ground of the challenge.¹ At common law a challenge for principal cause was tried by the court on the testimony of the juror, to the exclusion of other evidence, and if found true the juror was incompetent *per se*.² If the challenge was to the favor, as for undue influence and prejudice, the challenge was tried by two triers under the direction of the court, on testimony other than that of the juror; and where the common-law practice prevails, substantially the same distinction is preserved.³

est doctrine on the subject, and though in part overruled by subsequent decisions, was recognized in *Rex v. Edmunds*, 4 B. & Ald. 472, 6 E. C. L. 565.

Necessity of Instructing Jurors in Court.

— When a jury has been put upon triers, who have retired to consider the evidence, it is improper to move the court to send written instructions to the triers to propound a particular interrogatory for the purpose of establishing the disqualification of the juror, but the proper course is to have the triers brought into the court room and instructed in the presence of both parties. *Whaley v. State*, 11 Ga. 123.

Instruction that Challenge Was in Nature of Appeal. — In *Freeman v. People*, 4 Den. (N. Y.) 35, a challenge on the ground of the formation and expression of opinion was overruled after proof to sustain it, and a challenge to the favor being then interposed and submitted to triers, an instruction that the challenge to the favor was in the nature of an appeal from the judgment of the court on the facts was held erroneous.

Objections and Exceptions to Instructions given by the court may be taken. *Stewart v. State*, 13 Ark. 721. See also *Milan v. State*, 24 Ark. 348.

1. Duty of Challenging Party — Issue in Doubt. — Where a juror states that he has formed and expressed an opinion as to a matter which is claimed to be one of the principal questions at issue, if it is impossible for the presiding judge to determine from the pleadings or facts whether such issue was a material one, it is the duty of the party claiming the disqualification to offer to prove that the issue in question was material. *Weill v. Lucerne Min. Co.*, 11 Nev. 200.

Conclusion by Preliminary Interrogatories. — Neither the court nor counsel are to be concluded by preliminary interrogatories put to the jurors where the question of competency is to be de-

termined by triers. *People v. Johnson*, 2 Wheel. Cr. Cas. (N. Y. Oyer & T. Ct.) 361.

Oath to Juror. — The oath on the *voir dire* need not be readministered to a juror before he is examined by the triers. *Griffin v. State*, 15 Ga. 476.

2. Milan v. State, 24 Ark. 348; *People v. Christie*, 2 Park. Ct. Rep. (N. Y.) 579; *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *Ohio v. Ankrim*, Tappan (Ohio) 112.

3. Milan v. State, 24 Ark. 348; *Robinson v. State*, 1 Ga. 563; *Jones v. State*, 1 Ga. 610; *State v. Aaron*, 4 N. J. L. 263; *Respublica v. Dennie*, 4 Yeates (Pa.) 267; *State v. Baldwin*, 3 Brev. (S. Car.) 309; *State v. Sims*, 2 Bailey L. (S. Car.) 29; *Rex v. Edmunds*, 4 B. & Ald. 476, 6 E. C. L. 567. See *State v. Aaron*, 4 N. J. L. 263.

Restriction to Either Class of Evidence.

— A party challenging on suspicion of bias or partiality may either examine the juror on oath or produce other evidence to support his challenge; he cannot do both. *Ohio v. Ankrim*, Tappan (Ohio) 112.

In *Arkansas*, under a statute providing for the trial of all challenges for cause on the oath of the person challenged or by triers by other evidence, it was held that where the competency of a juror was tried by the court the trial should be upon the testimony of the juror on his *voir dire*, but that if the trial was by triers other evidence might be introduced to the exclusion of the oath of the juror challenged. *Stewart v. State*, 13 Ark. 721.

Impeachment of Juror. — In *Den v. Plissant*, 1 N. J. L. 254, it was resolved that if a jurymen challenged on account of his interest in the case is examined on his *voir dire*, and does not disclose any interest, the party challenging is not precluded, as in the case of a witness, from establishing the fact of interest by other testimony.

A Juror Objecting to his Partiality cannot

The tendency of the modern practice, however, to submit the whole question of the qualification or competency of the proposed jurors to the court, has in a great measure abolished this distinction, so that witnesses may be called in addition to the examination of the juror in all trials for the ascertainment of his unindifferency.¹ In proving the grounds of challenge the law of evidence is the same as in other cases.²

not prove his own impartiality. *Vance v. Haslett*, 4 Bibb (Ky.) 191.

A Challenged Juror Cannot Be Examined as a witness to the triers. *Joice v. Alexander*, 1 Cranch (C. C.) 528.

A Proposed Juror Cannot Be Compelled to Disclose Guilt of any crime, or any act which will disgrace him, in order to test his qualifications as a juror, but his incompetency must be established, if at all, by other evidence. *Burt v. Panjaud*, 99 U. S. 180.

A challenge on the ground that a proposed juror is under indictment, or charged with crime, which is made by law a positive disqualification, must be sustained by evidence *aliunde* on the *voir dire* examination of the proposed juror. *Sewell v. State*, 15 Tex. App. 56.

1. Allowance of Time to Procure Witnesses.—In *Hodge v. State*, 26 Fla. 11, the Supreme Court sustained the action of the court below in refusing a request for time to procure witnesses to show the bias of a juror, counsel failing to show how long it would require to procure the witnesses, their residence, or the facts to be proved.

Issues.—Although by statute witnesses may be examined on a challenge for actual bias, yet the defendant has no right to require that all proceedings be suspended and the compulsory process of the court issued to compel the attendance of a witness whose presence might have been procured had due diligence been exercised. *State v. Barrett*, 40 Minn. 65.

Refusal to Hear Other Testimony.—The trial of a challenge for cause in a criminal case is summary in its character, and while the court may receive evidence other than that of the challenged juror, the judgment will not be reversed because of the refusal of the judge to hear the testimony of other witnesses, where the juror's own testimony shows him to be competent. *State v. Lowe*, 56 Kan. 594.

It Is Error to Refuse to Hear a Witness as to the fact that the venireman had formed and expressed an opinion.

Ellis v. State, 25 Fla. 702; *Barber v. State*, 13 Fla. 675.

Right to Witnesses in Addition to Juror.—For the purpose of discovering who are qualified, a rigid and searching inquiry is allowed previous to the acceptance of the juror. This is usually done by the examination of the juror himself under oath on his *voir dire*, but witnesses can be called in addition to testify to any fact tending to show incompetency. *People v. Evans*, 72 Mich. 367.

The rule as to the method of trials of challenges to the polls is not well settled by the older authorities, but in *Epps v. State*, 19 Ga. 102, it was said to be everywhere agreed that the truth of the matter alleged as cause of challenge might be made out by witnesses, and that the juror challenged on his *voir dire* might be asked such questions as would test the state of his feelings.

Further Examination.—Where issue is joined on the truth of the averment of a challenge for cause, after a proposed juror has been examined, he may be further examined, other witnesses called, and the matter submitted. *People v. Reynolds*, 16 Cal. 128.

In the Examination of the Qualifications of a Juror the parties are not confined to an interrogation of the juror himself, but may introduce other evidence. *Shaw v. State*, 27 Tex. 750.

2. State v. Fox, 25 N. J. L. 566; *State v. Spencer*, 21 N. J. L. 197.

Proof of Cause on Trial to Favor.—Where the court is the trier of the challenge for principal cause and also of the challenge to the favor, and the latter immediately succeeds the other, the court may, in determining the challenge for favor, take into account what has been said by the proposed juror on the former challenge. *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. Cas. (N. Y.) 1.

Challenges Not Exhausted.—Where improper evidence is received on the

the right of several parties plaintiff or defendant is generally restricted to allowing no more than the number of challenges allowable to a single party, statutes giving a prescribed number of challenges to "parties," "each party," "either party," or the like, in civil actions, being construed to give the prescribed number of challenges to each side, whether it consists of one or a number of persons, plaintiff or defendant,¹ but where the interests of the parties are not identical, or are antagonistic, each litigant should be deemed a party, and as such should be allowed the full number of challenges.²

1. *Idaho*. — U. S. v. Alexander, 2 Idaho 354.

Illinois. — Schmidt v. Chicago, etc., R. Co., 83 Ill. 405.

Indiana. — Snodgrass v. Hunt, 15 Ind. 274.

Kentucky. — Sodousky v. McGee, 4 J. Marsh. (Ky.) 267.

Massachusetts. — Stone v. Segur, 11 Allen (Mass.) 568.

North Carolina. — Bryan v. Harrison, 76 N. Car. 360.

Ohio. — Moores v. Bricklayers' Union, 23 Wkly L. Bul. (Ohio) 48.

Tennessee. — Blackburn v. Hays, 4 Coldw. (Tenn.) 227.

When an Action Is Joint as to parties plaintiff or defendant, they are entitled, however numerous, to no greater number of peremptory challenges than though they prosecuted or defended singly. *McClay v. Worrall*, 18 Neb. 44.

Severing in Pleading. — Under a statute authorizing each party to a suit to make a prescribed number of peremptory challenges, the fact that the defendants severed in the pleading will not entitle each of them to the prescribed number of challenges, but only to that number collectively. *Bibb v. Reid*, 3 Ala. 88.

A Plaintiff in a joint action against several defendants is limited to the statutory number of challenges for one party. *Hundhausen v. Atkins*, 36 Wis. 518.

Bearing of Statute Respecting Criminal Causes. — The fact that merciful consideration of a statute will give separate challenges to joint defendants in a criminal case will have no bearing on the construction of a statute conferring challenges in civil cases. *Hundhausen v. Atkins*, 36 Wis. 518.

2. **Antagonistic Defenses**. — In *Stroh v. Hinchman*, 37 Mich. 490, decided under section 6027 of the Compiled Laws of Michigan, it was held that in

all civil cases each party may challenge two jurors peremptorily, and that when several defendants unite in one plea and defense, and appear by the same counsel, they are entitled to but two challenges in all, but that where two defendants sever in their pleas and appear by different counsel to litigate antagonistic defenses, each must be deemed a "party" within the section in question, and is entitled to two challenges.

Separate Answers. — In *Gram v. Sampson*, 4 Ohio Cir. Ct. Rep. 490, where defendants jointly sued filed separate answers by different attorneys, but did not antagonize each other, no more challenges were allowed than those to which a single defendant would be entitled.

Identity of Interest. — Under a statute (Rev. Stat. Tex., art. 3084) providing that each party to a civil suit shall be entitled to six peremptory challenges, it was held that when there is more than one defendant and the liability of each depends upon the same fact, they will be considered as only one party. But where there is no identity of interest between them, and the issues are not the same between them and the plaintiff, or if the defendants claim adversely to each other and their interests would be affected by the finding of the jury, then each defendant would be entitled to six peremptory challenges. *Rogers v. Armstrong Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 848; *Hargrave v. Vaughn*, 82 Tex. 347, *Wolf v. Perryman*, 82 Tex. 112; *Allen v. Waddill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 273.

Where the Interests of Two Defendants Are So Nearly Identical as to make the defendants in effect but one party, they are only entitled to the number of challenges allowed to "one party." *Jones v. Ford*, 60 Tex. 127.

(b) **Consolidation of Actions.** — The consolidation of actions against several defendants will not impair the right of each defendant to the number of peremptory challenges to which he would have been entitled had there been a separate trial.¹

(c) **Criminal Proceedings** — *aa.* **RIGHTS OF DEFENDANTS.** — In criminal cases statutes conferring the right to challenge peremptorily are sometimes construed to restrict defendants tried jointly to the challenges to which each would be entitled if tried singly,² but

Attachment. — On trial of the title to personal property, attaching creditors having no antagonistic interests are to be considered as one party for the purpose of determining the number of challenges to which they are entitled. *Raby v. Frank*, 12 Tex. Civ. App. 125.

Garnishment. — Under a statute providing that each party to a civil action shall be entitled to six peremptory challenges, and that where there is more than one defendant, and the liability of each depends upon the same facts, they shall be considered as one party, etc., an intervener in a garnishment proceeding who is making a common fight with others against the garnishee, and not against such others, is not entitled to six challenges on his own part. *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227.

In Wisconsin. under a statute giving to each party in a civil cause a prescribed number of challenges, when several defendants join in their defense, or, severing in their answers, set out but one defense, common to them all, they constitute but one party, and are limited to the statutory number of challenges given to a party. But when their defenses are essentially different, especially when they are hostile, and each has a distinct issue to maintain, each is a party, and as such entitled to the full number of challenges. *Hundhausen v. Atkins*, 36 Wis. 518.

Challenges Not Exhausted. — The refusal to allow to each of several defendants the full number of peremptory challenges is not reversible error where it does not appear that the challenges allowed were exhausted or that an objectionable juror was forced on them. *Allen v. Waddill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 273.

Unobjectionable Jury Obtained. — The refusal to allow a full number of challenges to both the defendant and an intervener will not be interfered with where it does not appear that, although

the peremptory challenges were exhausted, there remained upon the list the name of any juror whom either party desired to challenge. *Snow v. Starr*, 75 Tex. 411.

1. *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, distinguished in *Stone v. U. S.*, 167 U. S. 178, affirming 29 U. S. App. 32, 64 Fed. Rep. 667, wherein it was held that a defendant in two cases which were consolidated and tried together, who appealed from a judgment in one case in which he was sole defendant, and on the trial of which he had the benefit of all the challenges to which he was legally entitled, could not complain of the refusal of the trial court to allow a challenge on the trial of the other case, wherein he defended jointly, and in which the judgment was arrested and the verdict set aside.

2. *People v. McCalla*, 8 Cal. 303; *State v. Ford*, 37 La. Ann. 443; *State v. Cady*, 80 Me. 413; *Hamlin v. State*, 67 Md. 333; *People v. O'Loughlin*, 3 Utah 133.

Refusal to Join in Challenges. — If defendants jointly indicted refuse to join in their challenges, they must be tried separately in order to prevent the delay which might arise from exhaustion of the whole panel. *Cruce v. State*, 59 Ga. 83.

In *Charnock's Case*, 3 Salk. 81, Chief Justice Holt informed three defendants jointly indicted for treason, who had pleaded not guilty severally, that they might each challenge thirty-five veniremen peremptorily, but that if they availed themselves of this privilege they must be tried separately and singly, as not joined in the challenges. If, however, they intended to join in the challenges, they could challenge but thirty-five in the whole.

Offenses Requiring Joint Action. — But where two persons are tried together for an offense that required their joint action or concurrence, such as an affray, etc., so that the acquittal of either will operate as an acquittal of

irrespective of express enactment on the subject, though the right may exist by statute, in such cases a defendant, though tried jointly, is not thereby deprived of his individual right to make the full number of peremptory challenges to which otherwise he would have been entitled.¹

both, they may be required to join in their challenges. *Hawkins v. State*, 13 Ga. 324. This, however, is denied in *Bixbee v. State*, 6 Ohio 86.

Capital Case.—In *People v. Thayer*, 1 Park. Cr. Rep. (Erle Oyer & T. Ct.) 595, it was held that where two or more persons jointly indicted for murder are tried together, the whole number are only entitled to the same number as a single defendant.

Offense Less than Capital.—Where several defendants are tried jointly for an offense less than capital, under the *New Hampshire* statute, they have but two peremptory challenges in all, and not each the right to challenge two jurors peremptorily. *State v. Reed*, 47 N. H. 466.

Federal Courts.—By section 819, Rev. Stat. U. S., "in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges," etc. See U. S. v. Hall, 44 Fed. Rep. 883.

Exhaustion of Challenges Given by Federal Statutes—Rights under Territorial Statutes.—In *People v. O'Loughlin*, 3 Utah 133, it was held that defendants who jointly availed themselves of an act of Congress fixing the number of peremptory challenges at three, after exhausting the challenges so given could not make individual peremptory challenges under the statute of the territory.

Charging Challenges Prior to Separate Trial.—In view of a statutory provision (Crim. Code Ky., § 198) that on the trial of several defendants the challenge of one shall be deemed the challenge of all, one of several defendants is chargeable with all challenges interposed prior to his procurement of a separate trial. *Glass v. Com.*, (Ky. 1894) 26 S. W. Rep. 811.

Dividing Challenges.—Under an act giving a single defendant twenty-one peremptory challenges, and providing that when two or more defendants are tried jointly each shall be entitled to one-half of the peremptory challenges allowed by the act, it was held in a case where two defendants had been

jointly indicted and tried that an allowance of ten challenges to one and eleven to the other was a substantial compliance with the act. *Gibson v. State*, 89 Ala. 121.

In *Gregg v. State*, 106 Ala. 44, it appeared that by the statute the defendant in a capital case was accorded twenty-one challenges, and where there were two or more joint defendants each was entitled to one-half of that number, and it was held that one of two defendants jointly indicted who had made eleven challenges could not make complaint that the act was impossible of execution because the half of twenty-one was ten and a half, and that therefore he was entitled to the number of challenges allowed by a general statute.

1. *Brister v. State*, 26 Ala. 107; *Hawkins v. State*, 9 Ala. 137; *Cruce v. State*, 59 Ga. 83; *Horne v. State*, 37 Ga. 82; *Maton v. People*, 15 Ill. 536; *State v. Durein*, 29 Kan. 688; *State v. McLean*, 21 La. Ann. 546; *Smith v. State*, 57 Miss. 822; *State v. Doolittle*, 58 N. H. 92; *People v. Judson*, 11 Daly (N. Y.) 1; *People v. Vermilyea*, 7 Cow. (N. Y.) 383; *Bixbee v. State*, 6 Ohio 86; *State v. Stoughton*, 51 Vt. 362; *Schoeffler v. State*, 3 Wis. 823; *U. S. v. Haskell*, 4 Wash. (U. S.) 412, note; *U. S. v. Marchant*, 12 Wheat. (U. S.) 480; *Salisbury's Case*, Plowd. 100; *Swan's Case*, Foster 104; 3 Whart. Crim. Law, § 3194; 2 Hale P. C. 268; Bac. Abr., Juries, E, 9; 1 Chit. Crim. Law, 535.

Early English Doctrine.—In *U. S. v. Marchant*, 12 Wheat. (U. S.) 480, it is said that it became a question in very early times whether the court had power against the will of the prisoners to sever the panel and try them severally, if they insisted upon their right of separate challenge, and upon full consideration it was decided that the court had this power. Citing *Salisbury's Case*, Plowd. 100; *Thymolby's Case*, 2 Dyer 152, b.; *Kelyng's Reports* 9.

"Every Person."—Under a statute giving "every person" indicted, etc., a prescribed number of peremptory

bb. RIGHTS OF STATE. — The right of the prosecution differs in the several jurisdictions. Thus in some, where there are several defendants jointly on trial, there is a right on the part of the state to the same number of challenges to which all the defendants are entitled in the aggregate,¹ to the same number as to each defendant as there would be a right to were he tried alone,² or to a proportionate part of the number,³ while in others the right is restricted to a fixed number irrespective of the number of defendants.⁴

challenges, the defendants jointly indicted and tried together are each entitled to the full number of challenges allowed by statute. *Washington v. State*, 17 Wis. 147.

State and Defendant "Each" Entitled.

— Under a statute providing that the state and the defendant shall each be entitled to challenge peremptorily five jurors, it was held that where two defendants were arraigned each had the right to the full number of challenges. *Hill v. State*, 2 Verg. (Tenn.) 246.

Where One Defendant May Be Convicted.

— On the joint trial of two for an offense of which one may be convicted and the other acquitted, each is entitled to the number of peremptory challenges to which he would be entitled if tried separately. *Cruce v. State*, 59 Ga. 83.

Sufficiency of Record to Show Impairment of Right. — In *State v. Durein*, 29 Kan. 688, the record did not set forth, in detail, the proceedings on impaneling the jury, but simply stated that the court refused the demand that each defendant be allowed four peremptory challenges, and ruled that they were entitled in the aggregate to four and no more, and that the defendants used four such challenges, but no other statement or recital was contained therein with reference thereto. It further appeared that one of the defendants was convicted and that the jury disagreed as to the other, and it was held that the record sufficiently showed as to the defendant convicted that his right to challenge peremptorily had been impaired.

1. In Illinois. — Under a statute according to the state "a peremptory challenge of the same number of jurors that the accused is entitled to," where several are indicted jointly the prosecution is entitled to peremptory challenges equal to the whole number to which all the defendants are entitled. *Spies v. People*, 122 Ill. 265.

2. In Louisiana, under Act No. 30, of 1878, the state was entitled to the statutory number of peremptory challenges for each of the parties jointly on trial. *State v. Waggoner*, 39 La. Ann. 919; *State v. Green*, 33 La. Ann. 1408.

In Vermont, under a statute allowing to the state one-third the number of challenges to which the accused is entitled by law, where there is more than one defendant the state is entitled to one-third of the whole number of challenges accorded to the defendants. *State v. Fournier*, 68 Vt. 262.

3. In Florida, under a statute providing that in capital cases the prisoner shall have twenty peremptory challenges and the state five, the state can have no more than half on the trial of defendants jointly indicted. *Savage v. State*, 18 Fla. 909.

In Georgia, where two are tried jointly for a capital offense and neither waives his peremptory challenges, the state is entitled to half of the whole number which the law allows. *Butler v. State*, 92 Ga. 601.

4. See *State v. Gay*, 25 La. Ann. 472; *State v. Earle*, 24 La. Ann. 38, decided prior to the Act of 1878.

Ohio. — A statute providing that every prosecuting attorney, on the trial of an indictment, may peremptorily challenge two of the panel gives no right to more than that number when several defendants are put upon trial at the same time, under the same indictment. *Mahan v. State*, 10 Ohio 232.

Tennessee. — In *Wiggins v. State*, 1 Lea (Tenn.) 738, the court refused to allow the state more than the statutory number of challenges because of the fact that there were two defendants, showing that the reason of the rule allowing several defendants to have the benefit of the full number of challenges was that the right was given them because, although they might be tried together, yet the judgment might be different, and that each defendant must

cc. RIGHTS OF DEFENDANTS INTER SE. — On a trial of defendants jointly, a challenge by one will operate to exclude the juror as to all,¹ notwithstanding the insistence of the others that he sit in the case;² nor can either or any of them complain of a challenge by the other,³ nor can the right of one defendant to challenge peremptorily be abridged or impaired by the action of his codefendant.⁴

(4) *Several Counts in Indictment.* — The number of challenges allowed to a defendant indicted for a crime will not be affected by the number of counts in the indictment.⁵

stand or fall, ordinarily, as if tried alone.

Wisconsin. — On the trial of a capital offense, each defendant, how many soever may be included in the indictment, is entitled to twenty-four peremptory challenges, and the prosecution to but six, whether there be one defendant or many. *Schoeffler v. State*, 3 Wis. 823.

1. *Maton v. People*, 15 Ill. 536; *Hill v. State*, 2 Yerg. (Tenn.) 246.

2. *People v. McCalla*, 8 Cal. 301; *State v. Meaker*, 54 Vt. 112.

3. *State v. Jacobs*, 106 N. Car. 695; *State v. Smith*, 2 Ired. L. (N. Car.) 402.

Defendants Electing to Plead Together are bound to abide by each other's challenges. *Pigott v. Piggott*, Cro. Car. 531; 2 Hawk. P. C., c. 41, § 89; 1 Chit. Crim. Law 509.

Allowing Extra Challenges. — Where two were arraigned together under a joint indictment, and where they were by statute entitled to two challenges in all as one "party," it was held that neither could complain that he had the right to a juror who had been challenged by the other on the panel, where the court accorded to each two challenges. *State v. Cady*, 80 Me. 413.

Neither the Prosecution Nor the Defendant, though he be one of two or more, can be heard to complain of peremptory challenges tendered by the other. *State v. Durr*, 39 La. Ann. 751.

4. *Reynolds v. Rowley*, 2 La. Ann. 890; *State v. McLean*, 21 La. Ann. 546.

Challenge of Juror Accepted by Codefendant. — The challenge by one joint defendant, of a juror who has been accepted by the other, is not a ground of exception for the latter. *State v. Doolittle*, 58 N. H. 92.

Where the right of peremptory challenge exists, and two are arraigned and plead not guilty, they each have

the undoubted right to the full number of their peremptory challenges, and if one elect a juror the other may challenge him, in which event he must be set aside. *Salisbury's Case*, Plowd. 100.

Sufficiency of Record to Show Denial of Right. — Section 2763 of the *Iowa* code provides that joint parties cannot sever challenges. In *Cleveland v. Atkinson*, 94 Iowa 621, it appeared that judgment was recovered against two of three defendants, the third having a judgment in his favor, and that a new trial was granted to the two, whose challenge to a juror was overruled because the third defendant did not join, at which time the record failed to show any adjudication as to the successful defendant, though later a *nunc pro tunc* order was made establishing the adjudication. The appellate court refused to interfere with the ruling, it not appearing that the record contained all the evidence submitted on the trial.

Although one jointly indicted and on trial with others has been compelled to exhaust his peremptory challenges in getting rid of an obnoxious juror, and his codefendants have challenges remaining, special reasons should be assigned in the bill of exceptions why the same were unavailable to him, otherwise he fails to show that he was prejudiced. *State v. Garig*, 43 La. Ann. 365.

5. **Kindred Offenses.** — A statute conferring the right to a fixed number of challenges on trial of an indictment entitles a defendant to no more because separate misdemeanors of a kindred character are stated in separate counts. *State v. Skinner*, 34 Kan. 256.

Charging Distinct Offenses. — In *Smith v. State*, 8 Lea (Tenn.) 386, the defendant was charged in two counts with perjury at different times and places, and it was held that he was entitled to

(5) *United States Courts.* — In the courts of the United States under the Act of 1790,¹ and prior to the Act of 1840,² in analogy to the common law the right to challenge peremptorily existed only in trials for treason and other crimes the punishment of which was death.³ Under the Act of 1840, empowering the courts to make rules and regulations conforming the impaneling of juries to the state practice, there seems to have been considerable confusion, though the Supreme Court decided that the power included that of regulating peremptory challenges.⁴ Now by

no more challenges than if the indictment had been in one count.

Trying Counts Together. — It is not good ground of complaint that by compelling the defendant to go to trial on an indictment containing two counts instead of trying him on each count separately, he was deprived of challenges, etc., which he would otherwise have had. *U. S. v. Groesbeck*, 4 Utah 487; *U. S. v. Bromley*, 4 Utah 498.

By the Terms of the Massachusetts Statute of 1863, c. 84, on the trial of an indictment against two jointly, each defendant was entitled to no more than two peremptory challenges, irrespective of the number of counts in the indictment or the offense therein charged. See *Com. v. Walsh*, 124 Mass. 32.

1. Crimes Act of 1790, § 30 (1 Stat. at L. 119).

2. Act Cong., July 20, 1840 (5 Stat. at L. 394), now embodied in section 800, Rev. Stat. U. S.

3. See *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207.

Derivation from Common Law. — The right of challenge in the cases specified in the Act of Congress, 1790, in respect to the number of jurors, was derived from the common law, which allowed thirty-five in cases of treason, and twenty in cases of felony. *U. S. v. Shackelford*, 18 How. (U. S.) 588. See *U. S. v. Marchant*, 12 Wheat. (U. S.) 483.

Number Allowed under Act of 1790. — In offenses made capital by the Act of Congress of April 30, 1790, the prisoner might challenge twenty jurors peremptorily; in treason, thirty-five. In indictments for capital offense under that act the prisoner might challenge twenty jurors peremptorily and no more; in offenses made capital since that act he was entitled to thirty-five peremptory challenges according to the rules of the common law. *U. S. v. Dow*, Taney's Dec. (U. S.) 34. See

U. S. v. Johns, 4 Dall. (U. S.) 412; *U. S. v. Johns*, 1 Wash. (U. S.) 363.

Murder. — In *U. S. v. Hewson*, Brunner's Col. Cas. 532, which was an indictment for murder, the right of the prisoner was limited to twenty peremptory challenges, instead of allowing thirty-five as claimed.

Arson. — In *U. S. v. White*, 5 Cranch (C. C.) 73, which was a trial for arson, it was held that as the offense was not a capital one, the defendant was not entitled to challenge peremptorily.

Statute of State. — In *U. S. v. Shive*, 1 Baldw. (U. S.) 510, it was held that the state law giving the defendant the right to challenge peremptorily does not apply to proceedings in the Circuit Court of the United States.

4. See *U. S. v. Coppersmith*, 4 Fed. Rep. 198.

Act of 1840. — By c. 47 of the Act of Congress of July 20, 1840 (5 Stat. at L., p. 394), the courts of the United States were empowered "to make all necessary rules and regulations for conforming the designation and impaneling of juries, in substance, to the laws and usages now in force in such state [wherein situated], and * * * by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts."

Effect of Act of 1840. — The power conferred on the courts of the United States by the Act of July 20, 1840, c. 47, p. 394, included that of regulating the challenges to jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death, the right of peremptory challenge in which is recognized by the Act of 1790 and therefore cannot be abrogated. *U. S. v. Shackelford*, 18 How. (U. S.) 588.

the Revised Statutes of the United States the question as to the number of peremptory challenges permissible on the trials of civil actions and indictments for various offenses has been finally determined.¹

In the Territories, and in the absence of congressional legisla-

The Act of July 20, 1840, applies only to the mode of selecting the jury, that is by ballot, lot, or otherwise, as prescribed by the state laws, and does not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause, those questions standing upon the common law, except when regulated by Congress. *Per Nelson, J., in U. S. v. Douglass, 2 Blatchf. (U. S.) 207.*

Necessity of Right of Challenge under United States Statutes of Common Law. — In *U. S. v. Devlin, 6 Blatchf. (U. S.) 71*, it is said that the Act of Congress of July 20, 1840, did not make a state statute a statute of the United States so as to confer a right of peremptorily challenging in a case where it existed neither by the statutes of the United States nor at the common law.

Necessity of Congressional Legislation. — In the courts of the United States the right to challenge peremptorily depends upon the common law, except when regulated by Congress. *Per Nelson, J., in U. S. v. Douglass, 2 Blatchf. (U. S.) 207.* But see the opinion of Betts, J., in the same case.

Misdemeanor. — Unless the right of challenge is conferred by some statutes of the United States, there is no right to a peremptory challenge on the trial of an indictment for a misdemeanor. *U. S. v. Devlin, 6 Blatchf. (U. S.) 71.*

Uncertainty as to State Practice. — In *Jones v. Van Zandt, 2 McLean (U. S.) 611*, there being some difference of opinion among the members of the bar as to the state practice, the court allowed a peremptory challenge after the party challenging had declared himself satisfied with the jury and after the adverse party had challenged peremptorily.

1. Construction of Section. — In *U. S. v. Coppersmith, 4 Fed. Rep. 198, 2 Flipp. (U. S.) 546*, in construing section 819 of the Revised Statutes, which in cases of treason or capital offenses allows twenty peremptory challenges to the defendants and five to the United States, on the trial of any other felony ten to the defendant and three to the United States, and in all other

cases, civil and criminal, three peremptory challenges to each party, it was held that in other than capital cases a defendant is entitled to ten challenges: First, where the offense is declared by statute, expressly or impliedly, to be a felony; secondly, where Congress does not define an offense, but simply punishes it by its common-law name and at common law it is a felony; and, thirdly, where Congress adopts a state law as to an offense, and under such law it is a felony. See also *U. S. v. Daubner, 17 Fed. Rep. 793*, in which the offense charged the presentation of a false claim against the United States, and in which it was held that the accused was entitled to but three challenges.

Counterfeiting. — In *U. S. v. Coppersmith, 4 Fed. Rep. 198, 2 Flipp. (U. S.) 546*, it was held, on trial of an indictment for making, uttering, and passing counterfeit money, that the offense was not a felony within section 819 of the Revised Statutes of the United States, so as to entitle the defendant to more than three challenges.

Robbing a United States Mail Carrier of a registered mail package, and, in effecting the robbery, putting the life of the carrier in jeopardy by the use of a dangerous weapon, is a felony, and on trial for the offense the accused is entitled to ten peremptory challenges under section 819 of the Revised Statutes of the United States. *Harrison v. U. S., 163 U. S. 140.*

Trial for Joint Felony. — The Act of Congress of June, 1872, which is embodied in section 819 of the Revised Statutes of the United States, restricts parties indicted for felony to twenty peremptory challenges, and where several are indicted for a joint felony they are deemed a single party for the purpose of challenges under that section. *U. S. v. Hall, 44 Fed. Rep. 883.*

Removal of Cause. — On trial of a criminal cause removed from the state court to the federal court, the laws of the United States respecting peremptory challenges are applicable, and not the state law. *Georgia v. O'Grady, 3 Woods (U. S.) 496.*

tion on the subject, the provisions of the Revised Statutes are applicable.¹

e. PRESENCE OF ACCUSED. — It has been decided that the accused is entitled to be personally present when a challenge is interposed, and that he cannot be compelled to challenge unless brought face to face with the proposed juror and afforded an opportunity to inspect him.²

f. INFORMATION AS TO RIGHTS. — The trial judge may be required to inform the accused as to when the right of challenge should be exercised, if so desired, but the nonobservance of a statutory requirement of this nature will not be deemed prejudicial if the rights of the accused were not impaired.³

g. TIME OF INTERPOSITION OF CHALLENGE — (1) *Before Acceptance of Juror* — (a) *Generally*. — The time of the interposi-

1. *Following Federal Practice*. — When the organic law of a territory confers on the territorial courts the jurisdiction of the courts of the United States, necessarily the practice of those courts is likewise followed. Therefore, defendants in the territorial courts are entitled to the same number of challenges which they would be entitled to in the courts of the United States. *U. S. v. Upham*, 2 Mont. 113.

Indian Territory. — By the Acts of Congress of May 2, 1890, and March 1, 1895, the provisions of Mansfield's Digest (Ark.), c. 46, relative to Criminal Procedure, were made applicable to the Indian Territory; and in *Watkins v. U. S.*, (Indian Ter. 1897) 41 S. W. Rep. 1045, it was held that in capital and other felony cases the provisions of section 2239 of the Digest, which allow the prosecution ten peremptory challenges, control, and not section 819 of the Revised Statutes of the United States, which limits the government to five peremptory challenges in capital cases.

2. *The Defendant Cannot Be Compelled* to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and until an opportunity has been given for such inspection and examination of him as is required for the due administration of justice. *Pointer v. U. S.*, 151 U. S. 396.

Temporary Absence of Accused During Challenge by State. — In *Powers v. State*, 23 Tex. App. 42, it appeared that during the defendant's temporary absence from the court room a talesman, after examination, was challenged peremp-

torily by the state; that when the defendant's absence was noticed the court arrested the proceedings, and after waiting some time for the officers to bring the discharged talesman back, over the defendant's objections had the other talesmen examined and passed on, and it was held that the facts did not disclose any reversible error.

3. *English Practice*. — In *Brandreth's Case*, 32 How. St. Tr. 755, Mr. Justice Abbott, afterwards Lord Tenterden, stated that "the uniform practice has been that the juryman was presented to the prisoner or his counsel that they might have a view of his person, then the officer looked first to the counsel for the prisoner to know whether they wished to challenge him, and then turned to the counsel for the crown to know whether they wished to challenge him."

Right Understood by Accused. — Although by statute the court is required to inform the accused that should he desire to challenge any particular juror he must do so before the jury is sworn, yet the failure of the court to give the information will not necessitate the reversal of the judgment if it appears that the rights of the accused were fully understood by him and by his counsel. *People v. O'Brien*, 88 Cal. 483; *People v. Mortier*, 58 Cal. 262.

Exhaustion of Challenges. — The failure of the court to inform a defendant as to when his right of peremptory challenge should be exercised is immaterial where it appears that the defendant exhausted his peremptory challenges. *People v. Goldenson*, 76 Cal. 328.

tion of the challenge is a matter of importance.¹ It may be interposed at any time before the juror is accepted by the adverse party,² but the acceptance may preclude the right to challenge,³ or the failure to challenge when the opportunity is offered may operate as a waiver of the right to take from the box persons accepted as jurors by both sides after the completion of the panel, and although the jurors are not sworn and charged with the case.⁴

1. In *Massachusetts* the right to a peremptory challenge must be exercised before the jurors are interrogated as to their bias or opinions. *Com. v. Webster*, 5 Cush. (Mass.) 295; *Flagg v. Worcester*, 8 Cush. (Mass.) 69. And under the statutes in force in 1873, in capital cases, there was a like requirement. *Com. v. McElhaney*, 111 Mass. 439; *Com. v. Rogers*, 7 Met. (Mass.) 500.

Challenge After Examination. — In *Com. v. Knapp*, 9 Pick. (Mass.) 496, the court allowed a juror to be challenged peremptorily after he had been examined on the *voir dire*.

2. In *South Carolina*. — The state may exercise its peremptory right of challenge at any time before the acceptance of the juror by the prisoner. *State v. Corley*, 43 S. Car. 127; *State v. Haines*, 36 S. Car. 509.

3. *McMillan v. State*, 7 Tex. App. 142.

Under the Kentucky Practice, when a full panel of competent jurors is obtained, the commonwealth must accept or challenge. If the commonwealth declines to challenge, the jurors are passed to the defense. *Shelby v. Com.*, 91 Ky. 563. See also *Munday v. Com.*, 81 Ky. 233; *Jenkins v. Com.*, (Ky. 1887) 4 S. W. Rep. 816; *Wilson v. Com.*, (Ky. 1887) 4 S. W. Rep. 818.

However, the right to challenge is not lost by the examination of an individual juror. *Shelby v. Com.*, 91 Ky. 563.

Acceptance in Panels of Four. — Under the *Illinois Rev. Stat.*, c. 28, § 21, which provides that the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff, when the second panel of four is called, after the first panel has been passed on and accepted by both parties, neither can go back and challenge peremptorily any of the jurors so accepted, although they have not been sworn. *Mayers v. Smith*, 121 Ill. 442, *affirming* 25 Ill. App. 67.

Acceptance by Joint Defendant. — In

State v. Lyon, 89 N. Car. 568, there was a joint trial, and each defendant had the opportunity afforded by the tender of the jurors to make his own challenges. There was held to be no error in refusing to allow the jurors forming the panel to be withdrawn and again tendered to one of the defendants to enable him to use his remaining challenges.

Statutory Construction — Both Sides Concluded. — In *Poncin v. Furth*, 15 Wash. 201, a statute providing that a refusal by either party to challenge alternately should not deprive the adverse party of his full number of challenges, but that refusal on the part of the plaintiff to exercise his challenge in proper turn should conclude him as to jurors once accepted, was held applicable as well to the defendant as to the plaintiff.

After Announcing Satisfaction. — In *Ward v. Charleston City R. Co.*, 19 S. Car. 521, the plaintiff at first announced that she had no challenges to make, but after the defendant had challenged two jurors she insisted on her right, and there was held to be no error in denying the claim.

Under the South Carolina Statutes (Act of 1841), after jurors were challenged and -others drawn in their places neither party could challenge further. *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184, *following* *Charleston v. Kleinback*, 2 Spears L. (S. Car.) 418, both of which cases are *followed* in *Huff v. Watkins*, 15 S. Car. 82, which *distinguishes* *State v. Cardoza*, 11 S. Car. 195 (a criminal case), and is *followed* in *Gunter v. Graniteville Mfg. Co.*, 15 S. Car. 443.

4. *State v. Cameron*, 2 Chand. (Wis.) 172, 2 Pin. (Wis.) 490.

Arkansas. — *Sand. & H. Ark. Dig.*, §§ 2210-2213, requires that challenges should be made first by the state and then by the defendant, and that the state must exhaust its challenges to a juror before he is put on the defend-

(b) **Inadvertent Acceptance.** — However, in the absence of statutory inhibition to the contrary, the court, on good cause appearing, is vested with a discretion to permit the inadvertent acceptance of a juror to be withdrawn at any time before he is sworn, or before the jury is sworn.¹

ant. It was held that the allowance to the state of peremptory challenges to jurors who had been accepted by both parties, and over the objection of the defendant, was reversible error, especially where the panel was completed after exhaustion of the defendant's challenges. *Williams v. State*, 63 Ark. 527.

Texas Practice. — In *State v. Ezell*, 41 Tex. 35, it is said: "By the English practice it is understood that the party has a right to challenge until the juror is sworn, and that each juror is sworn as soon as he is examined, and opportunity is given for challenge, and not, as with us, after the jury has been completed; and it is said: 'The delay in swearing him when he is examined is not to give any privilege to the prisoner which he did not claim elsewhere, but to prevent multiplying oaths, and to save the delay incident to the administration of the oath twelve times instead of once.' Under this rule the practice in both cases is the same. In the one case the right of challenge must be exercised at the time the juror is sworn, and in the other when he takes his seat as a juror after having been examined. *State v. Potter*, 18 Conn. 166."

Under a statute providing that persons presented as jurors "shall be tried as to their qualifications, and unless challenged shall be impaneled," after both parties have accepted jurors and they are impaneled, neither party can challenge peremptorily. *Drake v. State*, 5 Tex. App. 649; *Horbach v. State*, 43 Tex. 260; *Baker v. State*, 3 Tex. App. 525. See also *State v. Potter*, 18 Conn. 176.

Administration of Oath Begun. — The rule that the right of peremptory challenge is waived when the juror is passed over to the opposite party cannot be maintained without qualification; but it must be exercised before the juror is accepted by the opposite party, and the administration of the oath is begun. *State v. Durr*, 39 La. Ann. 751; *State v. Cummings*, 5 La. Ann. 332.

Denial of Right. — In *People v. Kohle*,

4 Cal. 199, after twelve jurors had been called and accepted, the prisoner, having ten peremptory challenges, offered to challenge one, but the offer was refused, and the jurors were sworn. It was held that there was reversible error.

1. *Murray v. State*, 48 Ala. 675; *O'Connor v. State*, 9 Fla. 215; *Williams v. State*, 3 Ga. 453; *Spencer v. De France*, 3 Greene (Iowa) 216; *Edelen v. Gough*, 8 Gill (Md.) 87; *McFadden v. Com.*, 23 Pa. St. 12; *Hendrick v. Com.*, 5 Leigh (Va.) 707; *Whart. Crim. Pl.* (8th ed.), §§ 617, 672.

In the absence of any statute or rule to the contrary, the right to challenge peremptorily at any time before the jury is accepted and sworn may be exercised by permission of the court. *Santry v. State*, 67 Wis. 65 [*distinguishing State v. Cameron*, 2 Pin. (Wis.) 496; *Lamb v. State*, 36 Wis. 426; *Schoeffler v. State*, 3 Wis. 837]. See also *Fountain v. West*, 23 Iowa 9; *Beauchamp v. State*, 6 Blackf. (Ind.) 307; *Com. v. Piper*, 120 Mass. 185; *Hooker v. State*, 4 Ohio 350; *Hubotter v. State*, 32 Tex. 479.

Unauthorized Acceptance. — In *West v. State*, 79 Ga. 777, for the purpose of aiding the prosecution the stenographer propounded the questions to the proposed jurors, the solicitor-general accepting or rejecting them as they were put upon the state. One of the jurors having qualified, the stenographer inadvertently put the juror upon the prisoner, who accepted him. It was held that the juror not having been accepted by the state, the solicitor-general was properly allowed to challenge him peremptorily.

A Juror Accepted on the Faith of the Truth of His Sworn Answers, but who on cross-examination contradicts himself, may be challenged peremptorily before the oath is administered to him. *State v. Roland*, 38 La. Ann. 18.

In California, by the provisions of the Penal Code (§ 1068), it is discretionary with the court to allow a peremptory challenge to a juror after he has been accepted, and even after he is sworn. *People v. Montgomery*, 53 Cal. 576.

(2) *Before Administration of Oath* — (a) *Generally*. — The regular and most usual practice is to challenge jurors as they come to the book, that is, as they come to be sworn, and before they are sworn.¹ Hence, where it is required that challenges to individual jurors must be taken when the juror appears, and before he is sworn, the challenges of either party should be interposed and determined when the juror is called, and before proceeding further with the call,² and unless provision to the contrary has been

In Michigan. — After the prosecuting attorney had accepted the jury, the defendant challenged a juror peremptorily, and the prosecutor was allowed to challenge one of the jurors originally in the box, who had been previously accepted by him. *Jhons v. People*, 25 Mich. 499.

1. In *People v. Damon*, 13 Wend. (N. Y.) 351, which was a capital case, the court said: "The regular practice is to challenge jurors as they come to the book to be sworn, and before they are sworn; but I apprehend this is matter of practice, and may be departed from in the discretion of the court." In *People v. Carpenter*, 102 N. Y. 238, it is said that this is believed to be the general practice in the courts of *New York*, and seems to be the rule of the English courts, *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70; and also of the courts of many of the sister states, *Epps v. State*, 19 Ga. 102; *McFadden v. Com.*, 23 Pa. St. 12; *Rash v. State*, 61 Ala. 89; *State v. Potter*, 18 Conn. 166.

Right to Choose Time of Challenge. — Where challenges are required to be made before the jurors are sworn, the prisoner cannot choose the time before they are sworn within which to make his challenge, but if he has had a fair opportunity to make it, he will be deemed to have had all the privileges conferred on him by the statute where he allows the juror to take his seat without challenge. *State v. Potter*, 18 Conn. 166.

Declining Challenge. — In *State v. Potter*, 18 Conn. 166, a juror took his seat on the panel, the defendant having declined to challenge him when informed by the court that he might do so. After the panel was filled, his peremptory challenges not being exhausted the prisoner claimed the right to challenge the juror in question, but it was held that in the absence of any reason for a peremptory challenge then which did not exist before, when the

exercise of the right was declined, it was too late.

Right to Reserve Challenges. — In *Schuffin v. State*, 20 Ohio St. 233, a capital case, there was held to be no error in the fact that the court refused the claim of the defendant to reserve his peremptory challenges until a full panel of twelve, not liable to successful challenge for cause, should be selected, but required both parties to make their peremptory challenges, after having first exhausted their challenges for cause, to each juror as called, and, upon failure of the parties to make any valid challenge, ordered the juror so called at once to be sworn.

2. *People v. Kuok Wah Choi*, 2 Idaho 86; *State v. Armington*, 25 Minn. 29; *State v. Brown*, 12 Minn. 538; *State v. Roderigas*, 7 Nev. 328; *State v. Anderson*, 4 Nev. 265; *Territory v. O'Hare*, 1 N. Dak. 36; *Ward v. Charleston City R. Co.*, 19 S. Car. 521. See *State v. Pritchard*, 15 Nev. 74.

Completion of Cause — Jury Not Sworn. — In *State v. Scott*, 41 Minn. 365, it was held that a defendant in a criminal case who waives his right to challenge a juror peremptorily when the juror is called, as prescribed by statute, cannot so challenge after completion of the panel, although the jury has not yet been sworn.

Information as to Time of Challenge. — Under a statutory provision that the defendant must be informed that he must challenge when the juror appears, and before he is sworn, there is no error in rejecting a peremptory challenge to a juror after he has been individually sworn and the panel completed, but before the jury is sworn in a body. *People v. Carpenter*, 102 N. Y. 238. In this case the court informed the defendant's counsel, in conformity with the statute, that they would be required to challenge peremptorily as each juror was called and examined, before he was sworn; and each juror was called, examined, and accepted

made by statute or by rules governing the practice, or special or peculiar circumstances are presented, a peremptory challenge interposed after the administration of the oath to the jury comes too late.¹

(b) **Right Absolute.** — Unless the time when or the order in which a challenge may be interposed is expressly restricted by statute, the absolute right to challenge a proposed juror peremptorily may be exercised at any time after his appearance and before he is sworn to try the issue or issues involved.² The right of per-

before he was sworn. It was held that there was no ground of complaint that the right of peremptory challenge, which was deliberately withheld until all the jurors were sworn, was not continued after the full panel was secured.

Rule of Federal Practice. — In *St. Clair v. U. S.*, 154 U. S. 134, a rule of court that the impaneling and challenging of jurors shall conform to the state laws, except as otherwise provided by acts of Congress or the rules of the court, "but a juror shall be challenged or accepted and sworn in the case as soon as his examination is completed and before the examination of another juror," was held consistent with the settled principles of criminal law, and not an interference with the selection of an impartial jury.

1. *Cooley v. State*, 38 Tex. 636; *Horbach v. State*, 43 Tex. 242; *Kurtz v. State*, 145 Ind. 119; *McFadden v. Com.*, 23 Pa. St. 12; *U. S. v. Morris*, 1 Curt. (U. S.) 23.

After Opening Statements to Jury. — It is error to permit a party peremptorily to challenge a juror after the jury has been sworn, and after the opening statements have been made, upon mere request without good cause shown, and against an objection of the adverse party. *Peoria, etc., R. Co. v. Puckett*, 52 Ill. App. 222, citing *Mayers v. Smith*, 25 Ill. App. 67, 121 Ill. 442.

Necessity of Setting Aside Proceedings Had. — After the jury is sworn, it is too late to challenge any of them peremptorily unless there be first interposed a motion to set aside the submission. *Kurtz v. State*, 145 Ind. 119.

2. *California.* — *People v. Jenks*, 24 Cal. 11; *People v. Ah You*, 47 Cal. 121; *Silcox v. Lang*, 78 Cal. 118.

Florida. — *O'Connor v. State*, 9 Fla. 215; *Mann v. State*, 23 Fla. 610.

Indiana. — *Jackson v. Pittsford*, 8 Blackf. (Ind.) 194; *Wyatt v. Noble*, 8 Blackf. (Ind.) 507; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Munly*

v. State, 7 Blackf. (Ind.) 593; *Wiley v. State*, 4 Blackf. (Ind.) 458.

Maryland. — *Edelen v. Gough*, 8 Gill (Md.) 87.

Michigan. — *Hunter v. Parsons*, 22 Mich. 96.

North Carolina. — *State v. Patrick*, 3 Jones L. (N. Car.) 447.

Ohio. — *Hooker v. State*, 4 Ohio 348.

Vermont. — *State v. Spaulding*, 60 Vt. 228.

See also 1 Chit. Crim. Law 45.

Statutory Construction. — A statutory provision that before a juror is called the defendant shall be informed that if he challenges an individual juror he must do so when the juror appears and before he is sworn was construed, in *State v. Pritchard*, 15 Nev. 74, to mean that the defendant should be able to challenge peremptorily until the juror was sworn.

After Expressing Satisfaction with Jury. — The right, to challenge peremptorily may be exercised so long as the jury is not sworn, notwithstanding the previous declarations of the party exercising it that he is satisfied with the jury. *Hamper's Appeal*, 51 Mich. 71. See also *Hunter v. Parsons*, 22 Mich. 96; *Jhons v. People*, 25 Mich. 499.

Acceptance by Both Parties. — A juror who has taken his place in the jury box, and with whom both parties profess to be satisfied, can yet be peremptorily challenged by the prosecution before he is sworn. *People v. Carrier*, 46 Mich. 442.

In *Curnow v. Phoenix Ins. Co.*, 46 S. Car. 79, after a juror was presented and challenged by the plaintiff, the defendant stated that there was no objection to him, and the juror was replaced by another and the case called for trial. When the pleadings were about to be read the plaintiff, over the defendant's exception, was allowed to challenge again, and there was held to be no

emptory challenge ought to be held open to the last possible period, to wit, up to the actual swearing of the jury,¹ and no circumstance can bring that right within the discretion of the court so long as it is confined to the number of challenges allowed by law.²

(3) *After Administration of Oath.* — The allowance of a challenge of this nature, after the acceptance of a juror and after he has been sworn in the case, is not a strict matter of right,³ but in the discretion of the court, and for good cause, such a challenge may be allowed, either before or after the completion of the panel. In some states such a contingency is provided for by statute.⁴

error in view of a statutory provision allowing two peremptory challenges and extending the right to jurors substituted for those challenged.

Delay in Swearing Jury. — Under a statute providing that if all the challenges for cause on both sides be disallowed, either party may take a peremptory challenge, unless the right has been exhausted, and which sets no limit when such challenges shall be taken, except that they shall be interposed before the jury is sworn, if for any reason a court delays swearing the jury until it is fully impaneled, the time for challenging peremptorily is thereby extended, its only limitation being the time the jury is sworn. *State v. Pritchard*, 15 Nev. 74.

Under the English Practice the party may challenge until the jury is sworn. See *State v. Ezell*, 41 Tex. 35.

1. *After Challenging for Cause.* — The right of the accused to challenge peremptorily may be reserved until after he has made all his challenges for cause. *Hooker v. State*, 4 Ohio 348.

After Completion and Before Swearing Jury. — In *Lindsley v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 233, the twelfth juror called was challenged for cause, and the challenge was overruled. The court then inquired of counsel for the defendant if they challenged peremptorily, and on receiving a negative answer the juror took his seat in the box. While the other jurors were being sworn, and before the administration of the oath to the juror in question, counsel for the defendant insisted on the right of then challenging peremptorily, and it was held that the right still existed, that its exercise was an absolute right which could not be controlled by the court, and that it had not been waived by the

previous answer of counsel when declining to challenge peremptorily.

After Examination of Whole Panel. — A party will not lose his right to challenge peremptorily a juror whom he has examined on a *voir dire* because of failure to exercise the right until after he had examined the remainder of the panel. *Hunter v. Parsons*, 22 Mich. 96.

Necessity of Oath. — An order that in filling the panel each juror called shall be finally passed on by the exercise or waiver of peremptory challenges is ineffectual if before the challenge it has not been supplemented with an oath to the juror to try the cause. *State v. Pritchard*, 15 Nev. 74.

2. *O'Connor v. State*, 9 Fla. 215; *State v. Pritchard*, 15 Nev. 74; *Hendrick v. Com.*, 5 Leigh (Va.) 710.

3. *People v. Reynolds*, 16 Cal. 128.

4. *People v. Ward*, 105 Cal. 335; *People v. Bemmerly*, 87 Cal. 117; *State v. Hill*, 46 La. Ann. 736; *State v. West*, 46 La. Ann. 1009; *State v. Wren*, 48 La. Ann. 803; *State v. Roland*, 38 La. Ann. 18; *State v. Pritchard*, 15 Nev. 74.

In California. — If a party has omitted to challenge peremptorily he may do so after a juror is sworn, but before the completion of the jury. If he does not show cause he cannot so challenge, if the jury is completed. *People v. Scoggins*, 37 Cal. 676.

In Massachusetts, under a statute allowing peremptory challenges of jurors from the panel called to try the case before the commencement of the trial, a talesman may be challenged after he is sworn but "before anything else is done." *Sackett v. Ruder*, 152 Mass. 397.

Public Disclosure of Reasons. — In *Tweed's Case*, 13 Abb. Pr. N. S. (N. Y. Oyer & T. Ct.) 372, note, wherein it was held that a juror may be peremptorily

(4) *Extension and Abridgment of Time.* — Though a trial judge may have no authority to extend the time for challenging beyond the time fixed by statute,¹ he cannot by rule or order, or by notice or direction to the parties, abridge the time prescribed by statute within which they may exercise their right.²

challenged after he has been sworn, it was held that the court could exercise its discretion in allowing a challenge after a juror was sworn without requiring counsel publicly to disclose their reasons for interposing such challenge, and that the court itself being satisfied that substantial reasons existed which rendered it improper that the juror proposed to be challenged should be allowed to sit in the case, the challenge might be so allowed at any time before the actual commencement of the trial. *Citing* U. S. v. Morris, 1 Curt. (U. S.) 23; *People v. Damon*, 13 Wend. (N. Y.) 351.

Concession of Discretion. — Upon a criminal trial, after the defendant had exhausted his peremptory challenges, the counsel for the people asked to interpose a peremptory challenge to a juror who had been sworn and taken his seat, because of matters which had come to the counsel's knowledge after the juror was sworn. The counsel for the defendant objected, conceding that it was in the discretion of the court to permit the challenge, but claiming that the discretion should not and could not be exercised upon a mere oral statement of counsel. He also objected because the defendant had exhausted his peremptory challenges. The court overruled the objections and granted the request, and it was held that, assuming the court had discretion to permit a peremptory challenge after the juror had been sworn, as conceded, it was a proper exercise of that discretion to act upon the assurance of the public prosecutor. *People v. Hughes*, 137 N. Y. 29.

Substitution and Reswearing. — In *Marion v. State*, 20 Neb. 233, after the jury had been impaneled and sworn, one of the members was excused on a challenge interposed by the accused by permission of the court, and it was held that there was no error of which the defendant could complain in substituting a new juror, reswearing the panel, and proceeding therewith against his objection.

Revivor of Right by Reswearing Jury. — A reswearing of the jury as a whole

at the request of the defendant does not vacate or set at naught a former swearing of each juror individually, so that the right to challenge peremptorily will revive. *People v. Carpenter*, 38 Hun (N. Y.) 490, *affirmed* 102 N. Y. 238.

1. *State v. Fuller*, 114 N. Car. 885.

Refusal of the Trial Judge to Extend the Time for peremptory challenges beyond that fixed by statute is not error. *State v. Fuller*, 114 N. Car. 885.

2. **The Court Cannot by any Rule or Order** deprive a prisoner of the right to challenge a juror peremptorily before he is sworn, consequently it cannot do so indirectly by notifying him that a failure to challenge at a time stated, but before the jury is sworn, will be considered an acceptance. *State v. Pritchard*, 15 Nev. 74.

The right to challenge peremptorily exists until the juror is sworn, and cannot be abridged by the refusal of the court to allow it to be exercised after the juror takes his seat in the jury box. *People v. Carpenter*, 36 Hun (N. Y.) 315.

Reasonable Time should be given to the defendant to make his choice, but after the lapse of such time as the judge may consider reasonable the presiding judge should act in the matter, and if more time is desired he should be notified of the fact and asked for indulgence. He is not bound by any unbending rule, but even after ordering the juror to be sworn he may revoke his order and allow the defendant to object, or make such other disposition of the juror as would be proper under the law, upon application for that purpose. *Carr v. State*, 76 Ga. 592.

Allowing Longest Possible Time. — Where the statute makes no provision as to the time when a challenge shall be interposed, except that it may be taken before the juror is sworn, or that for good cause the court may allow it after the juror is sworn, the longest possible time should be allowed to the accused to exercise his right of peremptory challenge. *State v. Pritchard*, 15 Nev. 74.

4. **CHALLENGING TO FULL PANEL.** — It has been said that it was the general rule at common law that no peremptory challenges could be made until the panel was filled.¹ In a number of the states the practice is to have twelve persons who have qualified in the box before either side can be required to challenge peremptorily,² and in some jurisdictions as each juror is excluded another is called to fill his place,³ while in others the full panel is required to be first passed on and accepted by one side, and then tendered to the other side, which is required to exercise its right.⁴

1. *Cooley v. State*, 38 Tex. 636.

2. *People v. Scoggins*, 37 Cal. 676; *People v. Iams*, 57 Cal. 115; *People v. Russell*, 46 Cal. 121; *Silcox v. Lang*, 78 Cal. 118; *Vance v. Richardson*, 110 Cal. 414; *Shelby v. Com.*, 91 Ky. 563; *People v. Callaghan*, 4 Utah 63.

In *Nebraska* peremptory challenges cannot be compelled until all objections to the jury have been otherwise passed on and twelve men are in the box. *Rutherford v. State*, 32 Neb. 714. In this case a conviction was reversed because, against his objection, the defendant was required to use three peremptory challenges before the box was filled.

3. In *California*, in a Criminal Cause, twelve names must be drawn from the box, and the defendant may examine separately each person drawn, and make his challenges for cause before challenging any one peremptorily. If he challenges a certain number (say six), those accepted must then be sworn, and additional names to the number of those challenged be drawn and presented for examination, with which the same process should be repeated, and so continued until the jury is completed. *People v. Scoggins*, 37 Cal. 676; *People v. Iams*, 57 Cal. 115; *People v. Russell*, 46 Cal. 121. See also *People v. Callaghan*, 4 Utah 63. And see the discussion in *Territory v. O'Hare*, 1 N. Dak. 36.

Civil Cases. — Where the particular stage of the proceeding at which peremptory challenges may be interposed is not specified by statute, the proper practice in a civil action is to afford each party the right to examine the whole twelve jurors before exercising the right of peremptory challenge as to any, and if some are excused for cause the deficiency must be supplied with other names, who may, in like manner, be examined, until there shall be found in the box twelve competent and qualified jurors, and thereupon

each party may exercise the right of peremptory challenge, but neither can be required to exercise it peremptorily until this stage of the proceedings. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

In *California* the practice is to have twelve jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge shall have been exercised. *Vance v. Richardson*, 110 Cal. 414; *People v. Scoggins*, 37 Cal. 679; *Silcox v. Lang*, 78 Cal. 118.

4. *Mississippi.* — It is correct practice to require each party, when a full panel is presented to him, to challenge all whom he desires to challenge, and not to permit experimenting by challenging one and waiting to see who is called to his place, and then to challenge others who were in the box at first. *Thompson v. State*, 58 Miss. 62. See *Tatum v. Preston*, 53 Miss. 654.

Under a statutory provision (*Miss. Code*, 1892, § 1423) that all peremptory challenges by the state shall be made before the juror is presented to the prisoner, and that in all cases the accused shall have presented to him a full panel before being called on to make his peremptory challenges, a full panel should be passed on and accepted by the state, and tendered to the defendant, who should then be required to challenge those of the panel against whom he desires to exercise the right. The state should then fill the panel and again present it to the defendant, who should then be allowed and required to continue his challenges from those added by the state until he has exhausted those to whom he objects, within the limits of the challenges, and so on until the jury is secured. *Gibson v. State*, 70 Miss. 554; *State v. Mitchel*, (*Miss.* 1893) 12 So. Rep. 710.

Wisconsin. — In *Lamb v. State*, 36 Wis. 424, it did not appear that the

Under such practice, when a full jury is presented, each party should be required to challenge as many members of it as he objects to, and thereafter should be restricted in his challenges to the new jurors presented;¹ and where the calling of a new juror is made necessary by the challenge of either party, the adverse party may challenge the new juror, though he previously passed the panel, if he has not already exhausted the challenges allowed by law.²

i. ORDER OF CHALLENGING—(1) Criminal Proceedings—(a) Generally.—As between the state and a defendant in a criminal proceeding, and in the absence of statute, the order in which challenges should be interposed does not appear to have been formerly well settled. In some few jurisdictions the prisoner has been required to challenge first, or at least the fact that he has been so required has not been considered prejudicial.³ However,

panel had been called, but it did appear that twelve were not called before any was sworn, but that each juror was called singly, singly questioned for principal cause or favor, and singly submitted to the parties for peremptory challenge before another was called, and if not challenged peremptorily, was at once sworn, and so on, until the jury was completed and sworn. This mode was held an impairment of the right of peremptory challenge.

Refilling Panel.—There is no error in refusing to have the panel filled after each peremptory challenge. *State v. Ezell*, 41 Tex. 35.

1. *Tatum v. Preston*, 53 Miss. 654.

Challenging Jurors Previously Accepted After Exercise of Right by Adverse Party.—In *People v. McQuade*, 110 N. Y. 284, when the box was full, the people challenged six jurors, who were replaced, and the district attorney declared himself content. The defense then insisted that the prosecution should exercise its right before the defendant exercised his right, which the court refused to rule, and the defendant excepted. The defendant then challenged peremptorily, and the vacancies were filled as before. It was held reversible error to permit the prosecution subsequently, against the objection and exception of the defendant to challenge jurors who were in the box when the district attorney first declared himself content.

In *Fountain v. West*, 23 Iowa 9, twelve men being in the box, the plaintiff stated that he did not wish to challenge, but on a challenge by the

defendant and a refilling of the box, the plaintiff was allowed against the defendant's objection to challenge one of the jurors first selected, and the practice was held unobjectionable.

2. *U. S. v. Daubner*, 17 Fed. Rep. 793.

Absolute Right to Use All Challenges.

—Where a party entitled to two peremptory challenges uses one and passes the other, after exhaustion of the box, he may use the other on the refilling of the box, as to any member of the panel. *Koch v. State*, 32 Ohio St. 352.

3. **England.**—In *Brandreth's Case*, 32 How. St. Tr. 771, the question arose whether the prisoner should be required to exercise his right of peremptory challenge before the right of challenge was exercised by the crown, and after full argument it was decided that, according to the uniform practice, the right must be exercised first by the prisoner. See also *Layer's Case*, 16 How. St. Tr. 135; *State v. Bone*, 7 Jones L. (N. Car.) 121; *Turpin v. State*, 55 Md. 462.

Alabama.—In *Spigener v. State*, 62 Ala. 383, the court said: "We do not find it positively declared which party shall first make known his challenges. In England, for many long centuries, the crown or government has had no right of peremptory challenge. In many of the states composing the American Union, the state may challenge a limited number of jurors without assigning any reason or showing any cause therefor. Such is the law of Alabama. The number is different in the different states, and usually in-

to afford to a defendant accused of crime every reasonable opportunity to procure a jury of fair and impartial men, the better practice and the one generally recognized requires the state to accept or reject the person proposed as a juror before he is put upon the accused.¹

(b) **Challenges Unequal.** — Where the number of challenges to which the state is entitled is less than the number allowed to the defendant, in alternating, the defendant may be required to interpose in his turn such a proportion of his challenges as will enable both sides to exhaust their challenges in turn.²

creases with the magnitude of the offense charged."

In Maryland there was held to be no error in the action of the trial court in requiring the defendant to challenge peremptorily before calling on the state to exercise its right. *Turpin v. State*, 55 Md. 462.

In Texas it has been held that there is no error in requiring the defendant to pass on a full jury and to challenge or accept its members, and in filling the places of those challenged and requiring the defendant to pass on the new jurors, before requiring the state to pass. *State v. Ezell*, 41 Tex. 35.

1. **Alabama.** — *Spigener v. State*, 62 Ala. 383; *Wilson v. State*, 31 Ala. 371; *Murphy v. State*, 37 Ala. 142; *Lyman v. State*, 45 Ala. 72; *Murray v. State*, 48 Ala. 675.

Arkansas. — *Stewart v. State*, 13 Ark. 720.

Iowa. — *State v. Bowers*, 17 Iowa 46.

Mississippi. — *Stewart v. State*, 50 Miss. 587.

Missouri. — *State v. Hays*, 23 Mo. 287; *State v. Steeley*, 65 Mo. 218; *State v. Degonia*, 69 Mo. 485.

Nevada. — *State v. Pritchard*, 15 Nev. 74.

Ohio. — *Hooker v. State*, 4 Ohio 348.

United States. — *U. S. v. Butler*, 1 Hughes (U. S.) 457.

Challenging Together by Striking from List. — Where no prejudice is shown, it is no ground of reversal that the state and the defendant were required to challenge peremptorily at the same time by striking from a list, instead of conforming to the practice of allowing a right to be exercised as each party was called to be sworn, after having been found qualified to serve, the state speaking first and the defendant afterwards. *State v. Hays*, 23 Mo. 287.

Information to Defendant of Names Stricken Off. — The refusal of the court to require the state to make its chal-

lenges and to furnish the defendant with its list that he might ascertain who were challenged, before striking from his list, is not error, the practice in this respect being regulated by statute. *Vernon v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 364, *distinguishing* *Lewis v. U. S.*, 146 U. S. 370, decided in the absence of a statute. See also *Phillips v. State*, 6 Tex. App. 44.

In New Mexico, under a statute providing that no defendant shall be required to challenge peremptorily any particular juror until the state shall have finally passed upon and accepted such juror (Laws N. Mex. 1889, p. 26, § 24), it is reversible error to compel the defendant to exercise his right when before completion of the jury the regular panel becomes exhausted, and a special venire has not been drawn and a jury completed therefrom. *Territory v. Lermo*, (N. Mex. 1896) 46 Pac. Rep. 16. See also *Territory v. Barrett*, (N. Mex. 1894) 42 Pac. Rep. 66.

In New York, under the provisions of the Code of Criminal Procedure, the prosecution may be required to exercise its right of peremptory challenge before the defendant has made known whether the jury is satisfactory to him. *People v. McGonegal*, 136 N. Y. 62.

The New York Act of 1873 did not prescribe in what order the right of peremptory challenge should be exercised, but this was first prescribed by section 385 of the Code of Criminal Procedure, and the requirement of that section that the people shall challenge first is the only substantial advantage remaining to a defendant. *People v. McQuade*, 110 N. Y. 284.

In Pennsylvania, the commonwealth can only be held to alternative challenges when the box is full. *Com. v. Reid*, 8 Phila. (Pa.) 385.

2. **In Delaware**, in a criminal proceeding in which the defendant is allowed

(2) *Civil Actions*. — In civil cases, by force of express statutes, the duty first to exercise his right may devolve on the plaintiff.¹

(3) *Discretion of Court*. — In the absence of statutory provisions or rules of practice respecting the order in which peremptory challenges shall be interposed, the mode of procedure is discretionary with the trial judge,² whose action in that behalf is not the subject of review.³

six and the state three challenges, the latter has the right to reserve its challenges until the defense has interposed three challenges, and thereafter to exercise its privilege as to any new man, until the right is exhausted. *State v. Brown*, (Del. 1896) 36 Atl. Rep. 458.

In Idaho, in a criminal case, the defendant has double the number of peremptory challenges allowed the state, which is required to make the first challenge, and thereafter the defense is required to challenge twice before the state can be again called on to exercise its next peremptory challenge. *State v. Browne*, (Idaho 1896) 44 Pac. Rep. 552.

Under the Washington Code, §§ 348, 1297, providing that the plaintiff may challenge once, and the defendant once, and so alternately, and that such provision shall apply to criminal cases, in a case wherein the defendant has twelve challenges and the state six, the defendant must exercise two challenges to one exercised by the state until all the challenges allowed both sides respectively are exhausted. *State v. Eddon*, 8 Wash. 292.

Joint Defendants. — In *Rounds v. State*, 57 Wis. 45, the two defendants had forty-eight challenges collectively, and the state twelve; it was held that in alternating the state had the right to challenge one and the defendants four jurors; that the state was not bound to challenge until after four challenges by the accused, and had not lost the right to challenge when the accused failed to exercise their right to the limit.

Rule of Court. — Where the number of peremptory challenges allowed to the defendant and that allowed to the state are unequal, the trial court may establish a reasonable rule as to the number of challenges to be used by each side alternately until exhaustion of the right. *State v. Bailey*, 32 Kan. 83.

1. *Vance v. Richardson*, 110 Cal. 414; *Davenport Gas Light, etc., Co. v. Davenport*, 13 Iowa 229.

Burden of Proof. — Under a statute re-

quiring the plaintiff to announce his peremptory challenges first, it is immaterial who has the burden of proof. *Hegney v. Head*, 126 Mo. 619.

2. *Indiana*. — *Jones v. State*, 2 Blackf. (Ind.) 475.

Iowa. — *State v. Pierce*, 8 Iowa 231; *State v. Shelledy*, 8 Iowa 477.

Maryland. — *Zimmerman v. State*, 56 Md. 536; *Turpin v. State*, 55 Md. 464.

Massachusetts. — *Com. v. Piper*, 120 Mass. 185.

Michigan. — *Hamper's Appeal*, 51 Mich. 71.

Minnesota. — *St. Anthony Falls Water-Power Co. v. Eastman*, 20 Minn. 277.

Missouri. — *State v. Hays*, 23 Mo. 287.

Nebraska. — *Gravelly v. State*, 45 Neb. 878.

New Hampshire. — *Boardman v. Woodman*, 47 N. H. 120; *State v. Pike*, 49 N. H. 399; *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 314.

New Jersey. — *Patterson v. State*, 48 N. J. L. 381.

New York. — *People v. Miles*, 143 N. Y. 383.

Ohio. — *Schufflin v. State*, 20 Ohio St. 233.

South Carolina. — *State v. Boatwright*, 10 Rich. L. (S. Car.) 407.

Vermont. — *State v. Flint*, 60 Vt. 304.

Wisconsin. — *Santry v. State*, 67 Wis. 65.

If the Court Delays Swearing the Jury until it is completed, it is just and reasonable for the defendant to alternate with the state in taking his challenges, where the statute does not prohibit such practice. *State v. Pritchard*, 15 Nev. 74.

Federal Courts. — Where no provision is embodied in an Act of Congress respecting the order in which peremptory challenges shall be made, the courts of the United States are not bound by any settled rule of criminal law to pursue the particular method required by the local law. *Pointer v. U. S.*, 151 U. S. 396.

3. *State v. Shelledy*, 8 Iowa 477;

(4) *Failure to Follow Prescribed Order* — (a) *Right Lost*. — Where the order of the interposition of challenges is prescribed by a mandatory statute, or the order in which they shall be taken is matter of substance, the parties may be compelled to challenge in the prescribed order, and a disregard of the requirement may constitute prejudicial error.¹ In such case, the failure to challenge in turn may be treated as if a challenge were actually interposed.²

State v. Pierce, 8 Iowa 231; Com. v. Piper, 120 Mass. 185; Ossipee Hosiery, etc., Mfg. Co. v. Canney, 54 N. H. 295; State v. Pike, 49 N. H. 399, 406, note; Patterson v. State, 48 N. J. L. 381; Schuffin v. State, 20 Ohio St. 233.

1. Smith v. State, 4 Greene (Iowa) 189; Stewart v. State, 50 Miss. 587; State v. Steeley, 65 Mo. 218; State v. Degonia, 69 Mo. 485; Cunningham v. Prusansky, 59 Mo. App. 498; People v. McQuade, 110 N. Y. 284; State v. Fuller, 114 N. Car. 885; Com. v. Frazier, 2 Brews. (Pa.) 490.

Expressing Satisfaction with Jury. — Where the parties alternately challenged before the panel was filled, and the plaintiff, when asked if he was satisfied, waived his right "for the present," and the defendant declared himself satisfied, it was held that there was no error in declining to allow the plaintiff then to exercise the right. Vance v. Richardson, 110 Cal. 414.

Resumption of Right. — It is error to permit the prosecution, against the objection of the defendant, to resume the right of peremptory challenge after such challenges had been interposed by the defendant, and peremptorily to challenge jurors who were in the box when the defendant commenced to challenge, not excluded on his challenge, and as to whom the district attorney had before declared himself content, in view of a statute requiring challenges to be taken first by the people and then by the defendant. People v. McQuade, 110 N. Y. 284.

Under the New York Code of Criminal Procedure, §§ 385, 386, the prosecution may reserve its right of peremptory challenge to an individual juror until after the disposition of the challenges on both sides to such juror for actual bias; but it may be required to exercise the right before it is known whether or not the juror is satisfactory to the defendant. People v. McGonegal, 136 N. Y. 62.

Refusal of Right to Challenge Out of

Turn. — Alleged error in refusing the right to challenge peremptorily out of turn will not be considered when it is apparent that no other verdict than that rendered would have been warranted by the evidence. Poncin v. Furth, 15 Wash. 201.

Form of Objection to Challenge Out of Turn. — Where the plaintiff failed to exercise his right of challenge in turn as provided by statute, but challenged thereafter, it was held that any objection by the defendant should have been to the exercise of the challenge out of turn, and not to the jurymen leaving the box after he was challenged, upon the theory that the jury was complete. Gilchrist v. Brande, 58 Wis. 184.

Waiver of Objection to Challenge Out of Turn. — In Gilchrist v. Brande, 58 Wis. 184, the record showed that after the plaintiff had challenged two jurors and the defendant three (the statutory number), a new juror was called and challenged by the plaintiff. It not appearing that any objection was interposed by the defendant, it was held that the objection would be deemed to have been waived.

2. Where a Party Has Declined to Challenge when entitled, but thereafter, and following a challenge by the defendant, has exercised the right, the waiver may be treated as one challenge. Fountain v. West, 23 Iowa 9.

Declining Challenge. — In Hotz v. Hotz, 2 Ashm. (Pa.) 245, a list of the jurors was handed to the plaintiff's counsel, who declined to challenge by striking therefrom, and passed the list to counsel for the defendant, who struck off one name. It was held that the right of the plaintiff to challenge was confined to the juror last called, and that he could not object to any juror whose name was on the list when it was first handed to him.

A Defendant Who Voluntarily Refrains from exercising the right of peremptory challenge, and waives the same, to

(b) **Right Available.** — However, the general doctrine appears to be that an absolute right to challenge peremptorily is not lost by the fact that a party desiring to challenge passed jurors, or failed to alternate, but the right will continue until the juror is sworn and charged with the case.¹

j. **CHALLENGE TO JUROR SUBSTITUTED DURING TRIAL.** — By the English practice, where, during the progress of a trial, a juror became so incapacitated mentally or physically as to be unable to sit, the jury was discharged, the competent jurors recalled, and another name taken from the panel to complete the jury. The accused was then accorded all his challenges to the full number, after which each juror or the person substituted by the challenge was sworn *de novo*.² In some of the states of the Union, by statute, where a juror becomes incapacitated during the trial he may be discharged and the jury reformed. The decisions, however, as to the right of peremptory challenge on reformation of the jury are decidedly conflicting. Thus it has been held that though the challenges may have been exhausted

which he is entitled, cannot complain of alleged error relative to the order in which the right is required to be exercised. *State v. Bailey*, 32 Kan. 83.

United States Courts. — In *U. S. v. Butler*, 1 Hughes (U. S.) 457, it was decided that the rule laid down in *U. S. v. Marchant*, 12 Wheat. (U. S.) 480, and followed in *U. S. v. Wilson*, 28 Fed. Cas. No. 16,730, respecting the right to stand aside, or qualified challenge, was only in force when the government had no right of peremptory challenge; that where the government had the right to challenge peremptorily, it stood on the same footing with the defense, and that the right was precluded by failure to exercise it when the opportunity was afforded.

Waiver of Disqualification by Acceptance. — A party, by failing to exercise his right of peremptory challenge, will be held to have waived any objection on account of the known disqualification of a juror. *Palmer v. People*, 4 Neb. 68; *Morgan v. State*, (Neb. 1897) 71 N. W. Rep. 788, citing *Palmer v. People*, 4 Neb. 68.

1. *Silcox v. Lang*, 78 Cal. 118; *People v. Dolan*, 96 Cal. 315; *State v. Wren*, 48 La. Ann. 803; *State v. Jones*, 80 N. Car. 415; *State v. Vann*, 82 N. Car. 631; *State v. Vestal*, 82 N. Car. 563; *Hartzell v. Com.*, 40 Pa. St. 462; *Rounds v. State*, 57 Wis. 45; *Schumaker v. State*, 5 Wis. 324.

Absolute Right to Challenge. — Where

parties are entitled to two challenges, the waiver of the first is not a waiver of the second also. *Kennedy v. Dale*, 4 W. & S. (Pa.) 176.

Prejudice Not Resulting. — Permitting the state to challenge a juror peremptorily after having passed him, and after a peremptory challenge by the defendant, is an irregularity which, if not affecting any substantial right, does not require reversal. *People v. Majors*, 65 Cal. 138; *People v. McCarty*, 48 Cal. 557.

Notification by Court as to Effect of Passing. — In *State v. Pritchard*, 15 Nev. 74, it appeared that after twelve persons were examined, passed by both parties, and were in the box, inquiry was made of counsel for the accused as to whether he had any peremptory challenges. Counsel refused to exercise the right, and thereafter passed several jurors after notice from the court that by passing he would be considered as accepting all the jurors then in the box. The state interposed several challenges, and as often as a juror was set aside another name was drawn, thus keeping the panel full. When the state ceased challenging, the accused for the first time challenged one of the persons originally in the box, and it was held that the refusal to allow the challenge was erroneous.

2. Whart. Crim. Pl., § 508, note; 1 Chitty's Crim. Law 545; *Rex v. Edwards*, 4 Taunt. 309. See *infra*, XI. *Discharge of Jurors and of Jury.*

on the original selection, the right will exist to the full number allowed by law as respects the new jurors;¹ that in procuring a new juror or jurors there is a right to exercise only such peremptory challenges as have not already been exhausted in the original selection;² that after exhaustion of the peremptory challenges there is no right whatever to challenge a juror selected as a substitute for the one discharged;³ and, again, that the right to challenge peremptorily exists as if no challenge had previously been made.⁴

k. WITHDRAWAL OF CHALLENGE. — The general rule is that after a peremptory challenge has been interposed the challenger cannot withdraw it;⁵ but where exceptional circumstances exist,

1. *Tennessee*. — In *Garner v. State*, 5 Yerg. (Tenn.) 160, in considering a statute providing that if, during the progress of the trial, a juror should become so unwell that, in the opinion of the court, he is unable to serve, he may be permitted to withdraw, and the sheriff shall be directed to summon instant a juror in his place, who shall be sworn, and the trial proceed *de novo*, etc., a majority of the court was of the opinion that upon the summoning of a juror to fill the place of one discharged, the defendant was entitled, respecting the new juror, to the whole number of challenges allowed him by law, in the same manner as if no juror had been selected. See also *State v. Curtis*, 5 Humph. (Tenn.) 603.

2. In *North Dakota*, where during the trial a juror is discharged because too ill to sit in the case, and a new juror is sworn to complete the panel, the defendant is not entitled to exercise again all the peremptory challenges given him by statute, or to challenge peremptorily any one of the remaining eleven jurors, but in procuring the new juror the accused can exercise only such of his peremptory challenges as he has not already exhausted in procuring the other eleven. *State v. Hazledahl*, 2 N. Dak. 524.

3. In *Alabama*, under the Code of 1876, §§ 4879, 4906, there was held to be no error in refusing the privilege of challenging a juror who was selected as a substitute for one discharged by order of the court because incapacitated by sickness for the performance of his duty. *Jackson v. State*, 78 Ala. 471.

4. *California*. — Under a statutory provision that where a juror is discharged for sickness a new juror may be sworn, and the trial begun anew,

etc., if discharged for such a cause the right to challenge peremptorily exists as if none had been previously made. *People v. Stewart*, 64 Cal. 60.

5. *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

General Doctrine. — Where the accused has exercised the right of peremptory challenge in respect to any member of the panel, and the juror thus challenged has retired from the box, the court will not allow the challenge to be withdrawn or recalled. *Rex v. Parry*, 7 C. & P. 836, 32 E. C. L. 761.

To Procure Service of Juror. — After exhaustion of his peremptory challenges, the accused cannot withdraw one of his challenges to a juror and cause the latter to be sworn in. *Biddle v. State*, 67 Md. 304; *State v. Wright*, 53 Me. 328.

Withdrawal as to Talesman After Challenge to Other Talesman. — A peremptory challenge cannot be withdrawn, so as to allow the talesman challenged to be recalled and sworn, after another talesman has also been presented and challenged. *Furman v. Applegate*, 23 N. J. L. 28.

To Examine and Challenge for Cause. — After a juror has been peremptorily challenged, the challenger cannot capriciously withdraw the challenge and have him recalled for the purpose of examining and objecting to him for cause. *State v. Coleman*, 8 S. Car. 237; *Vojta v. Pelikan*, 15 Mo. App. 471.

Review of Refusal to Allow Withdrawal. — The discretionary action of the court in refusing permission to withdraw a peremptory challenge after the right has been exhausted is not reviewable. *Vojta v. Pelikan*, 15 Mo. App. 471.

the court is vested with a discretion to allow the withdrawal.¹

7. PEREMPTORY CHALLENGES TO CURE ERRONEOUS RULINGS

—(1) *In General.* — The decisions as to the effect of using or failing to use peremptory challenges to cure erroneous rulings on the part of the trial judge in forming the jury are by no means harmonious. Thus it has been decided that a complaint that a challenge for cause was improperly overruled is unavailable, where it appears thereafter that the objectant waived a peremptory challenge by which the objectionable juror might have been excused;² that where a challenge for cause is improperly overruled, the exclusion of a juror upon a peremptory challenge will not affect the tenability of the defendant's exception;³ and that the erroneous overruling of a good challenge for cause, thereby compelling the use of a peremptory challenge, is not prejudicial error, where it does not appear that the objectant was compelled to accept an objectionable juror.⁴ And it has also been held that a defendant is prejudiced by being obliged to use a peremptory challenge to exclude a juror because of error in refusing the right to examine him for the purpose of ascertaining the necessity of challenging peremptorily.⁵

1. *Morrison v. Lovejoy*, 6 Minn. 319.
Juror Present or Disqualified. — A peremptory challenge may be withdrawn, and the same person challenged for cause, provided he is present, so that he may be examined, or it be shown that he is disqualified by law; and if the challenge for cause is not sustained the peremptory challenge must stand. *Savage v. State*, 18 Fla. 909.

Before Calling Another Juror. — In *Garrison v. Portland*, 2 Oregon 123, there was held to be no error in allowing the withdrawal of a peremptory challenge before the proposed juror had retired and before another was called.

Exception to Withdrawal. — Where a peremptory challenge made by the prosecution, after the jurors are in the box, is withdrawn, on objection being made by the defendant, the latter has no ground of exception. *Leonard v. State*, 66 Ala. 461.

2. *State v. Yetzer*, 97 Iowa 423; *Owen v. Kamer*, (Ky. 1895) 29 S. W. Rep. 437; *Territory v. Hart*, 7 Mont. 42.

3. *Birdsong v. State*, 47 Ala. 68; *Brown v. State*, 70 Ind. 576; *Fletcher v. Crist*, 139 Ind. 121; *People v. McGonegal*, 136 N. Y. 62; *Dowdy v. Com.*, 9 Gratt. (Va.) 727; *Lithgow v. Com.*, 2 Va. Cas. 297.

If on challenge to a juror, in a capital case, the defendant excepts and

challenges peremptorily, he is entitled to an exception. *Baxter v. People*, 8 Ill. 368.

4. *Nevada.* — *Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157, *State v. Raymond*, 11 Nev. 98.

New York. — *People v. Bodine*, 1 Den. (N. Y.) 310; *Freeman v. People*, 4 Den. (N. Y.) 9; *Friery v. People*, 54 Barb. (N. Y.) 319; *Finkelstein v. Barnett*, 17 Misc. Rep. (N. Y. Supreme Ct.) 564.

Oregon. — *Ford v. Umatilla County*, 15 Oregon 324, approving *State v. Raymond*, 11 Nev. 98.

Texas. — *Balding v. State*, (Tex. App. 1887) 4 S. W. Rep. 579; *Loggins v. State*, 12 Tex. App. 65.

Utah. — *Conway v. Clinton*, 1 Utah 215; *People v. Thiede*, 11 Utah 241; and see same case, 159 U. S. 510.

Presumption of Prejudice. — There is no presumption that a party was prejudiced because compelled to use a peremptory challenge to exclude a juror as to whom a challenge to the favor should have been sustained. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401.

5. *State v. Bresland*, 59 Minn. 281, distinguishing *State v. Lawlor*, 28 Minn. 216, and *State v. Kluseman*, 53 Minn. 541, wherein the error charged consisted in the one case of retaining and in the other of rejecting a juror at the conclusion of the examination.

(2) *Exhaustion of Challenges.* — As to the effect of exhaustion of challenges because of the ruling of the court, there are many holdings that an erroneous decision overruling a challenge for cause is reversible error where the objecting party has previously exhausted his peremptory challenges or by reason of the error has been compelled to exhaust them;¹ but it has been held that not only must a party exhaust his peremptory challenges before he can question a ruling as to the competency of a juror challenged for cause — he must also make or offer to make another challenge.² These cases proceed upon the theory that the party

1. *California.* — *People v. Weil*, 40 Cal. 268.

Colorado. — *Mooney v. People*, 7 Colo. 218.

District of Columbia. — *U. S. v. Schneider*, 21 D. C. 381.

Illinois. — *Meaux v. Whitehall*, 8 Ill. App. 173.

Indiana. — *Voght v. State*, 145 Ind. 12.

Kansas. — *State v. Brown*, 15 Kan. 400.

Louisiana. — *State v. Jackson*, 37 La. Ann. 768.

Michigan. — *Thelsen v. Johns*, 72 Mich. 285.

Mississippi. — *Hubbard v. Rutledge*, 57 Miss. 7.

Nebraska. — *Miller v. State*, 29 Neb. 437; *Owens v. State*, 32 Neb. 167.

Nevada. — *State v. Raymond*, 11 Nev. 98.

New York. — *People v. Casey*, 96 N. Y. 115; *People v. Tyrrell*, (Supreme Ct.) 3 N. Y. Crim. Rep. 142. See also *People v. Bodine*, 1 Den. (N. Y.) 281.

Ohio. — *Mimms v. State*, 16 Ohio St. 221; *Hartnett v. State*, 42 Ohio St. 568.

Texas. — *Rothschild v. State*, 7 Tex. App. 519; *Holt v. State*, 9 Tex. App. 571; *Hollis v. State*, 8 Tex. App. 620;

Dreyer v. State, 11 Tex. App. 631; *Loggins v. State*, 12 Tex. App. 65;

Wright v. State, 12 Tex. App. 163; *Heskew v. State*, 17 Tex. App. 161; *Ward v. State*, 19 Tex. App. 664; *Thompson v. State*, 19 Tex. App. 593.

In *Tennessee* it is settled that, in a criminal case, the defendant must have exhausted all his peremptory challenges before he can question in the Supreme Court the ruling of the trial judge as to the competency of persons presented as jurors. *McGowan v. State*, 9 Yerg. (Tenn.) 193; *Carroll v. State*, 3 Humph. (Tenn.) 317; *Henry v. State*, 4 Humph. (Tenn.) 270; *Preswood v. State*, 3 Heisk. (Tenn.) 468;

Griffie v. State, 1 Lea (Tenn.) 44; *Holcomb v. State*, 8 Lea (Tenn.) 420;

Taylor v. State, 11 Lea (Tenn.) 721; *Hannum v. State*, 90 Tenn. 649; *Wooten v. State*, (Tenn. 1897) 41 S. W. Rep. 813.

Unnecessary Challenge. — One who peremptorily challenges when it is not necessary for him to do so waives his exception and cannot avail himself of such exception on error; and it is immaterial that he may have exhausted his peremptory challenges. *Stewart v. State*, 13 Ark. 720.

2. *Johns v. State*, 55 Md. 350.

Necessity of Challenge or Offer. — The rulings of the trial judge as to the competency of jurors challenged peremptorily will not be considered on appeal where the appellant accepted a juror to complete the panel after the exhaustion of his peremptory challenges, without objection, without challenging or offering to challenge him. *Wooten v. State*, (Tenn. 1897) 41 S. W. Rep. 813.

In this case it was said that though it is settled that in a criminal prosecution the defendant must have exhausted all of his peremptory challenges before he can question the ruling of the trial judge as to the competency of persons presented as jurors, it does not appear to have been distinctly decided whether or not, after exhausting his peremptory challenges, the defendant must go further and make or offer to make another challenge, to entitle him to a review of that ruling. Some of the opinions recite that the defendant exhausted all of his peremptory challenges without saying whether thereafter he made or offered to make another challenge. See *Moses v. State*, 10 Humph. (Tenn.) 456; *Moses v. State*, 11 Humph. (Tenn.) 233; *Alfred v. State*, 2 Swan (Tenn.) 581; *Major v. State*, 4 Sneed

will be presumed to have been injured by the ruling where he has been forced to exhaust all his peremptory challenges.¹ However, unless the complaining party was forced to accept impartial or obnoxious jurors, after exhausting his peremptory challenges, the question as to the competency of jurors challenged cannot be made.²

(3) *Challenges Not Exhausted.* — The question whether the nonexhaustion of peremptory challenges allowed by law will cure errors has been brought to the attention of the court in numerous cases, and it has been held that the failure of a party to avail himself of the right to exclude a juror found indifferent upon a challenge for cause by the exercise of his right of peremptory challenge will not prevent him from taking advantage of an error committed in determining the competency of the juror, although it appear that his peremptory challenges were not

(Tenn.) 600. Others, wherein the question of competency has been adjudged, mention the exhaustion of peremptory challenges, and also the additional fact that a further challenge was made. See *Eason v. State*, 6 Baxt. (Tenn.) 468; *Conatser v. State*, 12 Lea (Tenn.) 438; *Woods v. State*, 99 Tenn. 182.

Joint Defendants. — In *Wolf v. Perryman*, 82 Tex. 112, joint defendants demanded a larger number of challenges than was allowed them, and after exhaustion of the challenges permitted, as appeared by the record, "two jurors were placed in the panel," but the record failed to show further that the defendants "desired to challenge" either of the jurors in question. It was held that no injury appeared and that therefore the ruling was immaterial. See also *Snow v. Starr*, 75 Tex. 414.

1. *Ford v. Umatilla County*, 15 Oregon 313.

2. *Illinois.* — *Spies v. People*, 122 Ill. 1.

Louisiana. — *State v. Carries*, 39 La. Ann. 931.

Michigan. — *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560.

Montana. — *Territory v. Roberts*, 9 Mont. 12.

Tennessee. — *Preswood v. State*, 3 Heisk. (Tenn.) 468; *Holcomb v. State*, 8 Lea (Tenn.) 419.

Texas. — *Holland v. State*, 31 Tex. Crim. Rep. 345; *McKinney v. State*, 31 Tex. Crim. Rep. 583; *Goodson v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 20; *Grissom v. State*, 8 Tex. App. 386; *Holt v. State*, 9 Tex. App. 571; *Loggins v. State*, 12 Tex. App. 65; *Blackwell v. State*, 29 Tex. App. 195.

Wisconsin. — *Carthaus v. State*, 78 Wis. 560.

Failure to Exclude Prejudiced Juror by Challenge for Cause. — It is not ground for reversal that a prejudiced juror was called to fill the box after the exhaustion of the defendant's peremptory challenges, if the right of challenge for cause still existed. *Alexander v. Dunn*, 5 Ind. 122.

Prejudice Not Appearing. — It is not a valid objection that the twelfth juror was put on the defendant without his consent, where it appears that he has exhausted his peremptory challenges. The silence of the record must be regarded as evidence that no legal reason existed why the juror should not be received. *Rash v. State*, 61 Ala. 89.

Inability to Exclude Prejudicial Juror. — In *Salina v. Trosper*, 27 Kan. 544, the verdict was set aside and a new trial ordered because an incompetent juror, whom the defendant was unable to exclude because of the exhaustion of its peremptory challenges, sat in the case, and it appeared that he was instrumental in the rendition of a verdict for a larger amount than otherwise would have been given.

Challenge to Talesmen Selected by Consent. — In *State v. Plum*, 49 Kan. 679, it was held no ground for a new trial that, the defendant having objected to the selection of talesmen by the sheriff or his deputy, and both parties consenting that talesmen might be named by the court, the latter selected one who had been summoned by the sheriff, and upon whom the defendant was obliged to use his last peremptory challenge.

exhausted when the impaneling of the jury was completed; ¹ that overruling a challenge for cause based on good grounds is error, which is not cured by the fact that the defendant had not exhausted his peremptory challenges and might have excluded the juror; ² and that if the accused does not exhaust his peremptory challenges, he voluntarily accepts the jurors with a knowledge of their opinions. ³ And it has also been held that excusing a juror without consent of the complaining party is reversible error although such party's peremptory challenges were not exhausted. ⁴ But by the great weight of authority, no advantage can be taken of the improper overruling of a challenge for cause to an individual juror when the party ruled against has not previously exhausted his right of peremptory challenge. ⁵

1. *Wilson v. People*, 94 Ill. 299; *Brown v. State*, 57 Miss. 424; *People v. Bodine*, 1 Den. (N. Y.) 281; *Freeman v. People*, 4 Den. (N. Y.) 31.

Right to Reserve Challenges. — A defendant cannot be compelled to use his peremptory challenges to exclude a juror to whom a challenge for cause has been improperly overruled, but may be permitted to reserve them for the rejection of unsatisfactory jurors against whom challenges for cause cannot be successfully maintained. *People v. McGonegal*, 136 N. Y. 62.

2. *Curry v. State*, 5 Neb. 412; *Thurman v. State*, 27 Neb. 628; *People v. McQuade*, 110 N. Y. 284; *Monk v. State*, 27 Tex. App. 450.

In a Capital Case, error in overruling a good challenge for cause is not cured by the fact that the defendant did not exhaust his peremptory challenges before the completion of the jury. *Birdsong v. State*, 47 Ala. 68.

Error Must Be Positive to Justify Interference of Appellate Court. — Where the court sustains a challenge and the adverse party proceeds to trial without having exhausted his peremptory challenges, the appellate court should be well satisfied that the challenge was erroneously sustained before it should reverse for that reason. *Wisehart v. Dietz*, 67 Iowa 121.

Allowing Extra Challenges. — In *Iverson v. State*, 52 Ala. 170, it appeared that a challenge for cause was erroneously overruled before the exhaustion by the complaining party of his challenges, and it was held that the fact that the party was thereafter allowed extra challenges did not cure the error.

3. *Preswood v. State*, 3 Heisk. (Tenn.) 468; *McGowan v. State*, 9

Yerg. (Tenn.) 184. See also *Moses v. State*, 10 Humph. (Tenn.) 456; *Alfred v. State*, 2 Swan (Tenn.) 581.

4. **Excusing Juror.** — In *Hill v. State*, 10 Tex. App. 618, the trial judge, without the consent of the defendant, who did not object however, excused one of the veniremen, and in answering a contention of the prosecuting attorney that the defendant had not exhausted his peremptory challenges, the appellate court said: "That the defendant had not exhausted his peremptory challenges cannot in the least degree affect the question. He had a right to that juror—a right given to him by the law of the land. He may have had fifty peremptory challenges remaining, but we are at a loss to understand in what manner he could have exercised these challenges so as to restore to the eight the excused juror. Challenges are for the purpose of ridding the jury of obnoxious jurors, but can never replace one who has been wrongfully or rightfully excused."

5. *Arizona*. — *Chartz v. Territory*, (Arizona 1893) 32 Pac. Rep. 166.

Arkansas. — *Stewart v. State*, 13 Ark. 720; *Meyer v. State*, 19 Ark. 156; *Benton v. State*, 30 Ark. 328; *Wright v. State*, 35 Ark. 639; *Polk v. State*, 45 Ark. 165; *Mabry v. State*, 50 Ark. 492.

California. — *People v. Gatewood*, 20 Cal. 147; *People v. Gaunt*, 23 Cal. 156; *People v. Weil*, 40 Cal. 268; *People v. McGungill*, 41 Cal. 429; *People v. Freeman*, 92 Cal. 359; *People v. Durrant*, 116 Cal. 179; *People v. Winthrop*, 118 Cal. 85.

Colorado. — *Minich v. People*, 8 Colo. 440; *Babcock v. People*, 13 Colo. 518; *Union Pac. R. Co. v. Tracy*, 19 Colo. 331; *Prewitt v. Lambert*, 19 Colo. 7; *Van Houten v. People*, 22 Colo. 53.

10. **Standing Aside** — *a*. **ORIGIN OF RIGHT.** — The privilege of the prosecution to stand veniremen aside sprang up in England at the time when the right of peremptory challenge was entirely taken away from the crown by the statute 33 Edward I. (1305). In that state of the law the crown, having no power to

- Connecticut.* — State *v.* Hoyt, 47 Conn. 530; State *v.* Smith, 49 Conn. 376.
- Dakota.* — Herbert *v.* Northern Pac. R. Co., 3 Dakota 38.
- District of Columbia.* — U. S. *v.* Never-son, 1 Mackey (D. C.) 152.
- Florida.* — Andrews *v.* State, 21 Fla. 598.
- Georgia.* — Westmoreland *v.* State, 45 Ga. 225; Wilson *v.* State, 69 Ga. 225.
- Idaho.* — State *v.* Gorden, (Idaho 1897) 48 Pac. Rep. 1061.
- Illinois.* — Robinson *v.* Randall, 82 Ill. 521; Wilson *v.* People, 94 Ill. 299; Spies *v.* People, 122 Ill. 1; Ochs *v.* People, 124 Ill. 399.
- Iowa.* — State *v.* Davis, 41 Iowa 311; State *v.* Elliott, 45 Iowa 486; Barnes *v.* Newton, 46 Iowa 567; State *v.* George, 62 Iowa 682; State *v.* Winter, 72 Iowa 627; State *v.* Brownlee, 84 Iowa 473.
- Kansas.* — Morton *v.* State, 1 Kan. 468; Wiley *v.* Keokuk, 6 Kan. 95; Stout *v.* Hyatt, 13 Kan. 232; Florence, etc., R. Co. *v.* Ward, 29 Kan. 354; Atchison, etc., R. Co. *v.* Franklin, 23 Kan. 74.
- Louisiana.* — State *v.* Cazeau, 8 La. Ann. 114; State *v.* Lartigue, 29 La. Ann. 642; State *v.* Shields, 33 La. Ann. 1410; State *v.* Barnes, 34 La. Ann. 396; State *v.* Revells, 35 La. Ann. 302; State *v.* Farrer, 35 La. Ann. 317; State *v.* Ford, 37 La. Ann. 443; State *v.* Redmond, 37 La. Ann. 774; State *v.* Simons, 38 La. Ann. 41; State *v.* Creech, 38 La. Ann. 480; State *v.* Carries, 39 La. Ann. 931; State *v.* Durr, 39 La. Ann. 751; State *v.* Lewis, 41 La. Ann. 590; State *v.* Ford, 42 La. Ann. 255; State *v.* Jackson, 42 La. Ann. 1170; State *v.* Aarons, 43 La. Ann. 406; State *v.* Le Duff, 46 La. Ann. 546; State *v.* Green, 43 La. Ann. 402.
- Michigan.* — Sullings *v.* Shakespeare, 46 Mich. 408; People *v.* Barker, 60 Mich. 277; Theisen *v.* Johns, 72 Mich. 285; People *v.* Aplin, 86 Mich. 393; Luebe *v.* Thorpe, 94 Mich. 268.
- Minnesota.* — State *v.* Lawlor, 28 Minn. 216.
- Mississippi.* — Ogle *v.* State, 33 Miss. 383; Hubbard *v.* Rutledge, 57 Miss. 7; Fletcher *v.* State, 60 Miss. 675; Ferri-day *v.* Selser, 4 How. (Miss.) 506. See Shubert *v.* State, 66 Miss. 446.
- Missouri.* — Lisle *v.* State, 6 Mo. 426; Eckert *v.* St. Louis Transfer Co., 2 Mo. App. 36.
- Montana.* — Territory *v.* Hart, 7 Mont. 42; Territory *v.* Campbell, 9 Mont. 19; Davidson *v.* Bordeaux, 15 Mont. 245.
- Nebraska.* — Palmer *v.* People, 4 Neb. 68; Bohanan *v.* State, 15 Neb. 209; Kremling *v.* Lallman, 16 Neb. 280; Burnett *v.* Burlington, etc., R. Co., 16 Neb. 332; Curran *v.* Percival, 21 Neb. 434; Nowotny *v.* Blair, 32 Neb. 175; Blenkiron *v.* State, 40 Neb. 11; Jenkins *v.* Mitchell, 40 Neb. 664; Brumback *v.* German Nat. Bank, 46 Neb. 540; Smith *v.* Meyers, (Neb. 1897) 71 N. W. Rep. 1006.
- Nevada.* — Fleeson *v.* Savage Silver Min. Co., 3 Nev. 157; State *v.* Hartley, 22 Nev. 342.
- New Mexico.* — Territory *v.* Young, 2 N. Mex. 93; Anderson *v.* Territory, 4 N. Mex. 108.
- New York.* — People *v.* Petmecky, (Supreme Ct.) 2 N. Y. Crim. Rep. 450; Freeman *v.* People, 4 Den. (N. Y.) 10; People *v.* Carpenter, 102 N. Y. 238; People *v.* Larubia, 140 N. Y. 87; People *v.* Damon, 13 Wend. (N. Y.) 351.
- North Carolina.* — State *v.* Cockman, 2 Winst. L. (N. Car.) 95; State *v.* Gooch, 94 N. Car. 987; Capehart *v.* Stewart, 80 N. Car. 101; State *v.* Hensley, 94 N. Car. 1021; State *v.* Potts, 100 N. Car. 457; State *v.* Jones, 97 N. Car. 469; State *v.* Brittain, 89 N. Car. 481; State *v.* Arthur, 2 Dev. L. (N. Car.) 217; State *v.* Pritchett, 106 N. Car. 667; Whitaker *v.* Carter, 4 Ired. L. (N. Car.) 461; State *v.* Brogden, 111 N. Car. 656.
- North Dakota.* — Dakota *v.* O'Hare, 1 N. Dak. 36.
- Ohio.* — Mimms *v.* State, 16 Ohio St. 221; Erwin *v.* State, 29 Ohio St. 186; Har nett *v.* State, 42 Ohio St. 568.
- Pennsylvania.* — Funk *v.* Ely, 45 Pa. St. 444; Sayres *v.* Com., 88 Pa. St. 291.
- South Carolina.* — State *v.* McQuaige, 5 S. Car. 429; State *v.* Gill, 14 S. Car. 412; State *v.* Dodson, 16 S. Car. 453; State *v.* Anderson, 26 S. Car. 599;

exclude a juror objectionable, but not legally disqualified, was permitted to put him aside until the end of the panel, that it might be seen whether the prisoner could not get a jury of his choice from persons unobjectionable to the crown.¹

State v. Jacob, 30 S. Car. 131; *State v. Jackson*, 32 S. Car. 27; *State v. Campbell*, 35 S. Car. 28; *State v. Wise*, 7 Rich. L. (S. Car.) 413; *State v. Price*, 10 Rich. L. (S. Car.) 356.

Tennessee. — *Carroll v. State*, 3 Humph. (Tenn.) 315; *Preswood v. State*, 3 Heisk. (Tenn.) 468; *McGowan v. State*, 9 Yerg. (Tenn.) 184; *Holcomb v. State*, 8 Lea (Tenn.) 420.

Texas. — *Burrell v. State*, 18 Tex. 713; *Johnson v. State*, 27 Tex. 758; *Cotton v. State*, 32 Tex. 614; *Bowman v. State*, 41 Tex. 417; *International, etc., R. Co. v. Underwood*, 64 Tex. 466; *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650; *Bejarano v. State*, 6 Tex. App. 265; *Sharp v. State*, 6 Tex. App. 650; *Tuttle v. State*, 6 Tex. App. 556; *Myers v. State*, 7 Tex. App. 641; *Grisson v. State*, 8 Tex. App. 386; *Hollis v. State*, 8 Tex. App. 620; *McKinney v. State*, 8 Tex. App. 626; *Lum v. State*, 11 Tex. App. 483; *Loggins v. State*, 12 Tex. App. 65; *Ward v. State*, 19 Tex. App. 664; *Powers v. State*, 27 Tex. App. 42; *Nalley v. State*, 28 Tex. App. 387; *Williams v. State*, 30 Tex. App. 354; *Smith v. Bates*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044; *Whit v. State*, 30 Tex. App. 652; *Shaw v. State*, 32 Tex. Crim. Rep. 155; *Wilson v. State*, 32 Tex. Crim. Rep. 22; *Galveston, etc., R. Co. v. Wessendorf*, (Tex. Civ. App. 1896) 39 S. W. Rep. 132.

Utah. — *Conway v. Clinton*, 1 Utah 224; *People v. Hopt*, 4 Utah 250.

Vermont. — *State v. Gaffney*, 55 Vt. 451.

Washington. — *State v. Moody*, 7 Wash. 395.

Wisconsin. — *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401; *Grace v. Dempsey*, 75 Wis. 313; *Pool v. Milwaukee Mechanics Ins. Co.*, 94 Wis. 447.

Wyoming. — *Carter v. Territory*, 3 Wyoming 193.

United States. — *Burt v. Panjaud*, 99 U. S. 180; *Hopt v. Utah*, 120 U. S. 430, affirming *People v. Hopt*, 4 Utah 250; *Spies v. Illinois*, 123 U. S. 131.

New York Doctrine. — In *People v. Larubia*, 140 N. Y. 87, the court said that the decision of the court in *Freeman v. People*, 102 N. Y. 240, that

the use of a peremptory challenge after challenge for cause has been overruled precludes the party from availing himself of any exception taken on the trial of a challenge for cause, has never been overruled. The point was not involved in the *McQuade* case. The doctrine was explained and perhaps qualified in *People v. Casey*, 96 N. Y. 115, which held that it did not apply in a case where it appeared that before the jury was fully impaneled all the peremptory challenges of a defendant had been exhausted. In that case the court said: "Where, by the erroneous rulings of the court, a defendant is obliged to exhaust his peremptory challenges, it is clear he is harmed; that his rights are abridged, and that he has just cause to complain." In *People v. Carpenter*, 102 N. Y. 240, the doctrine of *Freeman v. People* was in substance reasserted by *Ruger, C. J.*, but the decision was placed on the ground that the jurors challenged were competent. The Supreme Court of the United States has applied the rule declared in *Freeman v. People* in a case where jurors challenged for cause were subsequently excluded on peremptory challenge, there being peremptory challenges unused when the jury was sworn. *Hopt v. Utah*, 120 U. S. 436; *Spies v. Illinois*, 123 U. S. 169.

1. *Sealy v. State*, 1 Ga. 216; *State v. Bone*, 7 Jones L. (N. Car.) 121; *Com. v. Marrow*, 3 Brews. (Pa.) 409; *U. S. v. Shackelford*, 18 How. (U. S.) 588; *Anonymous*, 1 Vent. 309; *Co. Litt.* 156; 3 Hale P. C. 271; 2 Hawk. P. C. 518; 4 Black. Com. 353; *Bac. Abr.*, tit. *Juries*, E, 10.

By the statute in question it was enacted that "notwithstanding it be alleged by them that sue for the king that the jurors of these inquests, or some of them, be not indifferent for the king, yet such inquest shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain; and the truth of the said challenge shall be inquired of according to the course of the court."

In Construing This Statute it was set-

b. PRACTICE IN THE UNITED STATES. — This practice has been recognized in some of the American states, wherein it is still followed, either as originally made use of or with such modifications as have become necessary by reason of changes in the general practice;¹ but wherever it is recognized and permitted, it is because of the adoption of the common law of England, either expressly or by implication.² The right to stand aside, however, can be exercised only by the state.³

c. FEDERAL COURTS. — In the courts of the United States

tied that if the king challenged a juror before the panel was perused, he need not show any cause till the whole panel had been gone through, and it appeared that there would not be a full jury when the person was challenged, and that if the defendant, in order to oblige the king to show cause, presently challenged *touts pur avoile*, the defendant was required to show all his causes of challenge before the king was required to show any. Bac. Abr., tit. Juries, E, 10. See also Ford's Case, T. Raym. 473; Skinner 82; 2 Hale P. C. 271.

In Bac. Abr., tit. Juries, E, 10, it is said: "It hath also been agreed, and is now the established practice of the courts, that if the king challenge a juror before the panel is perused, he needs not show any cause of his challenge till the whole panel be gone through and it appear that there will not be a full jury without the person so challenged. Co. Litt. 156 *b*, n. (4); Vent. 309; 2 Hale P. C. 271." See also Mansell v. Reg., 8 El. & Bl. 54, 92 E. C. L. 54.

Right Rested Solely on Construction of Statute. — In U. S. v. Douglass, 2 Blatchf. (U. S.) 207, it was said by Betts, J., that the right to a qualified peremptory challenge, in a criminal case, did not belong to the crown at common law, but rested solely upon the construction of 33 Edw. I.

Continuation of Practice. — In Com. v. Marra, 8 Phila. (Pa.) 440, it was said that since the passage of the statute of Edward I., and to that day (1869), it had been the practice in England to permit the crown to stand jurors aside until the exhaustion of the panel. Citing 2 Hale P. C. 271; 2 Hawk. P. C., c. 43, § 10.

1. In Georgia the practice is not recognized since the adoption of the Penal Code. Reynolds v. State, 1 Ga. 222.

In North Carolina a reasonable number of jurors of a particular panel may

be required to stand aside, at the instance of the state, until all the other jurors of that panel shall be called and accepted or rejected, and then the state must challenge for cause or challenge peremptorily the jurors so required to stand aside, if it has not previously exhausted its right in that respect. State v. Arthur, 2 Dev. L. (N. Car.) 217; State v. Hensley, 94 N. Car. 1021; State v. Benton, 2 Dev. & B. L. (N. Car.) 208; State v. Lytle, 5 Ired. L. (N. Car.) 58; State v. Craton, 6 Ired. L. (N. Car.) 164; State v. Cockman, 2 Winst. L. (N. Car.) 95; State v. Jones, 88 N. Car. 671.

Pennsylvania. — In Com. v. Marra, 8 Phila. (Pa.) 440, in considering the Act of 1834, which was stated to be identical with the Act of 1813, the court, after a statement that both were but repetitions of the English statute, referred to Com. v. Joliffe, 7 Watts (Pa.) 586, and further said that the remark attributed to Chief Justice Gibson, in that case, that "the provision that in any case of felony the commonwealth shall not challenge without cause was repealed by the Act of 1834," was a mistake, or possibly a misprint of the word "repealed" in place of "repeated."

In South Carolina the practice of standing aside jurors is said to have been established for a long time. State v. Stephens, 13 S. Car. 285; State v. McNinch, 12 S. Car. 95; State v. Barrontine, 2 Nott & M. (S. Car.) 553; State v. Wise, 7 Rich. L. (S. Car.) 412.

2. State v. Bone, 7 Jones L. (N. Car.) 121; Warren v. Com., 37 Pa. St. 45; Com. v. Joliffe, 7 Watts (Pa.) 585; Haines v. Com., 100 Pa. St. 317; Zell v. Com., 94 Pa. St. 258.

3. The defendant in a capital case has no right to postpone showing his cause of challenge to a juror until the panel is gone through; the right is solely that of the state. State v. Bone, 7 Jones L. (N. Car.) 121.

the decisions as to the right of the government to stand jurors aside are not uniform, and it is very doubtful whether the right exists at present, even by adoption of the state practice. In any event, there appears to be no recent case whereby the practice is settled.¹

d. EFFECT OF RIGHT TO CHALLENGE PEREMPTORILY. — Where the question has arisen, it has been held that the right of the state to stand aside was not affected or abrogated by statutes conferring the right of peremptory challenge.²

e. SPECIAL VENIREMEN. — It has been held that special veniremen, as well as regular jurors, may be required to stand aside,³ though at one time there were doubts expressed as to whether such practice was allowable.⁴

f. IN WHAT TRIALS RIGHT EXISTS. — That the right, where the practice is followed, exists in the higher grades of felony is

1. Right Recognized. — In *U. S. v. Wilson*, 1 Baldw. (U. S.) 78, the court said that on examining the opinion in *U. S. v. Marchant*, 12 Wheat. (U. S.) 480, it did not feel at liberty to refuse the qualified right of challenge claimed by the United States.

In *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207, it was said by Mr. Justice Nelson that the government had the right to a qualified peremptory challenge in the trial of a joint indictment for murder on the high seas (Mr. Justice Betts, the other member of the court, dissenting); that is, the right to set aside a juror without cause, and to have him finally excluded, unless the panel was exhausted by the challenges of the prisoner. Citing *U. S. v. Marchant*, 12 Wheat. (U. S.) 480.

Right Doubted. — The Act of Congress of 1790 did not necessarily take with it the qualified right, existing at common law, of peremptory challenge by the government; and unless the laws and usages of the state adopted by rule under the Act of 1840 allowed it on behalf of the prosecution, it should be rejected, conforming the practice, in this respect, to the state law. *U. S. v. Shackelford*, 18 How. (U. S.) 588.

Right Denied. — In *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207, it was said by Mr. Justice Betts that as the laws of the state of New York did not allow the prosecution in a criminal case to stand jurors aside — in other words, did not admit the right to a qualified peremptory challenge — the practice of the courts of the United States, within that jurisdiction, should be to conform,

in all respects, in trials by jury, as nearly as practicable to the laws thereof, and therefore the right did not exist. In this case there was a difference of opinion between Mr. Justice Nelson and Judge Betts as to how far the Act of Congress of 1840 imposed upon the federal court the duty of following the state practice.

2. Haines v. Com., 100 Pa. St. 317; *Warren v. Com.*, 37 Pa. St. 45; *State v. McNinch*, 12 S. Car. 95; *State v. Stephens*, 13 S. Car. 285.

North Carolina. — In a capital case the state, by its attorney, may direct a juror to stand aside until the panel is gone through with, and this is a challenge for cause to be shown at the end of the panel; if a cause be then shown and disallowed, the prosecuting officer may still challenge peremptorily or not, at his option. *State v. Benton*, 2 Dev. & B. L. (N. Car.) 196.

Challenging After Standing Aside. — Where a juror has been accepted by a defendant accused of murder, and is thereafter stood aside by the state, if there is no improper motive in thus standing him aside the state may thereafter challenge peremptorily. *Zell v. Com.*, 94 Pa. St. 258.

3. Rudy v. Com., 128 Pa. St. 500.

4. In Com. v. Twitchell, 1 Brews. (Pa.) 551, the court was of the opinion that the commonwealth had the right to direct a juror drawn on a special venire to stand aside, but said that as the question was a novel one, and might perhaps admit of doubt, the objection of the defendant would be sustained.

undoubted,¹ and in *Pennsylvania*, where the matter has been the subject of some discussion, it has been settled that the right exists on the trial of misdemeanors as well.²

g. LOSS OF RIGHT BY CHALLENGING FOR CAUSE. — If a juror has been challenged by the state, sworn on his *voir dire*, the challenge overruled, and he has been accepted by the defendant, the state cannot require him to stand aside.³

h. NUMBER WHO MAY BE SET ASIDE. — At common law the crown was not restricted as to the number of the panel who might be required to stand aside,⁴ but in the *United States* the right is required to be exercised under the supervision of the court, which may interfere if the practice is resorted to in respect to an unreasonable number.⁵

1. *Haines v. Com.*, 100 Pa. St. 317; *Com. v. Marra*, 8 Phila. (Pa.) 440; *Com. v. Noonan*, 15 Phila. (Pa.) 373; *Com. v. Joliffe*, 7 Watts (Pa.) 585; *State v. McNinch*, 12 S. Car. 94; *State v. Wise*, 7 Rich. L. (S. Car.) 412; *State v. Barrontine*, 2 Nott & M. (S. Car.) 553.

2. *Smith v. Com.*, 100 Pa. St. 329; *Com. v. Keenan*, 10 Phila. (Pa.) 194; *Com. v. Magee*, 10 Phila. (Pa.) 201; *Haines v. Com.*, 100 Pa. St. 324; *Com. v. Cunningham*, 8 W. N. C. (Pa.) 354.

In *Com. v. Noonan*, 15 Phila. (Pa.) 373, it was said that although there has apparently been much doubt and some discrepancy in practice in cases of misdemeanor, yet the court would regard the practice as settled by *Com. v. Keenan*, 10 Phila. (Pa.) 194, in which case the box was filled when the court excused the juror, apparently at his own request. Upon another juror being called to fill the vacancy thus created, the commonwealth was allowed to stand him aside.

In *Haines v. Com.*, 100 Pa. St. 317, it was contended that the right to stand aside, although conceded in the higher grades of felony, did not apply in other grades of crime, especially in misdemeanors; but the court said that no such distinction could be found in any of the text books or adjudicated cases. On the contrary, the authorities appeared to hold that the practice is the same both in trials for misdemeanor and for capital felonies. Citing 4 Black. Com. 353, note; 3 Harg. St. Tr. 579; 2 Hawk. P. C. 569.

Offenses Against Election Laws. — The commonwealth may stand jurors aside in prosecutions for offenses against the

election laws. *Com. v. Fry*, 5 Lanc. L. Rev. (Pa.) 75.

3. *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

4. By Common Law the king might challenge peremptorily without being limited to any number. This right was restricted by several Acts of Parliament, and the later practice has been that the officer of the crown directs a person to whom he objects to "stand by." He continues to do this without assigning any cause until the panel is gone through. If a full jury cannot be obtained, the persons stood aside are then called again in turn, and the prosecution must then show cause; but the practice gives to the crown an extensive right of peremptory challenge. See *Mansell v. Reg.*, 8 El. & Bl. 54, 92 E. C. L. 54; *Com. v. Marrow*, 3 Brews. (Pa.) 409.

In *State v. Benton*, 2 Dev. & B. L. (N. Car.) 206, it is stated that on the trial of Horne Tooke for treason as many as seven out of a panel of more than two hundred were thus removed to the end of the panel; and this was not deemed an unreasonable number; but in consequence of the very many persons excused, it was, in the end, likely to produce a serious inconvenience to the persons, which was only prevented by the honorable conduct of the attorney-general.

5. *State v. Arthur*, 2 Dev. L. (N. Car.) 217; *State v. Benton*, 2 Dev. & B. L. (N. Car.) 206; *State v. Hensley*, 94 N. Car. 1021; *State v. Sloan*, 97 N. Car. 499.

Stating Extent of Right. — In *State v. Sloan*, 97 N. Car. 499, there was held to be no error on the part of the trial judge in informing the solicitor for the

i. RECALLING VENIREMEN.—When the original venire has been gone through without forming a jury, any individual member thereof who, upon challenge of the state, has been set aside to see whether a jury might not be formed from the panel without him must be brought forward and challenged for cause, or tendered to the defendant, before resort can be had to another venire.¹ The jurors may be recalled in the order in which they were required to stand aside.²

state, in response to an inquiry by the latter, of the number of jurors the state would be permitted to stand aside after challenging for cause.

In North Carolina the practice prevailed, in capital cases, of permitting the state to stand jurors aside until exhaustion of the panel, and was not subject to exception where reasonably exercised by the court, and the challenges of the accused had not been exhausted before the "jurors stood aside" were tendered. *State v. Jones*, 88 N. Car. 671; *State v. Benton*, 2 Dev. & B. L. (N. Car.) 196.

Statement of Relationship by Juror Passed by State.—In *State v. Cunningham*, 72 N. Car. 469, a juror who was passed by the state, upon being tendered, and before he was sworn, stated his relationship to the prisoner, of which fact the state's attorney was ignorant. It was held that the court properly required the juror to stand aside until the completion of the panel.

Objections to Number Stood Aside.—Exhaustion of Peremptory Challenges.—If a jury has been obtained before the appellant has exhausted his peremptory challenges, the appellate court will not consider objections based on the action of the trial court in temporarily standing aside too great a number of jurors. *State v. Jones*, 97 N. Car. 469.

1. *State v. Washington*, 90 N. Car. 664; *State v. Shaw*, 3 Ired. L. (N. Car.) 532; *State v. Benton*, 2 Dev. & B. L. (N. Car.) 196; *State v. Arthur*, 2 Dev. L. (N. Car.) 217.

"The king need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the king's counsel must show the cause; otherwise the juror shall be sworn." 4 Black. Com. 353.

Construing the Statute of 33 Edward I.—The case of *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70, holds that cause of challenge on the part of the prosecu-

tion need not be shown till the whole of the panel is gone through. *Com. v. Keenan*, 30 Leg. Int. (Pa.) 416, 10 Phila. (Pa.) 194.

Failure to Recall.—Where one of the venire, upon being called, was challenged by the state and directed to retire till the panel was gone through with, and was not afterwards recalled, the prisoner making no motion to that effect and it being known that the juror was a witness for the prisoner, it was held that this was no ground for a venire *de novo* on the part of the prisoner. *State v. Lytle*, 5 Ired. L. (N. Car.) 58.

Resort to Veniremen Considering Another Case Before Calling Jurors Stood Aside.—Where all the jurors present had been sworn, challenged, or set aside, and eleven jurors were in the box, the accused claimed the right to have all the jurors in attendance called before calling individuals who had been set aside. It appeared that twelve of the panel were deliberating in another case, and it was held that there was no error on the part of the court in calling the twelfth juror from those who had been set aside and in proceeding with the trial, the accused not having exhausted his peremptory challenges. *Com. v. Weber*, 167 Pa. St. 153.

Challenge for Cause.—A juror may be required by the district attorney to stand aside until exhaustion of the panel, when he may be challenged for cause on behalf of the state. *Jewell v. Com.*, 22 Pa. St. 94.

2. Recalling Last Juror First.—The court may recall jurors in the order in which they were required to stand aside, and there is no error in denying a motion to recall first the last juror who was set aside. *Com. v. Eisenhower*, 181 Pa. St. 470.

Recalling in Order as Drawn.—In *State v. Boon*, 82 N. Car. 647, there was held to be no reversible error in directing ten jurors of the special

11. The Oath—*a*. NECESSITY—General Rules.—The juror's oath gives the measure of his duty,¹ and a jury is impaneled when sworn and charged with the case.²

In a Criminal Case the verdict of a jury is considered a nullity if the jury is not sworn.³

In Civil Cases it is held that by proceeding to verdict with an unsworn jury, without objection, the party is precluded from raising the objection thereafter.⁴

Oath for Term or in Each Case.—It has sometimes been held sufficient to administer a general oath to the jurors at the time they are impaneled, without swearing them in each case submitted to them during the term or time for which they are impaneled.⁵

venire, who were drawn, to stand aside until the panel was exhausted, at which time their names were called from the list in the order in which they were drawn, and they were disposed of by the state and the accused, the latter accepting one of them.

1. *Stratton v. People*, 5 Colo. 276.

2. *State v. Squaires*, 2 Nev. 226; *McFadden v. Com.*, 23 Pa. St. 12; *Sterling v. State*, 15 Tex. App. 249, holding that when a juror has been sworn in a capital case, he is impaneled and must remain upon the jury until the termination of the trial.

In a criminal cause, the term "trial" does not include the arraignment, or any other merely preparatory proceeding which may be taken prior to the time of administering the requisite oath to the jury. *Hunnell v. State*, 86 Ind. 431, citing *U. S. v. Curtis*, 4 Mason (U. S.) 237.

3. *Dresch v. State*, 14 Tex. App. 175; *Slaughter v. State*, 100 Ga. 323, holding that a conviction by an unsworn jury is a mere nullity, of which the accused could not, upon a subsequent arraignment, avail himself by a plea of *autrefois convict*. See also *infra*, IX. 11. f. (1) *Necessity of Showing that Jury was Sworn*.

Refusal to Hear Testimony on Motion for New Trial.—The action of the court below in refusing to hear two of the jurors who found a verdict and two other persons, in support of an application for a new trial on the ground that some of the jurors were not sworn, will not be disturbed. It will be presumed on appeal that the presiding judge knew that the jury was sworn. *Brewer v. State*, 12 Tex. 248.

Before Deputy Clerk Who Is an Attorney.—There is no error arising from

the fact that in the absence of the clerk, his deputy, who was likewise an attorney having causes pending in the court, administered the oath in the presence and under the direction of the court. *Thompson v. State*, 19 Tex. App. 593.

Several Cases Against One Defendant.—When more than one case against the same defendant is submitted to the same jury the oath should be administered in each case. *Kitter v. People*, 25 Ill. 42.

4. *Griffin v. Pitman*, 8 Oregon 342; *Jenkins v. Hudson*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 137, 2 How. Pr. N. S. (N. Y.) 244.

Ignorance of Defect.—That one juror was not sworn will not vitiate the verdict where it is not shown that the party or his counsel was ignorant of the omission during the trial, but the irregularity will be deemed waived. *Scott v. Moore*, 41 Vt. 205; *Powell v. Haley*, 28 Tex. 52.

Absence of Injury.—An omission to swear one of the jury which served, unaccompanied by injury or prejudice, will not require the verdict to be set aside. *Hardenburgh v. Crary*, 15 How. Pr. (N. Y. Supreme Ct.) 307.

5. *People v. Albany C. P.*, 6 Wend. (N. Y.) 548; *Pierce v. Tate*, 27 Miss. 283.

But the propriety of this practice was denied in *Barney v. People*, 22 Ill. 160, and *Stephens v. State*, 33 Tex. Crim. Rep. 101, which were criminal cases. See also *Chiles v. State*, 45 Ark. 143, holding that in all criminal cases, regardless of grade, the jury must be sworn as provided in section 2248, *Mansfield's Digest*, although it be selected from the regular panel. The general oath administered to the regular panel is not sufficient.

b. AFFIRMATION. — The record is sufficient although it shows that one of the jurors was not sworn, but affirmed.¹

c. FORM OF OATH — (1) *General Rules.* — The form of oath to be administered to the jury is often fixed by statute.²

In Civil Cases the jury is sworn well and truly to try the issues joined between the parties,³ or to assess the damages in a proper case, as where there are no issues by reason of the fact that a party fails to plead,⁴ or to try the issues and assess the damages, as in an action upon a penal bond.⁵

1. *State v. Price*, 11 N. J. L. 203.

Who May Affirm. — It has been held that unless a juror is one of a class who hold it unlawful to take an oath on any occasion he cannot be allowed to make solemn affirmation in lieu of the oath. *Bryan's Case*, 1 Cranch (C. C.) 151; *M'Intire's Case*, 1 Cranch (C. C.) 157.

But it is also held unnecessary to ask an affirming juror if he is conscientiously scrupulous of taking an oath, *Anonymous*, 3 N. J. L. 488; or that a record which states that some of the jurors were affirmed should also state that they alleged themselves conscientiously scrupulous of taking an oath. *Clark v. Collins*, 15 N. J. L. 473. See in general article AFFIRMATION, vol. I, p. 377.

2. *Law Governing.* — In *People v. Chalmers*, 5 Utah 201, it was held that after the swearing of a jury in the mode prescribed by law, there was no error in refusing to administer an additional oath prescribed by an Act of Congress which went in force the day after the jury was impaneled and sworn.

3. *Pierce v. Tate*, 27 Miss. 283; *Windham v. Williams*, 27 Miss. 313; *Jacksonville, etc., R. Co. v. Neff*, 28 Fla. 373; *McConnell v. Ryan*, 1 Tex. App. Civ. Cas., § 1020.

Reference should also be had to the cases *infra*, IX. 11. f. (2) *Sufficiency of Record Entry.*

4. *Where There Are No Issues* it is improper to submit the cause to the jury "to try the issues joined." *McNasser v. Sherry*, 1 Colo. 12; *Colorado Springs Co. v. Hewitt*, 3 Colo. 275; *Denny v. Hutcheson*, 1 Bibb (Ky.) 576; *Hopkins v. Preston*, 2 A. K. Marsh. (Ky.) 64; *Everhart v. Hickman*, 4 Bibb (Ky.) 341; *McAdams v. Massey*, 1 Smed. & M. (Miss.) 660; *Hewett v. Cobb*, 40 Miss. 61; *Baltimore, etc., R. Co. v. Christie*, 5 W. Va. 325.

Until Replication to a Good Plea in

Bar, the jury cannot be sworn to try the issue, for in fact there is no issue between the parties to be tried. *Miles v. Rose, Hempst.* (U. S.) 37.

Harmless Irregularity. — In *Buhl v. Trowbridge*, 42 Mich. 44, a stipulation was made between the plaintiffs and one defendant that the cause might be dismissed as to the latter, but the stipulation was not acted on, nor was any order of discontinuance entered, and but one of the other defendants pleaded. It was held that swearing the jury to try the issue between the plaintiffs and the defendants, when no issue had been joined with two of them, was a harmless irregularity.

Waiver of Error. — Error in swearing the jury to try issues instead of to assess damages is waived by permitting the administration of that form of oath without objection. *Edwards v. Edwards*, 31 Ill. 474.

5. *Phillips v. Governor*, 2 Ark. 382; *Taylor v. Auditor*, 4 Ark. 574; *Adams v. State*, 6 Ark. 497; *State v. Gibson*, 21 Ark. 140.

In an Action on a Penal Bond the jury is sworn to inquire into the truth of the breaches and assess the damages as to a party in default. *State v. Gibson*, 21 Ark. 140.

The practice of swearing a jury as well to try the issues in fact as to inquire of the damages on an issue in law previously found for the plaintiff obtains only in cases where the decision of the issue in law entitles the plaintiff to damages, without regard to the trial of the issues in fact. *Swann v. Rary*, 3 Blackf. (Ind.) 298.

To Assess Damages Instead of to Try Issues. — Where issues are joined on pleas of not guilty, and the jury is sworn, not to try those issues, but to inquire of damages, it is held that a judgment upon the verdict is reversible. *Williams v. Cheek, Sneed* (Ky.) 64; *Townsend v. Jeffries*, 17 Ala.

In Criminal Cases, either by the adoption of a form in analogy to that of the common law or by following the common-law form, the jury is sworn well and truly to try and true deliverance make between the state and the prisoner,¹ and a true verdict render according to the evidence,² though it is sometimes also sworn to "try the issues joined," apparently as in civil cases.³ It has also been held in *Arkansas* that as the jurors in criminal cases in that state are the judges of the law and the evidence, they should be sworn to give their verdict according to both.⁴

(2) *Scope of Oath.*—The usual oath taken by jurors will ordinarily include any issue which may be submitted to the jury

Inquiry into Breaches Equivalent to Trial of Issues.—In suits on penal bonds, where breaches had been assigned, swearing the jurors to inquire into "the truth of the breaches" is equivalent to swearing them to try the issues, and therefore unobjectionable. *McCoy v. State*, 22 Ark. 308; *McLain v. Taylor*, 9 Ark. 358.

To Try Issues Includes to Assess Damages.—If a plaintiff takes issue on a plea in abatement, it is held to be unnecessary to swear the jury specifically to assess damages, because being sworn well and truly to try the issues joined between the party and a true verdict render according to the evidence, this will include the assessment of damages. *Goggin v. O'Donnell*, 62 Ill. 66.

1. *Garner v. State*, 28 Fla. 113; *Smith v. State*, 25 Fla. 517.

An oath to "well and truly try and true deliverance make between the people of the state of Alabama and the prisoner," instead of "between the state of Alabama and the prisoner," was held to be erroneous. *Lewis v. State*, 51 Ala. 1; *Commander v. State*, 60 Ala. 1; *Perkins v. State*, 60 Ala. 7.

2. *State v. Jones*, 5 Ala. 666; *O'Connor v. State*, 9 Fla. 215; *State v. Johnson*, 37 La. Ann. 421; *State v. Logan*, 37 La. Ann. 778; *Lawrence v. Com.*, 30 Gratt. (Va.) 845.

See also *infra*, IX. 11. f. (2) *Sufficiency of Record Entry*.

Law and Evidence.—There is no error in refusing to swear a juror to find a verdict according to the law as well as the evidence in the case. *O'Connor v. State*, 9 Fla. 215.

There is no error in administering to the jury the oath prescribed by statute with the superfluous addition of a clause containing matter implied by

law—as to "true deliverance make according to the evidence and the law as given by the court." *Hartigan v. Territory*, 1 Wash. Ter. 447.

3. *Walker v. State*, 49 Ala. 369; *Hendrix v. State*, 50 Ala. 148; *McGuire v. State*, 37 Ala. 161; *Bell v. State*, 10 Ark. 536; *Sanford v. State*, 11 Ark. 331; *Burrow v. State*, 12 Ark. 65; *Palmore v. State*, 29 Ark. 248; *State v. Angelo*, 18 Nev. 425; *Lancaster v. State*, 91 Tenn. 267, wherein the jury was sworn well and truly to try the issues joined, and error was assigned upon the ground that the oath was inappropriate to a criminal case, but the court held that although the words "and true deliverance make," and some other words of the common-law form, were omitted, the oath administered was entirely sufficient. *Citing Fitzhugh v. State*, 13 Lea (Tenn.) 260; *Baxter v. State*, 15 Lea (Tenn.) 657.

"The Truth to Speak," etc., without being sworn "to try the issue joined," as required by the code, was held not to be a legal oath. *Dixon v. State*, 4 Greene (Iowa) 381.

"Sworn to Try the Case" is substantially the same as "sworn to try the issue." *Young v. Com.*, (Ky. 1897) 42 S. W. Rep. 1141.

Statutory Oath for Week.—"You do solemnly swear that you will well and truly try all issues and execute all writs of inquiry which may be submitted to you during the present week, and true verdicts render according to the evidence, so help you God," which is the statutory form, is not improperly administered in a criminal case." *Luke v. State*, 49 Ala. 30. But see *Chiles v. State*, 45 Ark. 143.

4. *Patterson v. State*, 7 Ark. 59; *Bell v. State*, 10 Ark. 536; *Sanford v. State*, 11 Ark. 331; *Burrow v. State*, 12 Ark. 65; *Palmore v. State*, 29 Ark. 248.

on the trial.¹ It is not a good ground of objection that the jury was sworn to try the "issue" instead of the "issues" between the parties.²

(3) *Substantial Compliance with Legal Form.*—If the oath administered to the jury is substantially in the prescribed or recognized form it will be sufficient, and a literal adherence to form will not be required.³ But the substance of the oath cannot be dispensed with, and the court cannot substitute in a criminal case a different oath from that prescribed by statute.⁴

1. *Londoner v. People*, 15 Colo. 557; *Arnold v. Arnold*, 20 Iowa 273.

An irregularity consisting in swearing the jurors to try the case as in an action at law, instead of swearing them to try such particular questions of fact as the court might submit to them, is harmless error. *Hornbrook v. Powell*, 146 Ind. 39.

2. *Lindley v. Kindall*, 4 Blackf. (Ind.) 189; *Bate v. Lewis*, 1 J. J. Marsh. (Ky.) 316; *Fowler v. Garret*, 3 J. J. Marsh. (Ky.) 682.

But see *U. S. v. Parker*, 2 Dall. (U. S.) 374, note, where a plea of nonassumpsit had been entered and the statute of limitations had also been pleaded, and the jury being sworn to try the "issue" and not the "issues" joined between the parties, there was held to be such irregularity that the court of its own motion ordered a juror withdrawn and continued the case.

3. *Alabama.*—*State v. Pile*, 5 Ala. 72; *Crist v. State*, 21 Ala. 137; *McGuire v. State*, 37 Ala. 161; *Walker v. State*, 49 Ala. 369; *Hendrix v. State*, 50 Ala. 148.

Iowa.—*Humphreys v. Humphreys*, 1 Morr. (Iowa) 359; *Harriman v. State*, 2 Greene (Iowa) 270.

Nevada.—*State v. Angelo*, 18 Nev. 425, holding that the words "this cause" were sufficient, instead of "this issue between the state of Nevada and Charles Angelo, the defendant."

Tennessee.—*Sharp v. Harrison*, 10 Heisk. (Tenn.) 573, holding that swearing a jury to try the "matters in dispute" is as appropriate as swearing it to try the issue joined.

Texas.—*Faith v. State*, 32 Tex. 374.

Washington.—*Leonard v. Territory*, 2 Wash. Ter. 381.

Omission of Concluding Invocation.—In *Minich v. People*, 8 Colo. 440, the oath was held sufficient although the clause "whom you shall have in charge" and the concluding phrase, or invocation, "so help you God" were

omitted, but it was held not to be a material omission, no statutory form of oath being prescribed, and the oath administered in its entirety not failing to swear the jurors to the performance of the duties required of them.

After the administration of the oath in the statutory form, it is unnecessary that the juror should repeat the words "so help me God." *State v. Paylor*, 89 N. Car. 539.

Different Form from That Prescribed.—In *Georgia*, that the oath administered in a justice's court on the trial of a right of property was the same as that required to be administered to special jurors in the Superior Court was held to constitute no objection, the oath required in both courts being substantially similar. *Carter v. Stanfield*, 8 Ga. 49. To the same point see *Earle v. Vanburen*, 7 N. J. L. 344.

4. *Alabama.*—*Edwards v. State*, 49 Ala. 336; *Lewis v. State*, 51 Ala. 1; *Commander v. State*, 60 Ala. 1; *Perkins v. State*, 60 Ala. 7.

Arkansas.—*Patterson v. State*, 7 Ark. 59; *Chiles v. State*, 45 Ark. 143.

Florida.—*Smith v. State*, 25 Fla. 517.

Georgia.—*Slaughter v. State*, 100 Ga. 323.

Iowa.—*Harriman v. State*, 2 Greene (Iowa) 285.

Minnesota.—*Maher v. State*, 3 Minn. 444.

Nevada.—*State v. Angelo*, 18 Nev. 425.

New Hampshire.—*State v. Rollins*, 22 N. H. 528.

North Carolina.—*State v. Owen*, 72 N. Car. 611.

Texas.—*Arthur v. State*, 3 Tex. 403; *Stephens v. State*, 33 Tex. Crim. Rep. 101; *Bawcom v. State*, 41 Tex. 191; *Sutton v. State*, 41 Tex. 515; *Bray v. State*, 41 Tex. 561; *Morgan v. State*, 42 Tex. 224.

Omission of "And a True Verdict Render According to the Evidence."—In *Ala-*

(4) *Waiver of Irregularity.* — Irregularity in the administration of the oath to a jury,¹ or in the form of the oath, may be waived by going to trial without objection. Where a party desires to avail himself of irregularity in the administration of the oath to the jury, the attention of the court should be called to it at the time the oath is taken, and he cannot sit by silently and take chances of a favorable verdict, and subsequently have the advantage of objections to such irregularity.²

d. *TIME AND ORDER OF SWEARING.* — The practice as to the time of administering the oath to the jury is not uniform. In some states each juror is sworn separately as he is called and selected,³ while in others no juror is sworn until all the jurors

bama it is held that an oath to the petit jury well and truly to try the issues joined, omitting the words "and a true verdict render according to the evidence," *Schamberger v. State*, 68 Ala. 543; *Storey v. State*, 71 Ala. 329; *Allen v. State*, 71 Ala. 5; *Roberts v. State*, 68 Ala. 524; *Johnson v. State*, 47 Ala. 62; *Stephens v. State*, 47 Ala. 696; or omitting the words "according to the evidence," *Allen v. State*, 71 Ala. 5, will not sustain a judgment of conviction. *Contra*, in *Washington, State v. Gin Pon*, 16 Wash. 425.

The omission of the words "the truth to speak in the premises" is not material. *Judah v. M'Namee*, 3 Blackf. (Ind.) 269; *Mann v. Clifton*, 3 Blackf. (Ind.) 304.

1. *Jacksonville, etc., R. Co. v. Neff*, 28 Fla. 373; *Smurr v. State*, 105 Ind. 125; *Henning v. State*, 106 Ind. 386; *Coleman v. State*, 111 Ind. 563; *Ship Milwaukie v. Hale*, 1 Dougl. (Mich.) 306; *People v. De Camp*, (Supreme Ct.) 10 N. Y. Supp. 811.

Harmless Irregularity in Manner of Swearing. — Where, upon an indictment for murder, several persons were sworn, in the regular way, as to their competency to serve as jurors, and held the Bible in their hands until they were accepted when the clerk proceeded to swear them as jurors, omitting the words "you swear" in the last oath, it was held that the omission, though irregular and reprehensible, did not vitiate the verdict. *State v. Owen*, 72 N. Car. 605.

Where a defendant has been indicted under alias names, and admits his true name, the fact that the clerk in administering the oath to the jury designates the defendant by the name admitted, and in addition by the names by which he was indicted, is harmless

error. *People v. Everhardt*, 104 N. Y. 591.

2. *Florida.* — *Seymour v. Purnell*, 23 Fla. 232; *Jacksonville, etc., R. Co. v. Neff*, 28 Fla. 373; *State v. Pearce*, 14 Fla. 153.

Georgia. — *Candler v. Hammond*, 23 Ga. 493; *Smith v. State*, 63 Ga. 168.

Indiana. — *Lindley v. Kindall*, 4 Blackf. (Ind.) 189; *Applegate v. Boyles*, 10 Ind. 435.

Kansas. — *State v. Baldwin*, 36 Kan. 1, approved in *Baldwin v. Kansas*, 129 U. S. 52.

Louisiana. — *State v. Wilson*, 36 La. Ann. 864; *State v. Robinson*, 36 La. Ann. 873.

Tennessee. — *Looper v. Bell*, 1 Head (Tenn.) 373.

Texas. — *McConnell v. Ryan*, 1 Tex. App. Civ. Cas., § 1020; *Clements v. Crawford*, 42 Tex. 602.

But where the substance of the proper oath is not administered in a criminal case, objection is not waived by not taking it before verdict. *Slaughter v. State*, 100 Ga. 323.

Wrong Oath Sufficiently Covering Particular Case. — Where the oath administered to a jury in a civil action is not the one prescribed by statute for such action, yet is sufficient to cover the inquiry involved or the issues covered by the pleadings therein, and the plaintiff makes no objection, but proceeds to trial, such irregularity in swearing the jury is not good ground for setting aside a verdict against the plaintiff on a motion for a new trial. *Seymour v. Purnell*, 23 Fla. 232.

3. *People v. Reynolds*, 16 Cal. 128; *People v. Iams*, 57 Cal. 115 [following *People v. Scoggins*, 37 Cal. 676; *People v. Russell*, 46 Cal. 121]; *State v. Brown*, 12 Minn. 538; *State v. Anderson*, 4 Nev. 265.

are selected and accepted. This depends, however, upon the statutory practice in each state.¹

Where the Statute Is Silent as to the time when the jurors shall be sworn, it is held to be within the discretion of the court to determine the practice, and the prisoner's legal right is not impaired if, after he has been allowed a fair opportunity to interpose a peremptory challenge to a proposed juror, he is foreclosed as to the further exercise of the right by the administration of the oath to the juror at any time after he has been examined and accepted.²

e. RESWEARING. — It sometimes becomes necessary to reswear the jury,³ as where a juror is substituted after the oath has been administered to the jury.⁴ So where an amendment changes

Under the *Maine Revised Statutes*, c. 82, § 74, traverse jurors are required to be sworn in the order of their names on the alphabetical lists, and the first twelve constitute the first jury and the next twelve the second. *Wallace v. Columbia*, 48 Me. 436.

1. Thus the failure to administer the oath to the jury as a body in cases less than capital, as prescribed by statute, is held to be reversible error. *Stephens v. State*, 33 Tex. Crim. Rep. 101 [citing *Ripley v. State*, 29 Tex. App. 37; *Heskew v. State*, 17 Tex. App. 161; *Ellison v. State*, 12 Tex. App. 557]. And in capital cases each juror is sworn as selected, *Ripley v. State*, 29 Tex. App. 37; and not two at a time, as was at one time the usual practice. *Ellison v. State*, 12 Tex. App. 557.

There is no error in postponing the administration of the oath until twelve jurors are obtained, and then swearing them in chief to try the prisoner. *Roberts v. State*, 65 Ga. 430.

In *O'Connor v. State*, 9 Fla. 215, each juror as he was tendered was ordered into the box and kept under the eye of the court until the whole twelve were chosen, and thereupon the court ordered them to be sworn in three at a time.

In *Pennsylvania* the practice as to the time of administering the oath is not uniform. In some districts each juror is sworn separately, as called and unchallenged, and in others none is sworn until all are selected. *Alexander v. Com.*, 105 Pa. St. 1.

The accused cannot insist that a number of unchallenged jurors less than twelve be sworn before the return to a special venire. *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

It is discretionary with the court to bring to the book less than the full number of twelve jurors. *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

Continuance Without Swearing. — After a jury has been procured there is no error in continuing a cause without swearing the jurors, where it appears that on the adjourned day they presented themselves, were sworn, neither party challenging, and proceeded to a verdict. *Miller v. Wilson*, 24 Pa. St. 114.

Talesmen. — When the regular panel is exhausted, and the deficiency is supplied by talesmen, they may be sworn separately as they are selected. *Hurley v. State*, 29 Ark. 17.

Objection. — An objection that the oath was administered to the whole body of jurors after their selection, instead of to each of them as selected, comes too late on motion for a new trial. *Caldwell v. State*, 12 Tex. App. 302.

2. *People v. Carpenter*, 102 N. Y. 238. In the absence of any law controlling the matter, no certain number of jurors need be called to be sworn. *Walker v. Collier*, 37 Ill. 362.

3. Thus in *Com. v. Knapp*, 9 Pick. (Mass.) 496, it was held that if a juror, after having been sworn in chief, is under the impression that he was sworn on his *voir dire* only, he should be again sworn in chief.

4. *Keech v. State*, 15 Fla. 591; *Jefferson v. State*, 52 Miss. 767.

In *Tennessee* it has been held that where a juror is substituted the other jurors need not be resworn. *Garner v. State*, 5 Yerg. (Tenn.) 160; *State v. Curtis*, 5 Humph. (Tenn.) 601; *Mahala v. State*, 10 Yerg. (Tenn.) 537.

the issue, or makes a new issue, the jury should be resworn,¹ as, it has also been held, it must be where, after a jury has been impaneled and a witness sworn, one of the defendants is ordered to be tried separately.² When an amendment does not change the issues there is no necessity for reswearing the jury.³

Failure to Request Reswearing.—If, however, a proper case arises for the reswearing of the jury, and a party wishes to reserve any alleged error in proceeding with the case without a reswearing, he should request that the jury be resworn, and reserve his exception to the action of the court if his request is improperly refused; otherwise he may waive the defect.⁴

f. RECORD—(1) *Necessity of Showing that Jury was Sworn.*—In Criminal Cases where the transcript fails to show that the jury which tried the defendant had been sworn, the verdict and sentence will be set aside.⁵

1. *Ostrander v. Clark*, 8 Ind. 211; *Kerschbaugher v. Slusser*, 12 Ind. 453; *Hoot v. Spade*, 20 Ind. 326; *Williams v. Miller*, 10 Iowa 344, *overruling* *Cole v. Swan*, 4 Greene (Iowa) 32.

2. *Babcock v. People*, 15 Hun (N. Y.) 347.

Where the swearing of a jury in a prosecution against two jointly and the entry of an order for separate trials are practically simultaneous, the jury will be deemed to have been sworn in the separate trial proceeded with. *People v. Cummins*, 47 Mich. 334.

3. *Londoner v. People*, 15 Colo. 557; *Maxwell v. Day*, 45 Ind. 509; *Hackney v. Williams*, 46 Ind. 413; *Knowles v. Rexroth*, 67 Ind. 59; *Merrill v. St. Louis*, 12 Mo. App. 466, 83 Mo. 244, holding that an amendment consisting merely of the joinder of an additional party will not require the reswearing of the jury.

Issue Enlarged.—Where the jurors were sworn "to well and truly try the cause submitted," etc., it was held that they need not be resworn on the filing of a new petition, after striking off one of the plaintiffs, and seemingly though the issue was enlarged. *Hinkle v. Davenport*, 38 Iowa 355.

4. *Sandford Tool, etc., Co. v. Mullen*, 1 Ind. App. 204; *Knowles v. Rexroth*, 67 Ind. 59; *Arnold v. Arnold*, 20 Iowa 273; *Hinkle v. Davenport*, 38 Iowa 355.

Reswearing After Arraignment and Plea.—If the jury was sworn before arraignment and plea, and no motion or request is made to reswear, and the trial proceeds without objection, there is a waiver of the informality. *Dolan*

v. State, 122 Ind. 141. See also *Wallace v. State*, 4 Lea (Tenn.) 309.

5. *Alabama.*—*Johnson v. State*, 47 Ala. 9; *Lacey v. State*, 58 Ala. 385.

Arkansas.—*Carnett v. State*, (Ark. 1888) 6 S. W. Rep. 513; *Harper v. State*, 25 Ark. 83; *Lawson v. State*, 25 Ark. 106; *Barbour v. State*, 37 Ark. 61; *Chiles v. State*, 45 Ark. 143.

Louisiana.—*State v. Gates*, 9 La. Ann. 94; *State v. Phillips*, 28 La. Ann. 387; *State v. King*, 28 La. Ann. 425; *State v. Douglass*, 28 La. Ann. 425; *State v. Calvert*, 32 La. Ann. 224.

Texas.—*Nels v. State*, 2 Tex. 280; *Biles v. State*, (Tex. App. 1887) 4 S. W. Rep. 902; *Dresch v. State*, 14 Tex. App. 175; *McHenry v. State*, 14 Tex. App. 209; *Baird v. State*, 38 Tex. 599.

Amendment to Show Fact.—Where the jury was sworn, and that fact can be proved, the record of the lower court may be so amended as to supply the omission; and thus completed, it may, under a writ of certiorari, be laid before the appellate court. *State v. Gates*, 9 La. Ann. 94.

Conclusiveness.—A record showing that the jury was sworn after arraignment and plea is controlling. *Dolan v. State*, 122 Ind. 141.

Where the entry states that the jury was duly sworn and impaneled, it will be presumed that all the jurors were sworn, although but eight of them are expressly mentioned as having been sworn. *State v. Christian*, 30 La. Ann. 367. But it is also held that where the record shows that but four of the jurors chosen on the second day were sworn, it will not be presumed in favor of the

In Civil Cases, it seems, the record need not show that the jury was sworn, where no mandatory statute requires it to be sworn in each case.¹

When, Where, and Before Whom Sworn. — The record of the indictment need not state when, where, and before whom the traverse jurors were sworn or affirmed.²

(2) *Sufficiency of Record Entry.* — Where the record entries show that the jury was sworn, but the form of the oath is not set out therein, in the absence of a contrary showing it will be presumed that the proper oath was administered,³ and this is said

regularity of the proceedings that all twelve duly qualified. *Bass v. State*, 6 Baxt. (Tenn.) 580.

1. *Goyne v. Howell*, Minor (Ala.) 62; *Perdue v. Burnett*, Minor (Ala.) 138; *Drake v. Brander*, 8 Tex. 351; *Clark v. Davis*, 7 Tex. 556, holding that where, under the statute, the jurors are sworn for the trial of all civil cases that shall be submitted to them during the term, the presumption is that they were sworn, and it is not necessary that the fact should appear on the record; *Freiberg v. Lowe*, 61 Tex. 436, wherein it was held that although the record on appeal in a civil case does not affirmatively show that the jury was sworn, yet if the objection was not saved by bill of exceptions, or the omission is not assigned as error, there is no ground for reversal; *Waddell v. Magee*, 53 Miss. 687, departing from the earlier doctrine in that state as announced in *Beall v. Campbell*, 1 How. (Miss.) 24; *Irwin v. Jones*, 1 How. (Miss.) 497; *Wolfe v. Martin*, 1 How. (Miss.) 30, and *Buck v. Mosley*, 24 Miss. 170, upon the authority of *Clark v. Davis*, 7 Tex. 556, *supra*, and *distinguishing Holt v. Mills*, 4 Smed. & M. (Miss.) 110, in that the oath required to be shown in that case was in a matter in which that court was exercising a special statutory jurisdiction.

See also *supra*, IX. 11. a. *Necessity.*

Judgment by Default. — Where it is required by statute that the jury shall be sworn in every civil case where judgment in such a case is rendered by default, the record must show affirmatively that the jury was sworn. *Botsford v. Yates*, 25 Ark. 282. See also the cases *supra*, IX. 11. c. (1) *General Rules.*

2. *State v. Price*, 11 N. J. L. 203; *M'Clure v. State*, 1 Yerg. (Tenn.) 206.

3. *Alabama.* — *Mitchell v. State*, 58 Ala. 417; *Crist v. State*, 21 Ala. 149;

McGuire v. State, 37 Ala. 161; *McNeil v. State*, 47 Ala. 503; *Walker v. State*, 49 Ala. 370; *McCuller v. State*, 49 Ala. 40; *Edwards v. State*, 49 Ala. 334; *De Bardelaben v. State*, 50 Ala. 180; *Blair v. State*, 52 Ala. 344; *Moore v. State*, 52 Ala. 424; *Bush v. State*, 52 Ala. 13; *Johnson v. State*, 47 Ala. 31, 62; *Bugg v. State*, 47 Ala. 50; *Smith v. State*, 47 Ala. 545; *Smith v. State*, 53 Ala. 486; *Murphy v. State*, 54 Ala. 178; *Gardner v. State*, 48 Ala. 263; *McRae v. Tillman*, 6 Ala. 486; *State v. Pile*, 5 Ala. 72; *Lockett v. State*, 47 Ala. 42; *Peterson v. State*, 74 Ala. 35; *Johnson v. State*, 74 Ala. 537; *Storey v. State*, 71 Ala. 329; *Allen v. State*, 71 Ala. 5; *Roberts v. State*, 68 Ala. 515; *Schamberger v. State*, 68 Ala. 543; *Washington v. State*, 60 Ala. 10.

Arkansas. — *Hurley v. State*, 29 Ark. 17; *Greenwood v. State*, 17 Ark. 332; *Harper v. State*, 25 Ark. 83; *Pruitt v. State*, (Ark. 1889) 11 S. W. Rep. 822; *Bell v. State*, 10 Ark. 536; *Neal v. Peevey*, 39 Ark. 337; *McDaniel v. Hanauer*, 25 Ark. 48; *State v. Gibson*, 21 Ark. 140; *Dillingham v. Skein*, *Hempst.* (U. S.) 181.

Colorado. — *Minich v. People*, 8 Colo. 440.

Florida. — *Garner v. State*, 28 Fla. 113.

Kansas. — *State v. Baldwin*, 36 Kan. 1, approved in *Baldwin v. Kansas*, 129 U. S. 52.

Kentucky. — *Young v. Com.*, (Ky. 1897) 42 S. W. Rep. 1141.

Minnesota. — To entitle the complaining party to relief the record must affirmatively show that one of the jurors impaneled was not sworn. *State v. Lautenschlager*, 23 Minn. 290, following *State v. Ryan*, 13 Minn. 370.

Mississippi. — *Furniss v. Meredith*, 43 Miss. 302; *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17; *Dyson v. State*, 26 Miss. 362.

to be a better form of entry than one reciting the oath, however accurately it may be set out.¹ But where the judgment entry in a criminal case purports to set out the full oath administered to the jury, it must express every essential element or ingredient of the oath as prescribed by the statute.² Whether or not an entry in the record of the mere fact of swearing professes to set out the oath *in totidem verbis* is a question which has arisen in connection with many kinds of expressions. Thus the word "sworn" is held to import *ex vi termini* a regular and legal oath, and does not purport to set out the oath in full;³ so of recitals in the judgment entry that the jury was lawfully sworn or duly sworn or sworn according to law.⁴ And where a record shows

Missouri. — *State v. Schoenwald*, 31 Mo. 147.

Nebraska. — *Smith v. State*, 4 Neb. 277.

Ohio. — *Wareham v. State*, 25 Ohio St. 601; *Bartlett v. State*, 28 Ohio St. 669.

Texas. — *Arthur v. State*, 3 Tex. 403; *Bawcom v. State*, 41 Tex. 189; *Edmondson v. State*, 41 Tex. 501; *Smith v. State*, 1 Tex. App. 408; *Chambliss v. State*, 2 Tex. App. 396; *Leer v. State*, 2 Tex. App. 495; *Everett v. State*, 4 Tex. App. 159; *Holland v. State*, 14 Tex. App. 182; *Clark v. State*, 18 Tex. App. 467; *Smith v. State*, 4 Tex. App. 626.

Virginia. — *Lawrence v. Com.*, 30 Gratt. (Va.) 846.

Washington. — *Leschi v. Territory*, 1 Wash. Ter. 13; *Hartigan v. Territory*, 1 Wash. Ter. 447.

West Virginia. — *State v. Ice*, 34 W. Va. 244.

See also *infra*, IX. 14. *Appeal and Review*.

Concluding Invocation. — That the record does not contain the invocation "so help you God," which is provided for at the conclusion of the statutory oath, affords no ground of reversal. *Kerr v. State*, 36 Ohio St. 614.

1. *Garner v. State*, 28 Fla. 113.

2. *Alabama*. — *Storey v. State*, 71 Ala. 329; *Allen v. State*, 71 Ala. 5; *Schamberger v. State*, 68 Ala. 543; *Johnson v. State*, 74 Ala. 537; *Davis v. State*, 54 Ala. 88; *Walker v. State*, 49 Ala. 369; *Smith v. State*, 53 Ala. 486.

Arkansas. — *Bivens v. State*, 11 Ark. 455.

Colorado. — *Minich v. People*, 8 Colo. 440.

Florida. — *Garner v. State*, 28 Fla. 113.

Nebraska. — *Smith v. State*, 4 Neb. 277.

Texas. — *Arthur v. State*, 3 Tex. 403; *Martin v. State*, 40 Tex. 19; *Bawcom v. State*, 41 Tex. 189; *Edmondson v. State*, 41 Tex. 496; *Morgan v. State*, 42 Tex. 225; *Burch v. State*, 43 Tex. 377; *Smith v. State*, 1 Tex. App. 408; *Chambliss v. State*, 2 Tex. App. 396; *Leer v. State*, 2 Tex. App. 495; *Tharp v. State*, 3 Tex. App. 90; *Everett v. State*, 4 Tex. App. 159; *Holland v. State*, 14 Tex. App. 182.

See also the cases generally in the preceding notes.

Clerical Error. — Where there were two issues in fact, and from the record it appeared that the jury was sworn "the truth to speak upon the issue joined," it was held that the entry was in substance good, but if at all defective, the mistake was merely clerical. *Montgomery v. Tillotson*, 1 How. (Miss.) 215.

Jurors are never specially sworn in any civil case. They are sworn to try all issues and execute all writs of inquiry that may be submitted to them during the term of day for which they are summoned. Rev. Code, 501, article 143. Where, therefore, the record recites that the jury was sworn "to try the issue," when the execution of a writ of inquiry was submitted to it, and *vice versa*, it is a mere clerical error and cannot be true in point of fact. *Hewett v. Cobb*, 40 Miss. 61.

"Issue" for "Issues." — Where there are several issues, and the record states the jury was sworn to try "the issue," the word "issue" will be taken collectively. *Hatcher v. Fowler*, 1 Bibb (Ky.) 337.

3. *Washington v. State*, 60 Ala. 10; *Dyson v. State*, 26 Miss. 362.

4. *Alabama*. — *Johnson v. State*, 74 Ala. 537; *Peterson v. State*, 74 Ala. 35; *Storey v. State*, 71 Ala. 329; *Allen v. State*, 71 Ala. 5; *Schamberger v. State*,

that the persons composing a jury were "impaneled and sworn to sit as jurors in this case," they will be presumed, on error, to have been legally sworn.¹ So expressions setting out some part of the oath, though not purporting to set out the whole, have been held not to attempt to set out the exact oath, and to be sufficient to show a legal swearing.²

68 Ala. 543; *Roberts v. State*, 68 Ala. 524; *Mitchell v. State*, 58 Ala. 417; *Gardner v. State*, 48 Ala. 263; *Lockett v. State*, 47 Ala. 42; *De Bardelaben v. State*, 50 Ala. 179; *Smith v. State*, 53 Ala. 486.

Arkansas. — *Greenwood v. State*, 17 Ark. 332; *McDaniel v. Hanauer*, 25 Ark. 48; *Harper v. State*, 25 Ark. 83, holding that had it been stated on the record that the jury was duly or regularly sworn, the court would have presumed that the oath had been properly administered, and that a statement in the record that the jurors "were sworn and impaneled, and took their place in the jury box," does not show that they were properly sworn; *Neal v. Peevey*, 39 Ark. 337; *Wells v. State*, (Ark. 1891) 16 S. W. Rep. 577.

Colorado. — *Minich v. People*, 8 Colo. 440.

Texas. — *Clark v. State*, 18 Tex. App. 467; *Smith v. State*, 4 Tex. App. 626.

Virginia. — *Lawrence v. Com.*, 30 Gratt. (Va.) 845.

Jury of Inquest — Return of Sheriff. — An entry by the clerk that the jury was "duly impaneled and sworn" is conclusive of the due impaneling and swearing of the jury, upon the presumption that the officer had properly discharged his duty; and hence, when the sheriff returned that a jury of inquest summoned to assess damages was "duly impaneled and sworn, according to law, to discharge their duties," the return must be construed as a statement that the proper oath was administered to the jury, and not as a recital of the substance of the oath administered, and therefore that it appeared that the jury was properly sworn. *New Orleans, etc., R. Co. v. Hemphill*, 35 Miss. 17.

1. *Furniss v. Meredith*, 43 Miss. 302. See also *Pruitt v. State*, (Ark. 1889) 11 S. W. Rep. 822, holding that a record stating that "the following named jurors," etc., "are called, found qualified, accepted, and sworn to try this cause" authorizes a presumption that the jury was duly sworn.

2. **Illustrations.** — Where the recital in

the judgment entry is that the parties appeared, and issue being joined upon a plea of not guilty, a jury came (naming them), "twelve good and lawful men, having the qualifications of jurors, who, being duly elected, tried, and sworn well and truly to try the issue joined herein," it cannot be regarded as an attempt to set out in full the oath actually administered, but should rather be considered as a statement by the clerk that the jury had been sworn and acted under oath; and the absence of any recital that the jury was required to give a true verdict according to law and the evidence is not a ground for reversal. *State v. Baldwin*, 36 Kan. 1 [approved in *Baldwin v. Kansas*, 129 U. S. 52]; *State v. Gin Pon*, 16 Wash. 425; *Smith v. State*, 4 Neb. 277. See also *McNeil v. State*, 47 Ala. 498; *McGuire v. State*, 37 Ala. 161; *State v. Pile*, 5 Ala. 72; *Edwards v. State*, 49 Ala. 334; *McCuller v. State*, 49 Ala. 40; *De Bardelaben v. State*, 50 Ala. 179.

But in *Alabama* it was held that a judgment entry, "Thereupon came a jury," etc., "who being * * * sworn," etc., "upon their oaths do say," etc., setting forth neither the words nor the form of the oath, is insufficient. *Bugg v. State*, 47 Ala. 50; *Johnson v. State*, 47 Ala. 62, and that a recital that the jury was "sworn well and truly to try the issue joined," etc., is not the oath required by statute, nor is it equivalent to a recital that the jury was well and truly sworn to try the issue joined according to law. *Horton v. State*, 47 Ala. 58. So a recital that the jurors were "sworn according to law, to well and truly try the issue joined," omitting the words "and a true verdict render according to the evidence" (Code 1876, § 4765), negatives the idea that the proper oath was administered. *Schamberger v. State*, 68 Ala. 543; *Storey v. State*, 71 Ala. 329; *Roberts v. State*, 68 Ala. 524; *Stephens v. State*, 47 Ala. 606; *Walker v. State*, 72 Ala. 218; *Gardner v. State*, 48 Ala. 263.

In *Baxter v. State*, 15 Lea (Tenn.) 657, Volume XII.

12. Objections After Verdict.—See the articles ARREST OF JUDGMENT, vol. 2, p. 793; EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153; NEW TRIAL.

13. Mandatory and Directory Statutes.—As with respect to other proceedings relative to the procurement of jurors generally, if the statutory provisions as to the formation of the jury are of a mandatory character, noncompliance therewith may invalidate the proceedings;¹ but where such provisions are merely directory, violations thereof will not be deemed prejudicial unless it is clearly shown that injury has resulted.²

a record showing that the defendant was brought to the bar and arraigned upon the indictment, that he pleaded not guilty as charged, and for his deliverance put himself upon the country, whereupon, to try the defendant upon his plea of not guilty, came a jury of good and lawful men, etc., and duly elected, etc., "to well and truly try said defendant upon his plea of not guilty to said charge in the indictment," etc., was held sufficiently to show that the jury was sworn to try the issues made by the charges in the indictment and the defendant's plea of not guilty thereto. See also *State v. Hargrove*, 13 Lea (Tenn.) 179.

In *Texas* a recital that the jury was duly sworn "well and truly to try the issue between the state of Texas and the defendant, and a true verdict render according to the law and the evidence," was held to show sufficiently that the jury was duly sworn, and the purpose for which it was sworn, but not to import a copy in *hac verba* of the oath administered to it, which need not be set out, nor that the oath prescribed by statute, "you solemnly swear that in the case of the state of Texas against —, the defendant, you will a true verdict render according to the law and evidence, so help you God," was not administered. *Cotton v. State*, 32 Tex. 614.

In *Florida* it was held that a record entry in a capital case which, after showing that the prisoner was arraigned and pleaded not guilty, stated: "Whereupon came the following jurors" (naming them), "who were duly selected, chosen, impaneled, and sworn to try the issues joined," could not properly be construed as purporting or having been intended to recite the oath prescribed by the statute for petit jurors in capital causes, which oath is as follows: "You shall well

and truly try, and true deliverance make, between the state of Florida and the prisoner at the bar, whom you shall have in charge, so help you God," but should be construed as merely importing and intended to show that the jurors were in fact sworn properly, or that the above oath was administered to them. *Garner v. State*, 28 Fla. 113. See also *State v. Pearce*, 14 Fla. 153.

1. *Alabama*. — *Ezell v. State*, 102 Ala. 101; *Murphy v. State*, 86 Ala. 45; *Steele v. State*, 83 Ala. 20; *Brazier v. State*, 44 Ala. 387; *Long v. State*, 86 Ala. 36.

Illinois. — *Lincoln v. Stowell*, 73 Ill. 246; *Rockford Ins. Co. v. Nelson*, 75 Ill. 548.

Maryland. — *Green v. State*, 59 Md. 123.

Missouri. — *State v. Holme*, 54 Mo. 153.

New York. — *Brisbane v. Macomber*, 56 Barb. (N. Y.) 376; *Lambertson v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 200; *Hardenburgh v. Cray*, 15 How. Pr. (N. Y. Supreme Ct.) 307.

Vermont. — *Mann v. Fairlee*, 44 Vt. 672.

Virginia. — *Hall v. Com.*, 80 Va. 555; *Richards v. Com.*, 81 Va. 110. And see *Honesty v. Com.*, 81 Va. 283.

2. *State v. Gleason*, 88 Mo. 582; *State v. Pitts*, 58 Mo. 556; *State v. Knight*, 61 Mo. 373; *State v. Ward*, 74 Mo. 256; *State v. Matthews*, 88 Mo. 121; *Vierling v. Chas. G. Stifel Brewing Co.*, 15 Mo. App. 125.

In *Texas*, articles 618, 619, 620, and 621 of the Code of Criminal Procedure, relating to the organization of the trial jury in a case of capital felony, are directory only, and the failure of the trial court to conform to them is not reversible error, unless injury to the defendant be shown. *Murray v. State*, 21 Tex. App. 466.

14. Appeal and Review — a. WHAT MAY BE REVIEWED. — The rulings and determination of the trial court on the formation of a jury which involve questions of law, ordinarily, and unless otherwise expressly provided for by statute, may be reviewed upon a proper presentation to the reviewing court.¹ Thus, the propriety of the determination of a challenge for principal cause is reviewable,² as is the conduct of trials of challenges to the favor and the determination thereon.³

b. THE RIGHT TO REVIEW. — The right or power of the reviewing court is largely dependent on statutory provisions, and

1. Necessity of Denial of Right. — No cause for challenge which does not deny to the party complaining the exercise of a natural or constitutional right can be assigned as error in the court of last resort. *Mabry v. State*, 50 Ark. 492 [citing *People v. Southwell*, 46 Cal. 141; *People v. Ah Chung*, 54 Cal. 308; *People v. Darr*, 61 Cal. 554; *People v. Welch*, 49 Cal. 174; *Palmore v. State*, 29 Ark. 248; *Wallace v. State*, 28 Ark. 547].

In *Kentucky* the Court of Appeals has no jurisdiction to revise the action of the lower courts in respect to challenges for cause. *Rutherford v. Com.*, 13 Bush (Ky.) 608.

2. *State v. Williams*, 3 Stew. (Ala.) 454; *Stalls v. State*, 28 Ala. 25; *Baxter v. People*, 8 Ill. 368; *Ex p. Vermilyea*, 6 Cow. (N. Y.) 565; *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *State v. Shaw*, 3 Ired. L. (N. Car.) 532; *Montague v. Com.*, 10 Gratt. (Va.) 767.

Errors Occurring While the Jury is Being Impaneled are "errors of law occurring at the trial," within a statute authorizing a review of such errors. *Hartnett v. State*, 42 Ohio St. 568; *Palmer v. State*, 42 Ohio St. 596.

The impaneling of a jury is a part of the trial, and any erroneous ruling thereon is an error of law occurring at the trial, within a statutory provision requiring such an error to be presented by a bill of exceptions or statement. *Silcox v. Lang*, 78 Cal. 118.

Where There Is No Dispute About the Facts upon which the challenge is based, the discussion as to the validity presents a question of law, which may be reviewed. *Holt v. People*, 13 Mich. 224.

Nature of the Right of Review. — In *Mann v. Glover*, 14 N. J. L. 195, it was said that improperly granting and improperly refusing a challenge are alike foundations of a writ of error, and that the application in such a case is not to

the sound and legal discretion of the court, but for the benefit, *ex debito justitia*, of an imperative rule of law. *Citing Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564.

Decision Based on Evidence. — Where the disallowance of challenges is based upon some evidence to sustain the action of the court, the decision is final and conclusive, and cannot be reviewed by an appellate court, whose jurisdiction is limited to reviewing decisions of the trial court upon matters of law by which substantial rights are prejudiced. *People v. McGonegal*, 136 N. Y. 62.

Decision Not Subject to Review by Statute. — The court may inquire whether error was committed in deciding that a juror was competent, notwithstanding a statutory provision that the decision of the court on challenges for cause, etc., shall not be subject to exception. *Wright v. State*, 35 Ark. 639 [citing *Palmore v. State*, 29 Ark. 248; *Benton v. State*, 30 Ark. 328].

3. *Balbo v. People*, 80 N. Y. 484.

Exception to Rulings as to Admissibility. — Where, upon a challenge for favor, there is error on the part of the court in the admission or rejection of evidence or in instructing the triers upon matters of law, a bill of exceptions will lie. *People v. Bodine*, 1 Den. (N. Y.) 281.

Rejection of Juror. — In *People v. McQuade*, 110 N. Y. 284, it was said that a statutory provision permitting exceptions to be taken to a decision allowing or disallowing a challenge for actual bias is not limited to exceptions to rulings as to the jurors who served, and though no exception is permitted to a ruling admitting or rejecting testimony on the trial of a challenge, except where the challenge is overruled and the juror served, yet an exception may be taken to the erroneous rejection of a juror, and such exception is reviewable on appeal.

usually cannot be invoked unless the questions involved are brought before the court in the manner prescribed by law or the practice.¹

c. PRESERVING EXCEPTIONS — (1) *Necessity*. — Objections to the mode of impaneling the jury cannot be presented for the first time in the reviewing court,² and where no objection is made nor exception taken to alleged irregularities or error in the trial court, questions relative thereto cannot be considered on appeal.³

1. *On Appeal from Judgment*. — The question of the competency of a juror who has been peremptorily challenged cannot be considered on an appeal from the judgment. *People v. Petmecky*, (Supreme Ct.) 2 N. Y. Crim. Rep. 450.

Necessity of Motion for New Trial. — An objection to the competency of a juror or the manner of his selection is not available on review unless made a ground by motion for a new trial in the court below. *Doolittle v. State*, 93 Ind. 272.

2. *State v. Rigg*, 10 Nev. 284; *O'Kelly v. Territory*, 1 Oregon 51; *Jewell v. Com.*, 22 Pa. St. 94; *State v. Anderson*, 26 S. Car. 599; *Bristow v. Com.*, 15 Gratt. (Va.) 634.

3. *Alabama*. — *Jones v. State*, 100 Ala. 209; *Hawk v. State*, 84 Ala. 6.

California. — *People v. Goldenson*, 76 Cal. 328; *People v. Cochran*, 61 Cal. 549.

Iowa. — *State v. Ostrander*, 18 Iowa 435.

Kansas. — *State v. Taylor*, 36 Kan. 329.

Mississippi. — *Organ v. State*, 26 Miss. 78; *Brantley v. State*, 13 Smed. & M. (Miss.) 468.

Missouri. — *State v. Marshall*, 36 Mo. 400; *Samuels v. State*, 3 Mo. 68; *State v. Jones*, 61 Mo. 232; *State v. Hopkirk*, 84 Mo. 278.

Montana. — *Wykoff v. Loeber*, 5 Mont. 535.

Nebraska. — *Clough v. State*, 7 Neb. 320; *Van Etten v. Butt*, 32 Neb. 288.

New York. — *Hardenburgh v. Crary*, 15 How. Pr. (N. Y. Supreme Ct.) 307.

North Carolina. — *State v. Boon*, 82 N. Car. 637; *State v. Ward*, 2 Hawks (N. Car.) 443. See also *State v. Boon*, 80 N. Car. 461; *State v. White*, 68 N. Car. 158; *State v. Davis*, 80 N. Car. 412; *State v. Bullock*, 63 N. Car. 570.

Texas. — *Post v. State*, 10 Tex. App. 579; *Caldwell v. State*, 12 Tex. App. 302; *Thomae v. Zushlag*, 25 Tex. Supp. 225.

United States. — See *Alexander v. U. S.*, 138 U. S. 353.

Necessity of Exception. — The court, in finally accepting and impaneling a jury, judicially determines the competency of the several members thereof, thus preserving to the parties all their rights respecting the qualifications of the jurors; therefore any allegation that any of them is incompetent, except as it may be based on exception taken to the overruling of a challenge, is an allegation against an adjudged fact. Judge Cooley in *People v. Scott*, 56 Mich. 154.

Under the California Penal Code of 1874, § 1073, the finding of the court on a challenge for cause will not be reviewed, unless an exception was taken to the admission or rejection of the testimony. *People v. Cotta*, 49 Cal. 166.

To Evidence on Trial of Challenge. — Where there is no exception to the evidence adduced on the trial of a challenge, the appellate court will not review the action of the court below. *People v. Kunz*, 73 Cal. 313.

For the Incorporation of Evidence in Bill of Exceptions. — Unless exceptions are reserved to the rulings, the judge may properly refuse to incorporate in the bill of exceptions evidence given on the *voir dire*. *People v. Goldenson*, 76 Cal. 328.

Form and Administration of Oath. — Where the complaint is to the form or to the administration of the oath, objections thereto, to be available, must be preserved by a bill of exceptions. *Dyson v. State*, 26 Miss. 362; *Bartlett v. State*, 28 Ohio St. 669; *Hartigan v. Territory*, 1 Wash. Ter. 447.

Exception or Motion for a New Trial. — For error or irregularity in summoning or impaneling a jury, unless the complaining party can present the objection in the form of an exception to some decision upon the trial, he must bring it before the court on a motion for a new trial, and cannot make it the ground of reversing the judgment upon

(2) *Sufficiency*. — The exception should be sufficiently specific to raise the question desired to be submitted for review and to acquaint the court with the particular matters as to which complaint is made.¹

d. THE RECORD — (1) *Generally*. — The record should be in the form required by statute or by the practice respecting appeals or other proceedings to review the regularity of the formation of the trial jury.²

(2) *Form and Sufficiency* — *In General*. — *Proceedings Below*. — The record should sufficiently show by appropriate language the proceedings had below which bear on the questions brought up for review.³

writ of error. *McCann v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 272, reversed on another ground, 16 N. Y. 58.

Failure to Accept Offer to be Heard as to Admissibility of Evidence. — In *State v. Taylor*, 134 Mo. 109, the court, after excluding evidence as to the competency of a juror, informed counsel that it would hear him further as to the admissibility of the evidence, and it was held that, no new offer of evidence having been made, the exclusion could not be urged as error.

1. *Sufficiency of Exceptions*. — In *Southern Pac. Co. v. Rauh*, 7 U. S. App. 84, 49 Fed. Rep. 696, the court informed a proposed juror that he need not answer certain questions asked, but no challenge for cause was interposed. It was held that there was not sufficient to bring the ruling of the court to the consideration of the reviewing court.

General Exception. — Though a defendant accused of felony failed to take a specific exception when he was called to challenge jurors not before him, a general exception to the action of the court in prescribing the mode of procedure will be deemed sufficient. *Lewis v. U. S.*, 146 U. S. 370.

Necessity of Specifying Objections. — In *Boyett v. State*, 2 Tex. App. 93, a statement in a bill of exceptions that "the exceptions were taken as above stated, but an inspection of the record in regard to the jury and the mode of summoning, etc., will show conclusively that every provision of the law in regard to the jury has been strictly observed," was held sufficient to counter-veil objections raised to the venire, when the grounds of objection were not so stated that the appellate court could determine the particular provision of law claimed to have been violated.

That an "Objectionable Juror" was impaneled and sat in the jury after the defendant had exhausted his peremptory challenges is not an exception sufficient to raise the question of the juror's status in the appellate court. *Ripsey v. State*, 29 Tex. App. 37.

A Motion relative to the number of challenges without cause to which the accused is of right entitled, preliminary to the drawing of the names on the venire for the purpose of selecting the jury, is not the proper mode by which to raise the question. *Clarke v. State*, 87 Ala. 71.

2. *Under the Provisions of the New York Code of Civil Procedure*, § 485, the proceedings as to challenges to jurors who served must be incorporated in the judgment roll, that the decision may be reviewed as of course on exceptions; but if a review of the exceptions is desired, where the challenge was sustained, the proceedings should be incorporated in a bill of exceptions, to be settled and annexed to the roll. *People v. McQuade*, 110 N. Y. 284.

3. *Names of Jurors Not Shown — Number Shown*. — Though the record fails to give the names of the individuals who composed the jury, it will be sufficient if it shows that the number required by law passed upon the issue. *Redus v. Wofford*, 4 Smed. & M. (Miss.) 579.

The record need not set out the names of the jurors; it will be enough if the transcript recites that "a jury came of good and lawful men, to wit, A B and eleven others, to try the cause." *Sears v. Green*, 1 Tex. Unrep. Cas. 727.

Designation of Number. — In *Johnson v. State*, 8 Baxt. (Tenn.) 450, a record containing a recital that "the following good and lawful men were selected," followed by eleven names in full and the surname of a person, was held suffi-

Indefiniteness. — Where the record is so indefinite that the reviewing court cannot determine the facts as to the competency or incompetency of a juror respecting the determination as to which error is predicated, the action of the trial court will not be interfered with.¹

The Alleged Error or Prejudicial Irregularity which is relied on to reverse the determination below must affirmatively appear in the record.²

cient to show a verdict by a jury of twelve men.

A Recital that "Thereupon Came Twelve Persons" having the qualification required by law as petit jurors and were sworn, etc., sufficiently shows that the jury was regularly impaneled. *De Bardelaben v. State*, 50 Ala. 179.

"Election" of Jurors. — The entry need not show that the jurors who tried the cause were "elected," etc., when it is stated that they, naming them, were duly impaneled, tried, sworn, etc. *White v. State*, 16 Tex. 206.

Omission of Regular Entry. — If there is enough in the return to show clearly that a jury was impaneled and the trial proceeded with, an objection to the omission from the record of the regular entry as to those facts is untenable. *Kenyon v. Woodward*, 16 Mich. 326.

Absence of Record Entry. — Where a clerk fails to enter of record a decision of a challenge for principal cause, if the particular facts appear on the return of a writ of certiorari the court may treat it as a decision on a regular issue in law. *People v. Vermilyea*, 7 Cow. (N. Y.) 108.

Qualification of Jurors. — The record need not show expressly that the jurors who tried the case were duly qualified. *Com. v. Stephen*, 4 Leigh (Va.) 679.

Form of Oath. — Unless it is attempted to set out the form of the oath, an objection that the jurors were not duly sworn will not be considered. *Bartlett v. State*, 28 Ohio St. 669.

1. Where it does not appear from the record what question was propounded to a juror, his answer being so indefinite that it cannot be known whether his opinion had any relation to the issues involved or the merits of the cause, the reviewing court will not interfere with the action of the court below in overruling a challenge. *Hughes v. Cairo*, 92 Ill. 339.

2. *People v. Goldenson*, 76 Cal. 328; *People v. Sing Lum*, 61 Cal. 539; *Hill v. State*, 91 Ga. 153; *Ray v. State*, 15

Ga. 223; *Brinkley v. State*, 58 Ga. 296; *Harkins v. State*, 6 Tex. App. 452; *Ray v. State*, 4 Tex. App. 450; *Dixon v. State*, 2 Tex. App. 530.

What Must be Shown — Facts Constituting Alleged Irregularity. — On objection to a trial jury for the reason that it was improperly drawn and impaneled, the facts constituting the alleged irregularity must be distinctly set out in the record. *State v. Roderigas*, 7 Nev. 328.

Examination of Juror as to Opinion. — To take advantage of an objection that a juror was incompetent because of expressions of opinion in advance of the trial, it must appear of record that the party was examined as to his expression or formation of opinion, and a showing thereof by affidavit is not sufficient. *Light v. Chicago, etc., R. Co.*, 93 Iowa 83; *State v. Shelledy*, 8 Iowa 509; *State v. Funck*, 17 Iowa 365.

On motion for a new trial because of the incompetency of a juror, the record must show affirmatively that the juror was examined on his *voir dire* and denied the expression or formation of an opinion. *Brown v. State*, 60 Miss. 447.

Denial of Right to Select from Particular Class. — That the right was denied to select jurors to complete a panel from a particular class of jurors must appear affirmatively by the bill of exceptions, or an objection on that ground will not be considered. *Weathersby v. State*, 29 Tex. App. 278.

Silence of Record as to Proceedings Subsequent to Disposal of Challenge. — Where the trial court overruled the defendant's challenge for cause to a juror, and the record was silent as to the manner in which the juror was dismissed, did not show that the defendant was compelled to exhaust his peremptory challenges to exclude him from the jury, and did not disclose that the party challenged was not one of the jurors who tried the case, it was held that, so far as the record disclosed, there was no prejudicial error in overruling the challenge

Objections and Exceptions. — The grounds or causes upon or for which the complaining party moves,¹ as well as the objections and exceptions taken below, should be made a part of the record by bill of exceptions or otherwise.²

Evidence on Examination of Juror. — If the record does not contain or purport to contain all the evidence on the examination of a juror³ or on the trial of a challenge for cause, it will be presumed that the evidence adduced justified the court in its finding as to

to the juror. *Blenkiron v. State*, 46 Neb. 11; *Burt v. Panjaud*, 99 U. S. 180.

Error Apparent of Record. — Where, on appeal, the appellant brings up so much of the record as discloses that he has not been accorded a trial by a legally constituted jury, he has shown affirmative error which entitles him to a reversal, unless something contained in the record shows that the error was not prejudicial. *State v. Snodgrass*, 52 Kan. 174.

Party Aggrieved. — Where the record fails to show upon whose motion a person was set aside as a juror, the court will not consider the propriety of questions asked him upon his *voir dire*. *Savage v. State*, 18 Fla. 909.

1. *Norton v. State*, 106 Ind. 163.

Cause of Challenge. — Where error is charged in overruling a challenge for cause, the record on appeal must show the cause for which the challenge was made, otherwise the appellate court will be unable to say whether the cause assigned was or was not sufficient in law. *State v. Dove*, 10 Ired. L. (N. Car.) 469.

Presumption as to Ground of Challenge. — Where the record fails to state the ground of challenge, a presumption as to the ground relied on will not be indulged. *Morehead v. State*, 34 Ohio St. 212.

In Texas it is not enough simply to state in a bill of exceptions that specified jurors were objectionable. The bill must go further and state some "cause" as the ground for challenge which would likely affect his competency or his impartiality. *Sutton v. State*, 31 Tex. Crim. Rep. 297 [citing *Hudson v. State*, 28 Tex. App. 323; *Nalley v. State*, 28 Tex. App. 387; *Ripley v. State*, 29 Tex. App. 37; *Blackwell v. State*, 29 Tex. App. 195].

2. *State v. Tibbs*, 48 La. Ann. 1278; *Van Etten v. Butt*, 32 Neb. 288; *Aistrop v. State*, 31 Tex. Crim. Rep. 467.

Objection — By Whom Made — Ruling Thereon. — The validity of an objection

to a juror will not be reviewed where the bill of exceptions fails to state the objection, which party interposed it, the ruling of the court thereon, that any objection was in fact made by either party, or what became of the juror, whether excused or not. *Brotherton v. State*, 30 Tex. App. 369.

To Evidence and Instructions on Trial of Competency. — Objections and exceptions taken to evidence on the trial of the competency of a juror by triers or to instructions of the court may be made a part of the record by bill of exceptions. *Stewart v. State*, 13 Ark. 721.

Failure to Show Objection — Presumption. — Where the record fails to inform the reviewing court that the plaintiff in error made any objections to the jury, it will be presumed that he took part in its selection, since if he did not demand the jury, and did not participate in selecting the jurors, it lies with him to show such a state of facts, and in the absence of any objection or refusal it will be presumed that he consented to submit his cause to the jury which tried it. *Millett v. Hayford*, 1 Wis. 401.

3. Necessity of Complete Examination on Voir Dire. — The action of the trial court in overruling a challenge for cause will not be reviewed unless the record contains a full and complete examination of the juror in question on his *voir dire*. *Johnson v. Holliday*, 79 Ind. 151; *Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 179.

Record Silent as to Examination. — The court will not revise the ruling of the court below in refusing a new trial because of alleged false statements made by a juror on his *voir dire*, the truth as to which did not come to the knowledge of the appellants until after the trial, where the statement of facts is silent as to what took place on the examination of the juror, and there is no bill of exceptions showing the action taken. *Shaw v. State*, 27 Tex. 750.

the qualification or disqualification of the juror in question.¹ However, where the error is apparent of record, incompleteness in this regard is immaterial.²

Papers and Documents. — Likewise papers or documents which may be necessary to enable the court to arrive at a conclusion respecting the contention of the parties will not be considered unless made a part of the record.³

c. REVIEW — (1) Generally. — The propriety of the decision of the trial court as to the competency of a juror may be determined by the reviewing court from its own examination of the evidence,⁴ but in the absence of evidence to support the deter-

1. *Cooper v. State*, 16 Ohio St. 328; *State v. Tom*, 8 Oregon 177; *Hayden v. Long*, 8 Oregon 244; *U. S. v. Groesbeck*, 4 Utah 487; *U. S. v. Bromley*, 4 Utah 498; *Timmerman v. Territory*, 3 Wash. Ter. 445; *Southern Pac. Co. v. Rauh*, 7 U. S. App. 84, 49 Fed. Rep. 696.

Challenge to Array. — A bill of exceptions must show that evidence was introduced in support of a challenge to the array. *State v. Rigg*, 10 Nev. 284.

Necessity of Showing Juror's Source of Information as to Opinion. — The appellate court will not disturb the finding below as to the competency of a juror upon the ground that the juror had formed and expressed an opinion, where the record fails to show the source of the information on which the juror based his opinion. *Miller v. State*, 32 Tex. Crim. Rep. 319.

2. The erroneous compulsion of a trial by disqualified jurors may be available error without bringing up all the evidence on appeal. *State v. Snodgrass*, 52 Kan. 174.

Error Shown by Record. — If the record shows that the trial court erred in allowing challenges, the judgment may be reversed, although the bill of exceptions does not purport to give all the evidence. *Schmidt v. Chicago*, etc., R. Co., 83 Ill. 405.

3. **Affidavits as to the Incompetency of a Juror** must be embodied in the bill of exceptions, or they will not be considered by the reviewing court. *People v. Stonecipher*, 6 Cal. 405.

Affidavits as to Statements by Jurors. — In *State v. Greenwade*, 72 Mo. 298, after the bill of exceptions was signed, and more than five days after the trial of the cause, the defendant filed affidavits respecting the statements made by one of the jurors tending to show that he was disqualified, but the bill of exceptions showed no such statement

on the part of the juror, and the court declined to consider the affidavit, and stated that counsel, if they desired such consideration, should have followed the provisions of the statute relative to affidavits from bystanders in the event of the untruth of the bill of exceptions.

Papers Read by Jurors. — After procurement of a jury, unidentified newspapers cannot be introduced for the purpose of showing that they were read by the jurors, and will not be considered in the reviewing court when not made a part of the record. *State v. Dyer*, 139 Mo. 199.

4. *Balbo v. People*, 80 N. Y. 484.

Advantage of Juror's Presence Below. — With due regard to the fact that the trial court had the advantage of the presence of the juror. *Balbo v. People*, 80 N. Y. 484.

Power to Try Indifferency. — Under chapter 427 of the *New York Laws of 1873*, which provided that the determination of the court upon a challenge for favor might be excepted to by either party, and that the determination might be reviewed on writs of error or certiorari, the reviewing court had the same power to pass on the question involved in the challenge for favor which the trial court had, as to the indifferency of the juror, within the rule of law applicable to the case. *Thomas v. People*, 67 N. Y. 218.

Consideration of Testimony. — Testimony of a juror on a challenge for favor cannot be considered in determining whether a challenge for principal cause was properly decided, where the trial of the latter challenge was for the court alone, to be decided upon the evidence taken, by the court, on that challenge only, while the testimony upon the challenge for favor was addressed to the triers appointed to try

mination below,¹ or unless the evidence is such that the incompetency appeared as a matter of law, the reviewing court will not interfere.²

Every Reasonable Intendment will be made in favor of the legality and regularity of the action of the trial court in forming the jury, and mere inconsequential errors and omissions, from which no prejudice resulted or could have resulted, may be disregarded.³ Hence, in reviewing the rulings of the trial court, its

that challenge, to whom alone it belonged to pass upon the challenge and to decide it. *Cancemi v. People*, 16 N. Y. 501.

1. Under the provisions of the *New York Code Crim. Pro.*, § 445, restricting exceptions which may be taken on the trial of an indictment, in allowing or disallowing challenges for actual bias, to exceptions made to the decision of the court on matter of law, the determination of the court below on the question of the indifference of a juror is not reviewable, except in the absence of any evidence to support it. *People v. McQuade*, 110 N. Y. 284.

Where the issue raised by the challenge is not one of law, but one of fact, based upon the evidence given on the challenge, and the ruling is subject to exception and review, the power of the appellate court is limited, and it cannot review the decision, except in the absence of evidence to sustain it. *Butler v. Glens Falls, etc., St. R. Co.*, 121 N. Y. 112.

The decision of the trial judge on the question of indifference of a juror, or for actual bias, is not subject to review, except in the absence of any evidence to support it, in which case it is an error of law, to which an exception will lie. *State v. Chapman*, 1 S. Dak. 414.

Existence of Statutory Grounds of Disqualification.—Where the grounds of disqualification are prescribed by statute, if on personal examination of the juror or by the testimony of other persons it is ascertained that none of the grounds exists, the action of the trial judge in accepting the juror will not be reversed, unless it appears that there was no legal evidence to support its judgment. *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394.

2. Denial of Challenge for Actual Bias.—Under the *New York Code Crim. Pro.*, § 445, a decision overruling a challenge for actual bias will not be reviewed unless the evidence discloses

a condition of mind on the part of the juror which as matter of law renders him incompetent. *People v. McQuade*, 110 N. Y. 284.

And see, under the *California Code*, *People v. Atherton*, 51 Cal. 495; *People v. Colson*, 49 Cal. 679; *People v. Murphy*, 45 Cal. 137.

Decision Not Supported by Evidence.—An order denying a challenge to a juror on the ground of actual bias can only be reviewed when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law. *People v. Fredericks*, 106 Cal. 554; *People v. Wong Ark*, 96 Cal. 129; *People v. Wells*, 100 Cal. 227.

For Implied Bias.—A decision of the court on the question of the implied bias of a juror will not be disturbed by the appellate court, unless it is so clearly against the evidence as to warrant a judge in setting aside a verdict as against the evidence. *U. S. v. Langford*, 2 Idaho 519; *Reynolds v. U. S.*, 98 U. S. 145.

3. *California*—*Thrall v. Smiley*, 9 Cal. 529.

Georgia.—*Odom v. Gill*, 59 Ga. 180; *Woolfolk v. State*, 85 Ga. 69.

Iowa.—*State v. Shelledy*, 8 Iowa 477.

Massachusetts.—*Com v. Justices*, 5 Mass. 435; *Amherst v. Hadley*, 1 Pick. (Mass.) 38; *Page v. Danvers*, 7 Met. (Mass.) 327.

New York.—*People v. Ransom*, 7 Wend. (N. Y.) 417.

Texas.—*Gardenhire v. State*, 6 Tex. App. 147; *Ray v. State*, 4 Tex. App. 450; *Dixon v. State*, 2 Tex. App. 530; *Woodard v. State*, 9 Tex. App. 412; *Hollis v. State*, 8 Tex. App. 620; *McKinney v. State*, 8 Tex. App. 626; *Cock v. State*, 8 Tex. App. 659; *Johnson v. State*, 4 Tex. App. 268; *Goforth v. State*, 22 Tex. App. 405.

Virginia.—*Burch v. Hylton*, 89 Va. 441.

United States.—*U. S. v. Gilbert*, 2 Sumn. (U. S.) 19; *Northern Pac. R. Co.*

action will not be revised unless it appears that the rights of the appellant or complaining party have been prejudiced, or that the law has been violated.¹

Prejudicial Error. — But where it appears that the trial court by its action denied, impaired, or diminished the right of the accused to a jury to which he was entitled by law, there is error fatal to a judgment of conviction.²

(2) **Conflicting Evidence.** — Where the evidence adduced below as to the competency or qualification of a juror who served on the trial, or of a person who was rejected as a proposed juror, is conflicting, the action of the trial court will not be disturbed, unless it is apparent that the determination was positively erroneous.³

v. Herbert, 116 U. S. 642; *Hayes v. Missouri*, 120 U. S. 71.

England. — *Rex v. Hunt*, 4 B. & Ald. 430, 6 E. C. L. 547.

1. *Goshen v. England*, 119 Ind. 368; *Carpenter v. Dame*, 10 Ind. 125; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275; *Harkins v. State*, 6 Tex. App. 452; *Ray v. State*, 4 Tex. App. 450; *Dixon v. State*, 2 Tex. App. 539; *Quinn v. Halbert*, 57 Vt. 178.

Unauthorized Appointment of Foreman. — That the court appointed a foreman of the jury without authority of law is immaterial, where no objection was made at the time nor any prejudice claimed. *Post v. State*, 10 Tex. App. 579.

Improper Action of Counsel. — In *Weadock v. Kennedy*, 80 Wis. 449, the attorneys for the plaintiff, who were on opposite sides of a case called immediately before the case in question, agreed to strike certain jurors on each side, so as to reduce the number of jurors in the next case, and the court, while characterizing such practice as one of the "tricks of the trade" not to be approved, refused a new trial because it did not appear that the defendant had suffered any injury.

Possible Error. — Where a challenge for cause has been sustained, though it would not have been erroneous to have overruled it, in the absence of a showing of prejudice the appellate court will not interfere. *Geiger v. Payne*, 102 Iowa 581.

Improperly Excusing Juror. — In *Boles v. State*, 13 Smed. & M. (Miss.) 398, a juror found competent on his *voir dire* requested to be excused for the reason that his wife was ill and a physician had been sent for to attend her, and it was held that there was such an unjustifiable exercise of power on the part

of the court, in excusing the juror of his own motion, and against the objection of the accused — the district attorney refusing his consent — as would entitle the accused to a new trial.

2. *Phillips v. State*, 68 Ala. 469; *Boles v. State*, 13 Smed. & M. (Miss.) 398.

3. *Pettibone v. Phelps*, 13 Conn. 445; *Moon v. State*, 68 Ga. 687; *Clem v. State*, 33 Ind. 418; *Miami Valley Furniture Co. v. Wesler*, 47 Ind. 65; *State v. Ihrig*, 106 Mo. 267; *State v. Williamson*, 106 Mo. 162; *Blackburn v. State*, 23 Ohio St. 146; *Spence v. State*, 15 Lea (Tenn.) 539; *Black v. Territory*, 3 Wyoming 313.

Where Contradictory Affidavits touching the competency of a juror are filed after verdict and judgment, and a new trial is refused, the appellate court will not review the finding below upon the facts embodied in the affidavits. *Schmidt v. Rose*, 6 Mo. App. 587.

Where the Alleged Use of an Improper Expression is Absolutely Denied by the juror, the decision of the presiding judge in favor of the credibility of the juror will not be disturbed. *Wallace v. State*, 70 Ga. 722.

A Finding by the Court Below on Conflicting Evidence on a Motion for a New Trial because a juror who served made false statements on his *voir dire* will be treated by the reviewing court with the same respect as a decision on conflicting evidence in a criminal action. *Holloway v. State*, 53 Ind. 554.

Decision Entitled to Great Weight. — On conflicting evidence as to whether or not a juror who had sat in the cause had formed and expressed an opinion, the conclusion of the court below will be entitled to great weight. *Johnson v. State*, 11 Lea (Tenn.) 47.

Competency in Doubt. — If the exami-

(3) *Discretion*. — The decision of the trial judge should be treated with great respect, and much weight should be given to his judgment, in view of the fact that he had opportunity to scrutinize the juror and observe his manner and conduct as well as his language.¹ Necessarily the trial judge is vested with a large discretion,² and the reviewing court will not revise his action in determining the fitness of a juror unless it is apparent that he abused the discretion confided in him, to the injury of the rights of the complaining party, or it is evident that he infringed the law.³

nation of the proposed juror leaves his competency doubtful, the reviewing court will not interfere with the action of the court below in sustaining a challenge for cause. *Denver, etc., R. Co. v. Driscoll*, 12 Colo. 520.

1. *Ortwein v. Com.*, 76 Pa. St. 414; *State v. Church*, 6 S. Dak. 89; *People v. O'Loughlin*, 3 Utah 133.

2. *State v. Sorter*, 52 Kan. 531; *Ferriday v. Selser*, 4 How. (Miss.) 506; *Curnow v. Phoenix Ins. Co.*, 46 S. Car. 79.

3. *Colorado*. — *Collins v. Burns*, 16 Colo. 7; *Salazar v. Taylor*, 18 Colo. 538.

Florida. — *Metzger v. State*, 18 Fla. 481.

Indiana. — *Bradford v. State*, 15 Ind. 347; *Fahnestock v. State*, 23 Ind. 231; *Holloway v. State*, 53 Ind. 554; *Coryell v. Stone*, 62 Ind. 307; *McCulley v. State*, 62 Ind. 428; *Achey v. State*, 64 Ind. 56; *De Priest v. State*, 68 Ind. 569; *Elliott v. State*, 73 Ind. 10; *Stout v. State*, 90 Ind. 1; *Hodges v. Bales*, 102 Ind. 494; *Walker v. State*, 102 Ind. 502; *Dill v. Lawrence*, 109 Ind. 564; *Stephenson v. State*, 110 Ind. 358; *Davidson v. State*, 135 Ind. 254; *Lewis v. State*, 137 Ind. 344.

Louisiana. — *State v. Waggoner*, 39 La. Ann. 919; *State v. Kane*, 32 La. Ann. 999; *State v. Rountree*, 32 La. Ann. 1144; *State v. Somnier*, 33 La. Ann. 237; *State v. Welsch*, 34 La. Ann. 991.

Massachusetts. — *Borden v. Borden*, 5 Mass. 67; *Kinnicutt v. Stockwell*, 8 Cush. (Mass.) 73.

Michigan. — *People v. Carrier*, 46 Mich. 442; *Torrent v. Yager*, 52 Mich. 506; *People v. Barker*, 60 Mich. 277.

Mississippi. — *Ferriday v. Selser*, 4 How. (Miss.) 518; *McCarty v. State*, 26 Miss. 302; *McGuire v. State*, 37 Miss. 369; *Gillian v. Brown*, 43 Miss. 641; *Head v. State*, 44 Miss. 731; *Chase v. State*, 46 Miss. 683; *Logan v. State*, 53 Miss. 431.

Missouri. — *State v. Dusenberry*, 112 Mo. 277; *Richey v. Missouri Pac. R. Co.*, 7 Mo. App. 581.

Nebraska. — *Dodge v. People*, 4 Neb. 220.

New Hampshire. — *State v. Jones*, 50 N. H. 369.

New York. — *People v. Beckwith*, 103 N. Y. 360.

South Carolina. — *State v. Wyse*, 32 S. Car. 45.

Tennessee. — *McGowan v. State*, 9 Yerg. (Tenn.) 184.

Texas. — *Hanks v. State*, 21 Tex. 526; *Hubotter v. State*, 32 Tex. 479; *Mason v. State*, 15 Tex. App. 534; *Ashton v. State*, 31 Tex. Crim. Rep. 479.

Vermont. — *State v. Ward*, 39 Vt. 231.

Virginia. — *Cluverius v. Com.*, 81 Va. 787.

What Constitutes Abuse. — It is not an abuse of discretion to hold a juror competent who has answered mistakenly as to the legal effect of a proposition. *Pemberton v. State*, 11 Ind. App. 297.

Decision Against Weight of Evidence. — The decision of the trial court in accepting, sifting, or rejecting a juror will not be disturbed on appeal, notwithstanding it may be presumably against the weight of evidence. *State v. Chatham Nat. Bank*, 80 Mo. 626, *affirming* 10 Mo. App. 482.

Compliance with Statutory Requirements. — The discretion of the court in the matter of challenges will not be controlled where statutory requirements have been substantially complied with, and there appears no error prejudicial to the appellant. *Williams v. State*, 63 Ark. 527.

Disregard of Statutory Requirements Must Be Clear. — Unless it clearly appears from the record that the requirements of the statutes have been disregarded in overruling challenges for cause, the ruling of the trial court

(4) *Presumptions.* — From recitals contained in the record, or from the silence of the record, the reviewing court may make deductions and indulge presumptions as to the existence of facts in the court below, where nothing appears to warrant a different conclusion, and may in like manner presume that a fair, impartial, and legally constituted jury was procured and served in the cause. Thus, presumptions may be indulged as to the grounds upon which challenges were interposed;¹ as to the proper disposition of such challenges;² that jurors who served in the trial were competent and duly qualified,³ or that objection to their competency was waived.⁴ Also, from the absence of objection to the array or to the individual jurors it may be presumed that a competent jury was obtained,⁵ that the proper form of oath

should be sustained. *Denver, etc., R. Co. v. Moynahan*, 8 Colo. 56. And see *State v. Church*, 6 S. Dak. 89.

1. Where no grounds of challenge are specified it will be presumed that the challenge was interposed upon the grounds indicated by the examination of the juror. *People v. Mallon*, 3 Lans. (N. Y.) 224.

2. In the absence of any showing on the subject there is no presumption of prejudice by the discharge of a juror on the challenge of the state. *Stephenson v. State*, 110 Ind. 358.

Determination of Challenge on Sufficient Evidence. — Unless the case or bill of exceptions shows to the contrary, it will be presumed that a challenge was tried and determined on sufficient evidence. *State v. Brecht*, 41 Minn. 50.

Proper Determination of Challenge. — In *People v. Wilber*, (Supreme Ct.) 39 N. Y. St. Rep. 743, the array was challenged because the officer was alleged to be under the control of the plaintiff and because the jurors had not been impartially drawn. The record contained a statement, "People object; no testimony offered to sustain challenge; challenge overruled." It was held that it would be presumed that the facts alleged were denied, were not supported by evidence, and that the challenge was properly overruled.

The action of the presiding judge in trying challenges will be presumed correct, unless it appears otherwise by exceptions upon the record, setting forth the facts upon which he based his decision. *Isham v. State*, 1 Sneed (Tenn.) 111.

As to Propriety of Determination. — The action of the court in sustaining a challenge will be presumed to be cor-

rect. *Goshen v. England*, 119 Ind. 368.

3. *Hart v. State*, 14 Neb. 572; *Keenan v. State*, 8 Wis. 132.

Presumption from Fact of Selection. — From the fact that a juror was selected it will be presumed that he was competent. *King v. State*, 91 Tenn. 617; *Cartwright v. State*, 12 Lea (Tenn.) 620.

Ascertainment of Competency. — In the absence of anything to the contrary in the record, the appellate court will presume that the bias or prejudice of any juror impaneled was ascertained in the court below, and that those who served qualified as competent. *Nash v. State*, 2 Tex. App. 362.

Impartial Jury. — Where nothing appears to the contrary, it will be presumed that the jurors selected were impartial. *State v. Kluseman*, 53 Minn. 541; *State v. Smith*, 56 Minn. 78.

4. *Waiver of Competency of Juror.* — To obtain a review of any question in regard to the qualifications of a juror, the record must show that when the juror was tendered he was properly challenged, with the grounds of challenge distinctly stated, the ruling of the court on the challenge, and that exception to the ruling was properly taken; otherwise it will be presumed that all objections to the competency of the juror were waived. *Fillion v. State*, 5 Neb. 351; 1 Chitty's Crim. Law 547; 2 Whart. Crim. Law, § 2974.

5. Irrespective of the question as to whether the jury was legally selected and summoned, if no objection was made to the array or to the individual jurors, or that any of them was incompetent, it will be presumed that there was a legal and valid jury. *State v. Taylor*, 36 Kan. 329.

was administered,¹ or that the jury was duly and regularly procured and impaneled,² and presumptions may be indulged generally as to various other matters indicated in the notes hereto.³

1. *Lawrence v. Com.*, 30 Gratt. (Va.) 845; *State v. Ice*, 34 W. Va. 244.

2. **Every Intendment Will be Made in Favor of the Legality** and regularity of the action of the court in making up the jury. *Pauska v. Daus*, 31 Tex. 67.

In the Absence of Any Showing to the Contrary, it will be presumed that the jurors were properly selected and drawn. *Kie v. U. S.*, 27 Fed. Rep. 351.

Compliance with Statutes. — Where the contrary does not affirmatively appear in the record, it will be presumed that the statutory provisions were followed. *Gapen v. Bretternitz*, 31 Neb. 302.

Organization Regular — Good and Lawful Men. — Proper organization of the jury will be presumed where the record shows that there was a jury of "good and lawful" men. *Jones v. State*, 100 Ala. 209.

Failure to Show How Juror Procured — Regular Juror or Talesman. — Unless it appears that a juror challenged who was not drawn as a member of the regular panel, and who served during the term as a juror, was placed upon the jury by the direction of the court as a member of the regular panel, to fill a vacancy, it will be presumed that he was a talesman and subject to challenge under section 1395, Rev. Stat. 1881, disqualifying jurors for prior service within the year. *Goshen v. England*, 119 Ind. 368.

In the absence of anything to the contrary it will be presumed that a juror was present as a member of the regular panel, and that he was not called as a talesman. *Douglass v. State*, 18 Ind. App. 289.

Attendance of Regular Panel. — If the bill of exceptions concedes that there is no record entry showing that the regular jurors for the term had been discharged, it will be taken as a fact that the court had a panel of regular jurors at that term, and that they had not been discharged. *State v. Gleason*, 88 Mo. 582.

Absence of Exception. — Where the record recites that the jury, after being sworn according to law, and after hearing the evidence and considering the same, returned a verdict, etc., and it does not appear that any exception was taken to the mode in which the

jurors were tried, selected, or sworn, it will be presumed that the jury was regularly impaneled. *Martin v. Barnhardt*, 39 Ill. 9.

Regularity in Procuring Juror. — Where the record shows nothing as to how a juror came upon the panel, it will be presumed that he was regularly drawn. *People v. Johnson*, 81 Mich. 573.

Presumptions — Service by One Apparently Not a Juror. — Where the verdict was signed by a person who by the record did not appear to have been a juror, the regularity of the verdict will be presumed, especially where there has been laches on the part of the complaining party. *Bickel v. Kraus*, (Ky. 1897) 39 S. W. Rep. 414.

Summoning Talesmen. — If the ground of objection to the mode of summoning talesmen is not properly presented by the bill of exceptions, it will be presumed that the proceedings were regular. *State v. Smith*, 26 La. Ann. 62.

Information to Jurors as to Character of Case. — Where the bill of exceptions contains no statement relative thereto, it will be assumed that the jurors who were examined were informed as to the case about to be tried so as to enable them to answer the questions understandingly. *Com. v. Surles*, 165 Mass. 59.

Following of Rule of Court. — In the absence of any rule of law on the subject, it will be presumed that in impaneling a jury the court followed a rule adopted by itself. *State v. Shelledy*, 8 Iowa 477.

3. **Of Mistake in Record.** — In *State v. Hultz*, 106 Mo. 41, it appeared by the bill of exceptions that the examination of the juror on the *voir dire* showed him to be competent, but that he had been ordered to stand aside, which he failed to do, but remained on the panel, and the appellate court presumed that the statement that he was ordered to stand aside was a mistake in making up the record on appeal.

Exhaustion of Peremptory Challenges. — If the record is silent the court will not presume that the appellant exhausted his peremptory challenges before the jury was obtained. *Johnson v. State*, 27 Tex. 758.

X. CUSTODY AND CONDUCT — 1. Officer in Charge — a. JURY MUST BE IN CUSTODY OF OFFICER — (1) In General. — It is the general rule that, when the jurors leave the court during the trial of the causes, they should be placed in custody of an officer duly sworn to attend them;¹ and the record should show that this was done,² though it is not necessary to show that the jury

Courts Will Take Judicial Notice of the Public Statutes and authoritative decisions of courts within their jurisdiction. Consequently it was held that the action of the trial court in proceeding to try and determine challenges for actual bias, pursuant to the Utah Act of March 13, 1884, instead of appointing triers as formerly required by the Criminal Practice Act of 1878, would not be reversed as error, even though the record was silent as to whether the amendatory Act of March 13, 1884, had been published as required by the Act of January 19, 1854. *People v. Hopt*, 3 Utah 396.

As to Mode of Qualification. — Where the record shows that the juror qualified on his *voir dire* there is no presumption that he did so by a statement of his condition, making known his convictions and the reasons thereof. *Riddle v. State*, 3 Heisk. (Tenn.) 401.

Denial of Right of Challenge. — Presumption will not be indulged that the accused was denied his legal right of challenge to its full extent. *Clarke v. State*, 87 Ala. 71.

Of Circumstances Authorizing Particular Number of Challenges. — Where, by statute, a certain number of challenges may be allowed under prescribed circumstances, if it appears that the prescribed number was permitted to be interposed it will be presumed, in the absence of anything to the contrary, that the circumstances in question existed. *Cable v. State*, 8 Blackf. (Ind.) 531.

1. *Farley v. People*, 138 Ill. 97; *State v. Parrant*, 16 Minn. 178.

In *Robbins v. State*, 49 Ala. 394, it was said: "It is the safer practice, especially in case of felonies, not to permit the jury to depart the presence of the court, even on an adjournment, unless attended by a sworn officer, and not to permit them to separate even then." See also *Williams v. State*, 45 Ala. 57.

In *King v. State*, 91 Tenn. 617, it was said that the rule relative to the custody of the jury requires that its members shall be put under the charge of

an officer sworn to keep them together, and to prevent them from mingling with others, or from having any communication with persons not of the jury, and to have none with them himself in regard to the case.

In a Justice's Court the jury must be put in charge of a constable sworn to attend it, unless it finds its verdict immediately, without leaving the box. The attendance is necessary, however, whether it retires from the court room or is left alone therein. *Douglass v. Blackman*, 14 Barb. (N. Y.) 381.

Special Order Unnecessary. — A jury impaneled and sworn in a felony case is, while not present in court, committed by the law to the custody of the sheriff or other officer until it is discharged, without any special order of the court committing it to his care. *State v. Poindexter*, 23 W. Va. 805.

Remaining in Custody During Trial. — The court may, in its discretion, direct the jury to remain in the custody of an officer during the trial. *People v. Considine*, 105 Mich. 149.

Where criminal trials are extended through a number of days, it is no deflection of the rule of the common law to place the jury, in case of adjournment, in charge of a sworn officer of the court, with instructions not to permit any communication between the jury and other persons with regard to the case on trial. *State v. Cucuel*, 31 N. J. L. 249.

Jury Taken Outside County. — In *Thompson v. Com.*, 8 Gratt. (Va.) 637, the jurors, while out for relaxation and exercise, accompanied by the officer having them in charge, passed from the county in which the trial was pending into an adjoining county, wherein they remained for a few minutes together, without conversation or communication between themselves or with other persons. There was held to be no such separation as would require a conviction of murder in the second degree to be set aside. To the same effect see *King v. State*, 91 Tenn. 617.

2. *Barnes v. Com.*, 92 Va. 794.

Sufficient Showing. — A record stating

returned into court in charge of the officer.¹ There are some cases, however, in which it has been held that where it clearly appears that the jury could not have been tampered with, the fact that no officer was in charge of it is not of itself ground for reversal.²

Verdict without Leaving Court Room. — Where the jury renders its verdict without leaving the court room, there is no necessity that it should be placed in charge of a sworn officer.³

Taking Jury to Private Place. — In giving the jury into the custody of the officer, the court generally directs that it be taken to a convenient private place, but a failure to comply with such direction is not a ground for setting aside the verdict if no injury resulted therefrom.⁴

that the jury, "having received the charge of the court, and having retired to their room to deliberate, returned into court the following verdict," etc., will authorize the presumption that a sworn bailiff accompanied the jurors in their retirement. *Morris v. Graves*, 2 Ind. 354.

1. *Robertson v. State*, 4 Lea (Tenn.) 425; *Scott v. State*, 7 Lea (Tenn.) 232. See also *State v. Ryan*, 13 Minn. 370; *State v. Poindexter*, 23 W. Va. 805.

2. In *Jarnagin v. State*, 10 Yerg. (Tenn.) 529, the court refused a new trial on the ground that the jury had retired to consider its verdict without being accompanied by an officer, where it appeared that the retiring room was in the building wherein the court was held, that the jurors had not been improperly separated, and that there had been no communication with them.

No Access to Jury Room Except from Court Room. — Where the jurors, in the presence of the court, retired by a stairway leading directly up from the court room, and deliberated upstairs, returning by the same way to the court room, the court still sitting, it appearing also that the stairway was the only means of access to and exit from the jury room, the fact that no officer was sworn to attend them or did in fact attend them is not a ground for reversal unless it appears that their privacy was invaded. *Smith v. State*, 63 Ga. 168.

Consent of Parties — Waiver of Objection. — In *Tower v. Hewett*, 11 Johns. (N. Y.) 134, consent of the parties that a jury in a justice's court might retire to consider its verdict without the attendance of a constable was held to amount to a waiver of irregularities on the part of the jury in drinking and

admitting strangers into the jury room.

3. *Meyer v. Foster*, 16 Wis. 296; *State v. Parrant*, 16 Minn. 178; *Fink v. Hall*, 8 Johns. (N. Y.) 437.

Record Need Not Show Swearing of Officer. — Where it does not appear from the return of a justice that the jury left the court room, it is immaterial that the record does not show that the officer was sworn to take charge of the jury. *Meyer v. Foster*, 16 Wis. 296.

4. **As to the Effect of Exposure to Outside Influences**, see *infra*, X. 9. *Communications with Outsiders*.

Jury Taken to Best Place to be Found. — It is not a good ground of objection that the jury was not kept in a private and convenient place if it appears that it was kept in as good a place as could be found in the vicinity of the court house, and that no right of the defendant was prejudiced. *State v. Hendricks*, 32 Kan. 559.

Jury Taken to Public Inn. — It is not a ground for setting aside a verdict that the jurors in a capital case, who were ordered by the court to be taken to a convenient private place, were taken by the officer to a public inn and there kept in his charge. *State v. Cucuel*, 31 N. J. L. 249. See also *State v. Fairlamb*, 121 Mo. 137.

Jury Taken to Public Square. — In *State v. Leunig*, 42 Ind. 541, it was held that the jury was improperly discharged because the bailiff in charge, disobeying the order of the court, instead of taking the jurors to a room took them to a public square, there left them, went to the saloon of the defendant, who was on bail, procured a can of beer from the barkeeper, and gave it to the jurors, who drank it.

Taken to Place Not Convenient. — The

Officer to Remain with Jury. — The officer in whose charge the jury is placed should not separate himself from the jury, and if he does so, and leaves the jurors where they are exposed to influences which may prejudice them, it may be a ground for a new trial.¹ But the requirement that the jurors shall be in charge of an officer sworn to attend them should not be construed to preclude the officer in charge from giving them or any of their number into the custody of another sworn officer where the occasion demands it.²

(2) **Who May Have Charge of Jury — Elisor.** — It is usual for a sheriff or constable to have charge of the jury, but where the ordinary officers are disqualified, an elisor may be appointed.³

A Minor may be placed in charge of the jury in the absence of any statute to the contrary.⁴

Where the Officer Is a Witness in the case, he is not on that account disqualified from acting as custodian of the jury,⁵ nor will his

fact that a jury was taken to deliberate in a place not convenient is no ground for reversal where it is not shown that by reason thereof the verdict was not a fair expression of opinion of all the jurors. *Newkirk v. State*, 27 Ind. 1.

Agreement Before Leaving Room. — It is not ground for a new trial that a jury was not kept in a private place until it rendered its verdict if, in fact, the jurors had agreed upon the verdict before leaving their room. *People v. Francis*, 52 Mich. 575.

Allowing Strangers to Have Access to Jury. — It is the duty of the bailiff not to permit strangers to have access to a juror out of his sight and hearing, and thus afford an opportunity, however slight, for tampering with the jury. *State v. Harris*, 12 Nev. 414.

1. *Love v. State*, 6 Baxt. (Tenn.) 154. As to exposure to outside influences, see *infra*, X. 9. *Communications with Outsiders*.

Jurors Left in Company of Outsiders. — Where an officer into whose charge a jury was committed went into a private residence, and while there withdrew from the room in which the jurors were, leaving them in the company of three outsiders, it was held that the verdict should be set aside although such outsiders testified that during the absence of the officer no allusion was made to the trial. *Com. v. Wormley*, 8 Gratt. (Va.) 712. But see *Hoover v. State*, 5 Baxt. (Tenn.) 672, wherein it was held that though the officer in charge of the jurors repeatedly separated himself from them in their retirement, it was not ground for a new trial

where the jurors did not separate and were not guilty of any misconduct.

2. *State v. Crawford*, 99 Mo. 74; *Tripp v. Bristol County*, 2 Allen (Mass.) 556; *People v. Hughes*, 29 Cal. 257.

Where Two Bailiffs Are Appointed to Attend a Jury, the absence of one for a short time, leaving the other in charge, is not improper. *State v. Harrigan*, 9 Houst. (Del.) 369.

Presumption of Authority. — That a juror, upon separating from his fellows, was in charge of a person other than the sheriff sworn to take charge of the jury will furnish a presumption that such person was a subordinate of the sheriff, and as such qualified to take charge of the juror in question. *State v. Crawford*, 99 Mo. 74.

3. *People v. Ebanks*, 117 Cal. 652.

Person Not a Constable. — In *Staley v. Barhite*, 2 Cai. (N. Y.) 221, a justice's judgment was reversed because a person not a constable was sworn to attend the jury.

4. Not Ground for New Trial. — The fact that a minor appointed as bailiff for the term has the custody of the jury in a criminal case, after being duly sworn to take charge of it, is no ground for a new trial, since he is an officer *de facto*, and as such his acts are valid as to third persons and the public. *McCann v. People*, 88 Ill. 103.

5. *State v. Shores*, 31 W. Va. 491.

In *People v. Coughlin*, 65 Mich. 704, it was held that there was no impropriety in the fact that the sheriff having charge of the jury during its deliberations made the complaint for homicide

serving in such case be of itself a ground for a new trial.¹

An Objection to the Officer in Charge will be deemed waived unless taken in season.²

b. SWEARING THE OFFICER — (1) Necessity for Special Oath. — As to the necessity for administering a special oath to the officer at the time the jury is placed in his charge, and the effect of a failure to do so, the decisions are not in accord. In some cases the rule that the officer must be specially sworn is strictly enforced, and an omission to administer such oath is held to be a ground for a new trial;³ but the modern tendency seems to be to relax the strictness of this rule, and not to set aside a verdict on account of the failure to swear an officer, where it appears that no prejudice has resulted therefrom,⁴ and if the officer has taken the general oath during the term it is held sufficient.⁵ Where the jury is placed in the charge of a sworn officer,

upon which the defendant was arrested, and also was a witness in the case on behalf of the people.

Not Prosecuting Witness. — An officer called upon to testify on behalf of the prosecution is not a prosecuting witness within the meaning of a law excluding a prosecuting witness from having charge of the jury. *Edwards v. Territory*, 1 Wash. Ter. 195.

1. *People v. Beverly*, 108 Mich. 509.
2. *Tripp v. Bristol County*, 2 Allen (Mass.) 556.

3. *Roberts v. State*, 72 Ga. 673; *Lewis v. People*, 44 Ill. 452; *State v. McCormick*, 57 Kan. 440; *McCann v. State*, 9 Smed. & M. (Miss.) 465; *Brucker v. State*, 16 Wis. 333.

Ordinary Oath of Office Insufficient. — The failure to administer to the bailiff, on taking charge of the jury, the special oath required by statute relative to his duties as to the custody of the jurors on their retirement is cause for reversal, although the ordinary oath of office was administered to him on his appointment, and although at the beginning of the trial the oath as to the charge of the jury during the trial was also administered. *State v. McCormick*, 57 Kan. 440. See also *Brucker v. State*, 16 Wis. 333.

Certiorari — Return Must Show Oath. — If the return on certiorari fails to show the administration of the oath prescribed by law to the constable in charge of the jury in a justice's court, the error is fatal; but it is not necessary that the form of the oath administered should be returned, and when the return does not purport to set it out *in hac verba* it will be presumed

that the statutory oath was administered. *Day v. Wilber*, 2 Cai. (N. Y.) 134; *Van Doren v. Walker*, 2 Cai. (N. Y.) 373; *Coughnet v. Eastenbrook*, 11 Johns. (N. Y.) 532.

Not Ground for Motion in Arrest. — That the jury in a capital case was in charge of an unsworn officer, though ground for a new trial, is not technically ground for motion in arrest of judgment. *McCann v. State*, 9 Smed. & M. (Miss.) 465.

4. *State v. Frier*, 113 Mo. 648; *State v. Hayes*, 78 Mo. 307; *People v. Johnson*, 46 Hun (N. Y.) 673; *Baker v. State*, 4 Tex. App. 223; *Chapman v. Chicago, etc., R. Co.*, 26 Wis. 295. See also *Slaughter v. State*, 24 Tex. 410.

One of the Officers Not Sworn. — Where the jury in a murder case was in charge of a sworn officer, who was assisted by an unsworn officer, it was held to be no ground for a new trial, no prejudice appearing to have resulted to the defendant. *People v. Beverly*, 108 Mich. 509.

Waiver of Objection. — In *People v. Johnson*, 110 N. Y. 134, it appeared that, by consent of counsel for the defendant, the jurors were allowed to visit the scene of the crime, and that they attended without the administration to the officers accompanying them of the prescribed oath. It was held that the omission of the oath was an irregularity, which was waived by consent that the view should be taken and by omission to object or call the attention of the court to the fact of the omission of the oath, such omission being known to counsel.

5. *O'Connor v. State*, 9 Fla. 215;

such as a constable, sheriff, or deputy marshal, it is considered that, in the absence of any statute to the contrary, the official oath of such officer is sufficient, and a failure to administer a special oath will furnish no ground for a new trial.¹ But in all cases where the special oath has not been administered the court should satisfy itself that no harm has resulted therefrom.²

At What Time to Be Sworn. — Under a statute providing that when the argument is concluded the jury may retire in the charge of a sworn officer, it was held no error to refuse to have the bailiff sworn until the argument had closed.³

Need Not Be Resworn. — Where the same officer has charge of the jury from the inception of the trial, and has been sworn to keep the jurors together, etc., it is not necessary that he be specially sworn each time that he retires with the jury.⁴

At What Time Objection Taken. — The objection that the officer into whose charge the jury was given when it retired was not specially sworn should be promptly taken at the time it becomes available, else it will be deemed waived.⁵

State v. Crafton, 89 Iowa 109; Clayton v. State, 100 Ind. 201. See also McCann v. State, 9 Smed. & M. (Miss.) 465.

1. Borcham v. Byrne, 83 Cal. 23; State v. Kennedy, 8 Rob. (La.) 590; State v. Frier, 118 Mo. 648; Deranlieu v. Jandt, 37 Neb. 532; Davis v. State, 15 Ohio 72. See also State v. Poin-dexter, 23 W. Va. 805; State v. Pol-lard, 14 Mo. App. 583.

In State v. Hays, 78 Mo. 600, the record showed that the sheriff who took the jury in charge when it retired was not sworn, as provided by statute, but the record showing that the jury retired under charge of the court and the sheriff, and there appearing no proof whatever that the sheriff or any one else even spoke to the jurors during their retirement, it was held that the verdict would not be disturbed, since to vacate it in such a case would be "an observance of the mere letter of the law, without an intelligent recognition of its spirit."

United States Deputy Marshal. — Although the more regular and usual practice would be to administer a special oath to a deputy marshal placed in charge of a jury, yet, considering the fact of his general oath to perform his duty, that no objection was made at any stage of the trial to his custody of the jury without a new oath, that the jurors were duly cautioned as to their duties, and that there was nothing tending to show that they were ex-posed to any influences calculated to

prejudice the defendant, the court is not obliged as a matter of law to set aside the verdict because of the failure to administer the special oath. U. S. v. Ball, 163 U. S. 662.

2. State v. Hayes, 78 Mo. 307.

3. State v. Underwood, 76 Mo. 630.

Officer Sworn After Retirement of Jury.

— In State v. Hayes, 78 Mo. 307, it appeared that the officer was not sworn to keep the jurors together, etc., until one hour and a half after their retirement, but it also appeared that he was sworn before he had any communication with them, and before the rendition of the verdict. There was held to be no such error as would require a reversal of the judgment. See State v. Hays, 78 Mo. 607, wherein the foregoing case is distinguished.

4. Johnson v. State, 8 Baxt. (Tenn.) 450; State v. Ice, 34 W. Va. 244; State v. Shores, 31 W. Va. 491; State v. Poin-dexter, 23 W. Va. 805.

Will Not Require Reversal. — That an officer was not sworn at recess is not such an irregularity as will require reversal, where it appears that but a few hours previously and when the jury was given in his charge he was sworn in conformity with a statute "to attend the jury," etc. Sanders v. People, 124 Ill. 218.

5. Chapman v. Chicago, etc., R. Co., 26 Wis. 205; Deranlieu v. Jandt, 37 Neb. 532; Baker v. State, 4 Tex. App. 223. See also Slaughter v. State, 24 Tex. 410.

(2) *Sufficiency of Oath — Form.* — In jurisdictions where the common-law practice is not adhered to, the form of the oath required to be administered to an officer before a jury is given into his custody will be found prescribed by statute.¹

Showing Oath by Record. — In *Tennessee* the record in every felony case must show affirmatively that the requisite oath was administered to the officers in charge of the jury.² This may be done by spreading the oath at large upon the minutes of the court,³ or by the sworn recital of the officer or officers that they were sworn as required by law.⁴

c. MISCONDUCT OF OFFICER — (1) *In Jury Room During Deliberation.* — While the presence of the bailiff in the jury room is a practice not to be commended,⁵ it is held by the weight of

1. *Form at Common Law.* — Formerly, at the common law, the form of the oath was: "You shall swear that you shall keep this jury without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed — so help you God." 1 Chit. Crim. Law 632.

In *New Jersey* an oath administered to the officer in whose charge the jury is placed is as follows: "You shall take this jury to some convenient place and there keep them separate from all others during the adjournment of the court; you shall not permit any person to speak to them, nor shall you speak to them yourself upon the subject of this trial, and you shall return them into court when the court convenes again, with all convenient speed — so help you God." *State v. Cucuel*, 31 N. J. L. 249.

"Converse" Equivalent to "Communicate." — An oath to the officer not to permit the jurors to converse with any person, etc., is tantamount to an oath not to allow them to communicate, etc. *Scott v. State*, 7 Lea (Tenn.) 232.

2. *Lea v. State*, 94 Tenn. 495.

Insufficient Entry. — Where the only entry in reference to the oath administered by the officers in charge of the jury during the intervening night recited simply that they were "sworn to wait on said jurors until the meeting of the court tomorrow morning at 8.30 o'clock," it was held that the entry was fatally defective because it contained nothing involving any kind of restraint upon the public, upon the jury, or upon the officers themselves. *Lea v. State*, 94 Tenn. 495.

A statute requiring the officer to keep the jurors separate and apart from all persons, and not allow them to communicate with any person, or any person to communicate with them, and not to communicate with them himself during the trial about the cause further than to ask them if they have agreed, is not complied with where the record shows that "the officer was sworn, according to law, to keep them together, separate and apart from all other persons, not to talk with them about the cause, nor allow others to do so, until he returned them into court tomorrow morning." *Buxton v. State*, 89 Tenn. 216.

3. *Lea v. State*, 94 Tenn. 495.

Must Show All the Requisites. — Where the law requires a certain oath, if the oath administered is set out on the record, to be good it must show all the requisites. *Buxton v. State*, 89 Tenn. 216; *Lancaster v. State*, 91 Tenn. 267.

In *New York* if a justice undertakes to set out the oath he administered to a constable, and it varies from that prescribed, it is fatal, notwithstanding he states that he "duly" administered it. *Reynolds v. Bedford*, 3 Cai. (N. Y.) 140.

4. *Lea v. State*, 94 Tenn. 495; *Lancaster v. State*, 91 Tenn. 267. See also *Taylor v. State*, 6 Lea (Tenn.) 235.

Sufficient Record. — A record showing that the officers attending the trial jury were "sworn as required by law in such cases" is sufficient. *Lancaster v. State*, 91 Tenn. 267.

5. *People v. Hartung*, 17 How. Pr. (N. Y. Oyer & T. Ct.) 85. See also *Waterman v. State*, 116 Ind. 51.

In *McGuire v. State*, 10 Tex. App. 125, it was said that the sheriff or other

authority that such presence is not, of itself, ground for a new trial, where it does not appear that the officer in any way participated in the proceedings or influenced the minds of the jurors.¹ There are some cases, however, which hold that the presence of the bailiff during the deliberations of the jurors raises a presumption of injury to the accused and is, of itself, sufficient to vitiate the verdict,² especially where the bailiff has given testimony bearing upon the real issue in the case.³

(2) *Communicating with Jury.*—An officer having a jury in charge should never speak to the jurors, unless by order of the court, except to ask them whether they have agreed.⁴

officer in charge of a jury has no right to be with the jurors during their deliberations or in any way make any suggestion to them touching the cause under consideration.

1. *Gainey v. People*, 97 Ill. 270; *State v. Caulfield*, 23 La. Ann. 149; *State v. Hopper*, 71 Mo. 425; *In re Benson*, (Monroe County Ct.) 16 N. Y. Supp. 111; *People v. Hartung*, 17 How. Pr. (N. Y. Oyer & T. Ct.) 85; *State v. Harper*, 101 N. Car. 761; *Slaughter v. State*, 24 Tex. 410; *Crockett v. State*, 52 Wis. 211.

In *Gainey v. People*, 97 Ill. 270, it was held that, though the presence of the bailiff during the deliberation of the jury was a grave irregularity, it would not vitiate the verdict where it affirmatively appeared that the officer was not influenced by improper motives, and that beyond the mere effect of his presence with the jury his conduct was unexceptionable, and nothing was shown from which it might reasonably be inferred that the jury was improperly influenced or the rights of the accused prejudiced.

Presumption of No Injury.—Where an officer sworn to take charge of the jury is instructed by the court that he may remain with the jurors during their deliberations, it will be presumed, in the absence of all showing to the contrary, that the officer was a proper person to have charge of the jury, and that his presence in the jury room did not tend to embarrass the jurors in their deliberations; that he was entirely disinterested as to the result of the trial. *Crockett v. State*, 52 Wis. 211, *disapproving* *People v. Knapp*, 42 Mich. 267.

In *Indiana* it is not a good ground for a new trial that the bailiff was present with the jurors in their room during their deliberations, where it is

shown that his presence was necessary to the proper discharge of his duties, and that no harm resulted to the complaining party. *Fitzgerald v. Goff*, 99 Ind. 28.

It was formerly held in that state that the presence of the bailiff in the jury room after the jurors had retired to deliberate was good ground for a new trial although it did not appear to have caused any injury. *Rickard v. State*, 74 Ind. 275; *McClary v. State*, 75 Ind. 260.

Discharged Bailiff in Jury Room.—Where a bailiff discharged for misconduct in taking a juror to an improper place enters the jury room after his discharge and closes the door, there is no ground for reversal if it appears that nothing was said in the room except that he inquired for his hat, and that he was immediately recalled by the court. *Green v. State*, 59 Miss. 501.

2. *Gandy v. State*, 24 Neb. 716; *People v. Knapp*, 42 Mich. 267. And see also *State v. Bailey*, 32 Kan. 83.

In *Bullock v. Hosford*, 2 Root (Conn.) 349, the verdict was set aside because the jurors allowed the constable to be present during their deliberations and because one of their number conversed with him about the case.

3. *Tarkington v. State*, 72 Miss. 731.

In *State v. Snyder*, 20 Kan. 306, it was held that the defendant was entitled to a new trial, it appearing that the bailiff, who had testified to matters of fact on behalf of the state, was with the jurors in their room during the greater part of their deliberations, and that no explanation of his conduct was offered, nor any showing that prejudice had not resulted. But see *Gainey v. People*, 97 Ill. 270.

4. *Rickard v. State*, 74 Ind. 275; *Cole v. Swan*, 4 Greene (Iowa) 32.

Where Prejudice Results. — If the officer converses with the jurors during their deliberations and makes statements calculated to influence their verdict, there is good ground for a new trial.¹ Thus, where a bailiff makes unauthorized statements to the

It Is Highly Reprehensible Conduct on the part of a bailiff to make statements as to the person on trial which are calculated to prejudice his case in the minds of jurors. *State v. Dallas*, 35 La. Ann. 899.

The Court Has No Right to direct the bailiff to go to the jury room and instruct the jurors as to the return of their verdict. *Quinn v. State*, 130 Ind. 340.

1. Remarks Prejudicial to Accused. — In *State v. Dallas*, 35 La. Ann. 899, a trial for larceny, the verdict was set aside because one of two deputy sheriffs in charge said, in the presence of the jurors, that the accused had been in the penitentiary before, and in answer to one of the jurors, during their deliberation, made further statements to the effect that the accused had been sentenced to the penitentiary for having participated in a riot, and that he had been thereafter pardoned.

In *Nelms v. State*, 13 Smed. & M. (Miss.) 500, a capital case, it appeared that two officers in charge of a jury spoke on the subject of the case in the presence of the jury, one saying that it was "a worse case than D.'s" and the other that public opinion was against the accused, and it was held that a new trial should have been granted.

Stating to Juror that Case Was a Plain One. — In *State v. Langford*, 45 La. Ann. 1177, which was a trial for assault with intent to ravish, the verdict was set aside mainly because of the misconduct of a deputy sheriff in charge of the jury, who, on being informed that the jurors stood eleven to one, stated to the juror who held out that the case was a plain one, or words of similar import.

Diverting Jury's Attention. — In *Barnett v. Eaton*, 62 Miss. 768, the verdict was set aside and a new trial granted because the officer in charge of the jurors diverted their attention from the case under consideration by noisily repeating the history of his own exploits, talking so much, according to some of the jurors, that they ceased to note what he was saying, and did not remember what he had said. It fur-

ther appeared that during the deliberations the jury was so situated that the officer might, in some of the conversations, have discussed the case with some of the jurors without the others hearing what was said, and it was deposed that he was a partner of one of the parties, though it did not appear that the successful party was at all connected with the unlawful action of the officer.

Officious Intermeddling. — In *Brown v. State*, 69 Miss. 398, the judgment was reversed because the bailiff suggested to the jurors his personal desire that they should not longer delay their decision, as he wished to be relieved of further waiting, and because of his officious intermeddling by pointing out an instruction by which they were told they might find the defendant guilty of murder and award imprisonment for life, instead of capital punishment, upon which, in the opinion of the prosecuting attorney, they would agree upon a verdict.

Misconduct on the part of jurors in seeking information of the bailiff, and on his part in answering them and imputing to the judge statements respecting their custody and the merits of the case, and in advising them and generally making himself officious, which is of such a flagrant character that prejudice must be presumed, requires a new trial, where no attempt is made to rebut the presumption. *State v. La Grange*, 99 Iowa 10.

Dictating Verdict. — In *Dansby v. State*, 34 Tex. 392, the judgment was reversed because the deputy sheriff and bailiff in charge of the jurors interfered with them during their deliberation and directed and dictated their verdict. To the same effect see *Hulet v. Barnett*, 10 Ohio 459.

Reading Instructions to Jury. — Where a bailiff in charge of jurors during their deliberations read to them portions of the instructions it was held sufficient to demand a reversal of the judgment, notwithstanding the portions of the testimony read were correctly stated and the reading was at the request of the jury. *State v. Brown*, 22 Kan. 292.

jurors regarding the necessity for a verdict or as to the probable consequences of their failing to agree within a specified time, if such statements have any influence in bringing the jury to an agreement the verdict should be set aside.¹

Where no Prejudice Results. — Although an officer may have been guilty of impropriety in making unauthorized statements to the jury, yet if, under all the circumstances, it does not appear that the conduct in question had the effect of forcing or influencing the verdict, there is no reason for a new trial.²

(3) *Sleeping with Jury.* — The fact that the officer slept in the

1. *Nelling v. Industrial Mfg. Co.*, 78 Ga. 260; *Obear v. Gray*, 68 Ga. 182; *Gholston v. Gholston*, 31 Ga. 625; *State v. La Grange*, 99 Iowa 10; *Hogan v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 949.

In *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159, it appeared that after the jurors had been out eight or nine hours without being able to agree, the bailiff came to their room, and was told that they could not agree, and requested that the judge be sent for. There was conflicting evidence as to whether the bailiff had informed them as to the length of time which they might be kept together, some of them understanding that they might be kept for eight days. It further appeared that two of the jurors were respectively the father and the uncle of a very sick child, and that within two hours after the occurrence in question they reached a verdict. Upon these facts a new trial was granted.

Intimidation of Jurors — "Hell to Pay." — In *People v. Mitchell*, 100 Cal. 328, the verdict, convicting the defendant of murder, was set aside upon the grounds that during the trial four of the jurors at night visited a woman, who was a consort of the defendant, who kept a disreputable place, and was an important witness in the case, drank intoxicating liquors, and talked with her about the case; that the conduct of the jurors became so notorious that the judge took occasion to admonish them; that the admonition was published in a daily newspaper, and that thereafter, while some of the jurors were discussing the misconduct of the others, the sheriff of the county, who was an important witness on behalf of the prosecution, declared that "if those fellows who were down on High street [the disreputable resort in question] hang this jury, there will be hell to pay."

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It was held that the jurors might have brought in the verdict of conviction in order to clear themselves of suspicion.

2. *Nelling v. Industrial Mfg. Co.*, 78 Ga. 260; *Leach v. Wilbur*, 9 Allen (Mass.) 212; *Pope v. State*, 36 Miss. 121; *Wiggins v. Downer*, 67 How. Pr. (N. Y. Supreme Ct.) 65; *State v. Wart*, 51 Iowa 587; *State v. Cady*, 46 La. Ann. 1346; *McGuire v. State*, 10 Tex. App. 125.

In *Pope v. State*, 36 Miss. 121, a new trial was refused although the bailiff told the jurors that unless they decided the case one way or the other they would have nothing more to eat and no water to drink, some of the jurors understanding this to be a statement made by direction of the court.

Harmless Response to Request for Testimony. — In *State v. Barker*, 43 Kan. 262, it was held to be no ground for a new trial that in response to a request for testimony the bailiff said, the door being closed, "Gentlemen, you cannot have any testimony admitted after you have gone into your jury room," instead of conveying the request to the judge and obtaining a direction from him.

Conversation Not Relating to Trial. — A verdict will not be set aside because the jurors, while deliberating, conversed with a deputy sheriff who sat at the same table with them at supper, where they were kept together during the adjournment of court, and the conversation did not relate to the trial, and could not have affected their decision. *State v. Summers*, 4 La. Ann. 27.

Officer Making No Reply to Juror's Question. — It is not ground for reversing a judgment that in their retirement one of the jurymen asked the bailiff if they could find the verdict and the court fix the punishment, where the bailiff made no reply, no further inter-

same room with the jury is not of itself ground for a new trial where it appears that no influence was exerted by him upon the minds of the jurors.¹

(4) *Furnishing Liquor to Jury.* — It is improper for an officer to furnish liquor to a juror,² though it is not, of itself, ground for a reversal where no injury has resulted therefrom.³

(5) *Proof of Misconduct.* — In the absence of sufficient proof to the contrary,⁴ the conduct of an officer in charge of a jury will

rogation took place, and it was apparent that no prejudice resulted. *State v. Stark*, 72 Mo. 37.

Misconduct Must Be Proved. — A new trial will not be granted for alleged misconduct on the part of the bailiff in making statements to the jurors in their room as to how long a judge would keep them for the purpose of obtaining a verdict, unless the misconduct is clearly proved. *Clay v. Montgomery*, 102 Ala. 297.

1. *Webb v. State*, (Miss. 1897) 21 So. Rep. 133; *Kirk v. State*, 73 Ga. 620; *Doyal v. State*, 70 Ga. 134; *State v. Morris*, 84 N. Car. 756.

In *Cornwall v. State*, 91 Ga. 277, it was held that although an attending bailiff remained all night in the same room occupied by the jurors at a hotel where they were lodged under instructions of the court, it would not vitiate the verdict, unless the jury was there for the purpose of deliberation, or something was said or done concerning the case, and especially when the room was merely occupied as a place of repose, and when the case was not under discussion or immediate consideration, at any time when the bailiff was present, or during that night.

2. *Robinson v. State*, 33 Ark. 185; *Kee v. State*, 28 Ark. 155; *Westmoreland v. State*, 45 Ga. 225; *Davis v. People*, 19 Ill. 74. As to the effect of intoxicating liquors furnished to the jury, see *infra*, X. 11. *b. Intoxicating Liquors.*

3. *Robinson v. State*, 33 Ark. 185. See also *State v. Beste*, 91 Iowa 565.

Liquor for Sick Jurors. — Where the court had adjourned, leaving the jurors in charge of an officer with instructions to discharge them, unless they agreed within a certain time, or if they agreed, to have them seal their verdict, the foreman of the jury told the bailiff that a juror was sick and required some brandy. The officer, after seeing the juror, and believing him ill, sent to a druggist, procured a

small quantity of brandy, and passed it to the foreman. Afterwards another juror fell upon the floor in a fit, and the officer sent for a physician, who attended the juror. Subsequently the jury agreed upon a verdict, sealed it, and was discharged. It was held that the presiding judge having found that the officer acted in good faith, and that the unsuccessful party had not been prejudiced, there was no requirement on the part of the reviewing court, as a matter of law, to set aside the verdict. *Nichols v. Nichols*, 136 Mass. 256.

Undue Influence — New Trial. — In *People v. Myers*, 70 Cal. 582, a new trial was granted on its appearing that the sheriff in charge of the jury, who relied on a conviction for reimbursement of moneys paid out, and for a reward, furnished the jurors with liquor in public saloons, at his own expense, this irregularity being held not counterbalanced by the fact that the jurymen on one occasion were treated by one of their own number and on another occasion by one of the attorneys for the defendant.

4. **Hearsay Evidence.** — In *McClary v. State*, 75 Ind. 260, the fact that the bailiff had told the affiant that he was in the jury room a greater part of the time while the jury were in consultation was held to be mere hearsay evidence, and insufficient to support a positive allegation that the bailiff was in the room during the time the jurors were deliberating.

Certiorari — Justice's Return. — In view of the practice that a justice's return of what he knows officially must determine the result on certiorari, a return by a justice that he has no personal knowledge that the attending officer remained with the jury during their deliberations, but since the trial was informed of it as a fact by some of the jurors, requires that the proceedings below shall remain undisturbed. *People v. Etter*, 72 Mich. 175.

be presumed to have been proper.¹ To prove misconduct on his part the testimony of a juror is admissible.²

(6) *Punishment for Misconduct.* — The officer in charge of a jury may be punished by the court for improper conduct.³

2. *Sending Jury Out During Argument on Instructions or Evidence.* — It is within the discretion of the court to send out the jury during arguments relative to the instructions⁴ or the admissibility of evidence.⁵

3. *Illness of Juror.* — A mere temporary attack of sickness, though it may for the time being incapacitate a juror, is not necessarily a reason for discharging him. Where the circumstances permit, it is proper to wait a reasonable time for the juror's recovery,⁶ and if he so far recovers as to permit the trial to proceed, and there is no reason to suppose that he was mentally incapacitated by his sickness, the verdict will not be disturbed.⁷

1. *Kirk v. State*, 73 Ga. 620; *Thompson v. State*, 26 Ark. 323.

2. *Nelms v. State*, 13 Smed. & M. (Miss.) 500.

Affidavits of Jurors are admissible to show the misconduct of the bailiff. *Thomas v. Chapman*, 45 Barb. (N. Y.) 98; *Heller v. People*, 22 Colo. 11.

Affidavits in Appellate Court. — Where the misconduct of bailiffs is presented to the court below entirely on affidavits, the appellate court may judge of the weight to be attached to them. *Heller v. People*, 22 Colo. 11.

Inadmissible in Chancery. — The testimony of jurors is not admissible, on an application in chancery for a new trial, to show an intermeddling of the bailiff in the jury room. *Hulet v. Barnett*, 10 Ohio 459.

3. *For Furnishing Liquor* to the jury, or allowing it to be furnished, the officer in charge should be punished. *Westmoreland v. State*, 45 Ga. 225; *Davis v. People*, 19 Ill. 74; *Kee v. State*, 28 Ark. 155.

For Improper Interference by a bailiff with the jury in their deliberations he should be punished. *Brown v. State*, 69 Miss. 398; *Nelms v. State*, 13 Smed. & M. (Miss.) 500; *Reins v. People*, 30 Ill. 256.

4. *Casey v. State*, 37 Ark. 67.

Motion to Direct Verdict. — A party is not entitled to have the jury retire during the argument of a motion to direct a verdict. *State v. Huff*, 76 Iowa 200.

5. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205.

To Determine Competency of Witness. — In a capital case the court may require

the jury to retire until it determines the competency of a witness. *Kraner v. State*, 61 Miss. 158.

To Explain Objectionable Question. — There is no error on the part of the presiding judge in sending the jury out of the court room in charge of a sworn officer while counsel states to the court what evidence he desires and expects to elicit from a witness to whom he has propounded a question which has been objected to. *State v. Moore*, 104 N. Car. 743.

6. *Nichols v. Nichols*, 136 Mass. 256.

7. *People v. Brown*, 76 Cal. 573.

In *Hughes v. People*, 116 Ill. 330, a juror had a spasm or fit which rendered him unconscious for a few hours. No discussion of the case was had until the juror was so far restored that he was able to take part in the deliberations, and it was held that there was no prejudice to the defendant.

In *Surles v. State*, 89 Ga. 168, it was held that a new trial was not necessary because of the fact that during the trial a bed was furnished to a juror, weak from illness, and upon which he reposed during the remainder of the trial, where his medical attendant deposed that his physical condition did not impair his mental faculties nor unfit him for his duties, and the juror himself deposed that his mental faculties were in their normal condition; that he was free from pain, and his mind in as collected a condition as in health.

A Juror Having Become Ill After Agreement, but before rendition of the verdict, and thereafter recovering after

Medical Attention. — The court may, in its discretion, allow suitable and necessary medicine and medical attention to be furnished to a sick juror,¹ and if the jurors are not thereby exposed to prejudicial influences, there is no ground for a new trial.²

4. Misconduct of Jurors—*a*. GENERAL PRINCIPLES. — The divergence of the jury from the line of duty is susceptible of such an infinity of degrees, and the circumstances attending each dereliction are so infinite in variety, that no two derelictions, in general character the same, will be even approximately of equivalent enormity, and it is impossible to state specifically what facts, circumstances, or conditions will constitute such misconduct as to require the disturbance of a verdict.³

professional treatment, again retired with his fellows and joined with them in a verdict. On a motion subsequently made, for a new trial, there was testimony pro and con as to whether the juror had been mentally incapacitated prior to and at the time of the agreement, or was merely suffering from nervous exhaustion consequent upon the strain of the trial. Testimony was given as to the past health of the juror, his general health, and his condition since the trial which warranted the trial court in denying the motion, and with its action in that behalf the appellate court refused to interfere. *People v. Buchanan*, 145 N. Y. 1, *affirming* (Gen. Sess.) 25 N. Y. Supp. 481.

Juror Drowsy and Inattentive to Argument. — In *Baxter v. People*, 8 Ill. 368, a capital case, it was held insufficient ground to set aside a verdict that during the address of counsel for the defendant one of the jurors had a chill, was placed on a pallet by order of the court, and for a time, being drowsy, did not comprehend the argument, though he understood all the evidence, and all said previously by counsel — the fact that he was asleep or in a drowsy condition being known to the prisoner, but the attention of no one being called to the fact. The judgment in this case, however, was reversed on another ground.

1. *Nichols v. Nichols*, 136 Mass. 256; *O'Shields v. State*, 55 Ga. 696. As to intoxicating liquors administered to jurors as medicine, see *infra*, X. 11. *b*. (2) (b) *When Drinking Not Ground for New Trial*.

2. *People v. Buchanan*, 145 N. Y. 1 [*affirming* (Gen. Sess.) 25 N. Y. Supp. 481]; *Goersen v. Com.*, 106 Pa. St. 477; *State v. Town, Wright* (Ohio) 75.

Physician Called After Agreement. — A new trial will not be granted on the ground that jurors were ill when deliberating and that one of them was treated by a physician, where it is shown that the physician was not called until after agreement on the general verdict, that he prescribed for the juror in question by consent of the appellant, and that all the jurors were able actively to participate in the consideration of the case. *Wesley v. Chicago, etc., R. Co.*, 84 Iowa 441.

Physician Should be Cautioned. — In *Nichols v. Nichols*, 136 Mass. 256, it was said that if the sickness of a juror is brought to the attention of the court while the jurors are deliberating, and medical attendance seems to be necessary, the better way is for the court to select a suitable physician and to caution him in advance not to enter into any conversation with any of the jury upon any matter except such as may be directly connected with the needed relief for the disorder.

3. In *State v. Cucuel*, 31 N. J. L. 249, Beasley, C. J., after using in effect the language of the text, said: "I cannot but think that among legal phenomena, few are more strange than that this question has been one on which courts have been much divided." See also the various sections herein dealing with specific heads of misconduct.

Unseemly and Reprehensible Conduct. — Although the conduct of the jurors in entering into disputes calling for the reading of minutes of the testimony previously given and entering upon the discussion and controversy with counsel as to the construction of written evidence may be unseemly and reprehensible, yet it cannot be said to be prejudicial, especially if the court

b. PREJUDICIAL MISCONDUCT — (1) Effect in General. — Where prejudice has resulted to the unsuccessful party from the misconduct of the jury, he is entitled to have the verdict set aside, provided he was not concerned in such misconduct.¹

has instructed the jury relative to its conduct in that respect. *Truman v. Bishop*, 83 Iowa 697.

Irregularities which would subject a jury to censure, whether in drinking, separating, or the like, unless there be some reason to suspect that the irregularity may have had some influence on the final result of the cause, will not be sufficient to overturn the verdict. *State v. Harrigan*, 9 Houst. (Del. 369.

Misbehavior Towards Court. — A verdict should never be set aside for a juror's misbehavior towards the court, unless it is prejudicial to one or other of the parties. *State v. Madoil*, 12 Fla. 151; *Crane v. Sayre*, 6 N. J. L. 110.

With Regard to Instructions. — Inattention to or misapprehension of instructions on the part of a portion of the jury is not ground for a new trial. *State v. Dickson*, 6 Kan. 209.

Questioning the correctness of the instructions by the jury after retirement is not such misconduct as will require reversal. *State v. Peterson*, 38 Kan. 204.

Calling for Evidence. — Irregularity on the part of a jury in a justice's court in requiring additional evidence is not such misconduct as will render the verdict illegal. *Nolen v. Heard*, 87 Ga. 293.

In *State v. Watkins*, 9 Conn. 47, after the evidence was closed, and while the audience were retiring, one of the jurors, in a voice audible to the clerk of the court, addressed the public prosecutor, saying: "We must have B. [a witness] here, and you must bring him here." The next morning, the case being still on trial, the same juror publicly made application to the presiding judge to the same effect. The court, being of opinion that there was no prejudice, and that the motive of the juror and of his fellows was simply to have the cause sifted to the bottom in order more satisfactorily to their own minds to do public justice, refused to disturb the verdict.

Playing Cards. — In *State v. Taylor*, 134 Mo. 109, the alleged misconduct was the playing of cards, but it did not appear whether this occurred during

the trial or during recess, before they were finally charged with the case. The court said that if merely pending the trial and before the cause was delivered to them for determination, a simple game of draughts or cards to relieve the tedium of recess would not be regarded as a serious affair, certainly when indulged in with moderation.

Stating How Jury Stands on Verdict. — In *People v. Kennedy*, 57 Hun (N. Y.) 532, it was held that there was no ground for disturbing the verdict for the reason that after a statement by the jurors to the court that they could not agree before being sent out for further consideration, one of them proceeded to state how the jury stood, but was stopped by the court.

Juror Reporting Evidence for Newspaper. — In *State v. Cottrell*, 19 R. I. 724, it was held that the fact that the foreman of a jury in a criminal case reported the evidence for a newspaper was insufficient to warrant a new trial, where it did not appear that the report was inaccurate, "dressed up," or in any respect different from what it would have been if the notes had been taken for the personal use of the juror.

Forced Verdict. — In *Morrow v. M'Lennen*, 3 N. J. L. 477, the judgment was reversed because those in favor of the prevailing party insulted the others, broke out of the room in defiance of the constable, and procured provisions, which they publicly ate in an adjoining room and refused to share with those differing in opinion with them. In this case the affiant, one of the jurors, stated that he joined in the verdict, though opposed to it, under the apprehension of being starved out.

Cautioning by Court. — Where rumors of the alleged misconduct of a juror are brought to the attention of the court, it may call the attention of the jury thereto, and admonish the jurors as to the repetition of the alleged misconduct. *State v. Floyd*, 61 Minn. 467.

1. *Portis v. State*, 27 Ark. 360; *Collier v. State*, 20 Ark. 36; *Hutchins v. State*, 140 Ind. 78; *Grinnell v. Phillips*, 1 Mass. 530; *Woodbury v. Anoka*, 52

(2) *Punishment for Misconduct.* — When it becomes known to the trial court that jurors have been guilty of conduct inconsistent with their duties, they should be brought before the court and such punishment should be imposed on them as their offense may require,¹ as for a contempt of court.²

(3) *Necessity of Prejudice.* — The rule supported by the weight of authority is that a verdict will not be disturbed because of misconduct or irregularity on the part of jurors unless the dereliction complained of was of such a character as to affect their impartiality or to incapacitate or disqualify them from the proper performance of the duties imposed upon them by law.³

Minn. 329; Hayward v. Calhoun, 2 Ohio St. 164; Anschicks v. State, 6 Tex. App. 524; State v. Harrison, 36 W. Va. 729; State v. Hartmann, 46 Wis. 248.

Innocence of Prevailing Party. — If it does not appear that the misconduct was occasioned by the prevailing party, or by any one in his behalf, and if it does not indicate any improper bias in the juror's minds, and the court cannot see that it either had or might have had an effect unfavorable to the moving party for a new trial, the verdict ought not to be set aside. Pettibone v. Phelps, 13 Conn. 445; Woodbury v. Anoka, 52 Minn. 329; Koehler v. Cleary, 23 Minn. 325; Dennison v. Powers, 35 Vt. 39; Jackson v. Smith, 21 Wis. 26.

Party Participant in Misconduct. — A new trial will not be granted for misconduct of a juror in which the complaining party participated. U. S. v. Salentine, 8 Biss. (U. S.) 404; Bradshaw v. Degenhart, 15 Mont. 267.

1. *Arkansas.* — Kee v. State, 28 Ark. 155; Portis v. State, 27 Ark. 360.

Connecticut. — State v. Andrews, 29 Conn. 100.

Florida. — Tervin v. State, 37 Fla. 396.

Georgia. — State v. Helvenston, R. M. Charl. (Ga.) 48.

Indiana. — Cheek v. State, 35 Ind. 492.

Kentucky. — Yancey v. Downer, 5 Litt. (Ky.) 11.

Maine. — Purinton v. Humphreys, 6 Me. 379; Bowler v. Washington, 62 Me. 302.

Pennsylvania. — Redmond v. Royal Ins. Co., 7 Phila. (Pa.) 167.

South Carolina. — Pulaski v. Ward, 2 Rich. L. (S. Car.) 122; Welch v. Welch, 9 Rich. L. (S. Car.) 133.

Tennessee. — Riley v. State, 9 Humph. (Tenn.) 646; Griffec v. State,

1 Lea (Tenn.) 41; Davidson v. Manlove, 2 Coldw. (Tenn.) 346.

Texas. — Edrington v. Kiger, 4 Tex. 89.

Wisconsin. — Grottkau v. State, 70 Wis. 462.

England. — Mounson v. West, 1 Leon. 132.

2. *State v. Doty*, 32 N. J. L. 403, where jurors were attached for contempt on the trial of an indictment for embracery: Downer v. Baxter, 30 Vt. 467; Offutt v. Parrott, 1 Cranch (C. C.) 154; Murphy v. Wilson, 46 Ind. 537.

Contempt in Presence of Court. — Where the contempt consists in leaving a justice's court in violation of the juror's duty and of the orders of the court, an affidavit of the facts, because the contempt was not committed in the presence of the court, is not necessary in order to justify the issuance of an attachment for contempt. Murphy v. Wilson, 46 Ind. 537.

Where the Misconduct Is a Violation of a Statute, and not of the mandate of the court, it is a misdemeanor and not a criminal contempt. People v. Oyer & T. Ct., (Supreme Ct.) 3 N. Y. Crim. Rep. 208. See also Cannon v. State, 3 Tex. 31, holding that a separation of the jury is a misdemeanor for which jurors may be punished.

3. *Arkansas.* — Collier v. State, 20 Ark. 36; Kee v. State, 28 Ark. 155; McKenzie v. State, 26 Ark. 334; Thompson v. State, 26 Ark. 323.

California. — People v. Kramer, 117 Cal. 647; People v. West, 73 Cal. 345.

Colorado. — May v. People, 8 Colo. 210; Outcalt v. Johnston, 9 Colo. App. 519.

Connecticut. — Pettibone v. Phelps, 13 Conn. 445; State v. Watkins, 9 Conn. 47.

Delaware. — State v. Harrigan, 9 Houst. (Del.) 369.

(4) *Misconduct After Agreement.* — After the jurors have agreed upon their verdict, it has been held, under various circumstances, that improper conduct will not affect the verdict or entitle the unsuccessful party to a new trial.¹

Florida. — *State v. Madoil*, 12 Fla. 151.

Georgia. — *Collins v. State*, 73 Ga. 76.

Indiana. — *Ball v. Carley*, 3 Ind. 577; *Bersch v. State*, 13 Ind. 434; *Harrison v. Price*, 22 Ind. 165; *Whelchell v. State*, 23 Ind. 89; *Flatter v. McDermitt*, 25 Ind. 326; *Medler v. State*, 26 Ind. 171; *Holloway v. State*, 53 Ind. 554; *Achey v. State*, 64 Ind. 56; *De Priest v. State*, 68 Ind. 569; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *Long v. State*, 95 Ind. 481; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Barlow v. State*, 2 Blackf. (Ind.) 114.

Iowa. — *Langworthy v. Myers*, 4 Iowa 23; *Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 881; *Walker v. Dailey*, 87 Iowa 375; *State v. Beste*, 91 Iowa 565; *Carbon v. Ottumwa*, 95 Iowa 524; *Bowman v. Western Fur Mfg. Co.*, 96 Iowa 188; *Hathaway v. Burlington, etc., R. Co.*, 97 Iowa 747; *Purcell v. Tibbles*, 101 Iowa 24.

Kansas. — *State v. Dickson*, 6 Kan. 209; *State v. Gould*, 40 Kan. 259.

Kentucky. — *Yancey v. Downer*, 5 Litt. (Ky.) 11.

Maine. — *Clark v. Lebanon*, 63 Me. 393.

Minnesota. — *Woodbury v. Anoka*, 52 Minn. 329; *Koehler v. Cleary*, 23 Minn. 325.

Mississippi. — *Green v. State*, 59 Miss. 501.

Missouri. — *State v. Upton*, 20 Mo. 397; *State v. Hart*, 66 Mo. 208; *State v. West*, 69 Mo. 401; *State v. Clifton*, 73 Mo. 430; *State v. Baber*, 74 Mo. 202; *State v. Taylor*, 134 Mo. 109.

Nebraska. — *Gran v. Houston*, 45 Neb. 813.

Nevada. — *Richardson v. Jones*, 1 Nev. 408, holding that irregularities on the part of jurors will not authorize a verdict to be set aside unless the party complaining shows, at least by reasonable presumption, that he has been injured thereby.

New Jersey. — *Crane v. Sayre*, 6 N. J. L. 110; *State v. Cucuel*, 31 N. J. L. 249.

New York. — *People v. Menken*, 36 Hun (N. Y.) 90; *People v. Kennedy*, 57 Hun (N. Y.) 532; *People v. Gaffney*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.)

36; *Hager v. Hager*, 38 Barb. (N. Y.) 94; *People v. Ransom*, 7 Wend. (N. Y.) 423; *Smith v. Thompson*, 1 Cow. (N. Y.) 221; *Horton v. Horton*, 2 Cow. (N. Y.) 589; *Ex p. Hill*, 3 Cow. (N. Y.) 355; *Wilson v. Abrahams*, 1 Hill (N. Y.) 207.

Oregon. — *State v. Brown*, 7 Oregon 200.

Rhode Island. — *State v. Cottrell*, 19 R. I. 724.

Tennessee. — *King v. State*, 91 Tenn. 617.

Texas. — *McDonald v. State*, 15 Tex. App. 493; *Allen v. State*, 17 Tex. App. 637; *Testard v. State*, 26 Tex. App. 260.

Vermont. — *Dennison v. Powers*, 35 Vt. 39.

West Virginia. — *State v. Belknap*, 39 W. Va. 427.

United States. — *Henry v. Ricketts*, 1 Cranch (C. C.) 545; *Poole v. Chicago, etc., R. Co.*, 2 McCrary (U. S.) 251.

Prejudice in Favor of Complaining Party. — A party cannot complain of misconduct which would have been for his benefit. *Portis v. State*, 27 Ark. 360.

Merits of Case. — If, in view of all the evidence, the verdict effectuates justice between the parties, it should not be set aside and the parties put to the trouble and expense of a new trial, because of the misconduct of a juror in the jury room. *Hathaway v. Burlington, etc., R. Co.*, 97 Iowa 747; *Langworthy v. Myers*, 4 Iowa 23.

1. *Leaving Jury Room.* — In *Spler v. State*, 89 Ga. 737, it was held that the presiding judge properly refused to set aside a verdict because of the misconduct of the jurors in leaving the jury room, after they had agreed and sealed their verdict, because of the heat and the weather, and in occupying the court room and the veranda of the same, or in eating watermelons on the veranda, it appearing that they were under the strict charge of two bailiffs, who prevented all intercourse by bystanders with them during the night.

Remarks Importing Bias. — That a juror upon his discharge after verdict in a sarcastic and unfriendly tone said "I wonder how G. [counsel for the unsuccessful party] feels now" is not

c. PRESUMPTIONS—EVIDENCE OF MISCONDUCT—(1) *Presumption of Misconduct.*—The presumption that the jurors performed their duty and observed the admonitions of the court is one which is strongly indulged and can only be overthrown by positive proof of some act of misconduct.¹ A mere suspicion that they acted improperly will not be sufficient to justify the setting aside of a verdict,² but the alleged misconduct must be positively shown and not left to inference from circumstances.³

reason for a new trial. *Lee v. McLeod*, 15 Nev. 158. See also *infra*, X. 5. a. *Remarks of Jurors.*

Making Verdict Known.—A new trial will not be granted merely because after agreeing on and signing a verdict, but before its rendition, one of the jurors informed counsel for the successful party that the verdict was in his favor. *Hyde v. Lookabill*, 66 Iowa 453; *Ingersoll v. Truebody*, 40 Cal. 603.

The verdict will not be set aside because after agreement, and while the jury was in the court room ready to announce the verdict, one of the jurors handed to the successful party a slip of paper containing the amount of the verdict, which the latter, without looking at, handed to his counsel, who looked at it and immediately handed it back to the party, who returned to the juror with instructions to hand it to the clerk. *Fash v. Byrnes*, 14 Abb. Pr. (N. Y. Super. Ct.) 12.

1. *California.*—*People v. Williams*, 24 Cal. 31; *People v. Kramer*, 117 Cal. 647.

Colorado.—*Outcalt v. Johnston*, 9 Colo. App. 519.

Connecticut.—*Thomson v. Church*, Kirby (Conn.) 212.

Illinois.—*Roe v. Taylor*, 45 Ill. 485.

Indiana.—*Mergentheim v. State*, 107 Ind. 567.

Iowa.—*Fulliam v. Muscatine*, 70 Iowa 436.

Kansas.—*Gleason v. Strauss*, 5 Kan. App. 80.

Minnesota.—*State v. Dumphrey*, 4 Minn. 438; *Eich v. Taylor*, 20 Minn. 378.

Mississippi.—*Lee v. State*, 45 Miss. 114.

Nevada.—*State v. St. Clair*, 16 Nev. 207.

Pennsylvania.—*Coyle v. Gorman*, 1 Phila. (Pa.) 326.

Rhode Island.—*Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188.

Tennessee.—*Boyd v. State*, 14 Lea (Tenn.) 169.

United States.—*Johnson v. Root*, 2 Cliff. (U. S.) 108; *Parshall v. Minneapolis, etc., R. Co.*, 35 Fed. Rep. 649.

In *Hannum v. State*, 90 Tenn. 647, it was held that an application for a new trial on the ground of an improper communication between a juror and an outsider was properly refused, where the only evidence thereof was that of the defendant and the officer having him in charge, neither of whom was able to name the alleged wrongdoer or the nature of the communication, and the jurors and their bailiff denied the fact, the circumstance being such that there was a mistake in the charge.

In *Kutch v. State*, 32 Tex. Crim. Rep. 184, there was held to be no error in refusing a new trial based upon the ground that two witnesses talked to the jurors, and said in their presence that the defendant did not want good men to try his cause, but wanted to get away to El Paso, where he could get rascals to try his case, and one of the jurors, not named, said that the defendant would not escape. This was sworn to by nobody but the accused, and the sheriff and two deputies swore that no such conversation took place, nor was there an opportunity for such conversation. This was likewise testified to by eleven of the jurors, the twelfth being absent from the state, and the two witnesses were also shown to be absent from the state.

2. *Roe v. Taylor*, 45 Ill. 485. But see *State v. Cucuel*, 31 N. J. L. 249.

3. *People v. Williams*, 24 Cal. 31; *Mergentheim v. State*, 107 Ind. 567; *Gleason v. Strauss*, 5 Kan. App. 80; *State v. Dumphrey*, 4 Minn. 438; *Eich v. Taylor*, 20 Minn. 378; *Lee v. State*, 45 Miss. 114; *Boyd v. State*, 14 Lea (Tenn.) 169; *Johnson v. Root*, 2 Cliff. (U. S.) 108.

Where There Is No Evidence in a Bill of Exceptions to sustain it, an allegation of misconduct and irregularity in the proceedings of the jury will not be considered. *Van Etten v. Butt*, 32 Neb. 288

(2) *Presumption of Prejudice from Proof of Misconduct.*—Where misconduct on the part of a juror which might have been prejudicial has been shown, it is held in many cases that the presumption of prejudice arises therefrom, and that this presumption must be rebutted by the successful party to prevent the setting aside of the verdict or the granting of a new trial;¹ and whenever the misconduct of the jury can be reasonably supposed to have resulted to the injury of a party, a new trial should be granted.²

d. *OBJECTIONS — WHEN AND HOW MADE* — (1) *Waiver by Failure to Object Promptly.* — Failure to object to the misconduct of the jury or of a juror when the opportunity is offered will be deemed a waiver of the objection.³

1. *Arkansas.* — *Maclin v. State*, 44 Ark. 115.

Georgia. — *Shaw v. State*, 83 Ga. 92.

Indiana. — *Creek v. State*, 24 Ind. 151; *Short v. West*, 30 Ind. 367; *Hutchins v. State*, 140 Ind. 78.

Massachusetts. — *Com. v. Roby*, 12 Pick. (Mass.) 496.

Minnesota. — *Woodbury v. Anoka*, 52 Minn. 329; *Koehler v. Cleary*, 23 Minn. 325.

Mississippi. — *Green v. State*, 59 Miss. 501.

Nebraska. — *Edney v. Baum*, 44 Neb. 294.

Tennessee. — *Nile v. State*, 11 Lea (Tenn.) 694.

West Virginia. — *State v. Cartright*, 20 W. Va. 32; *State v. Robinson*, 20 W. Va. 714; *Flesher v. Hale*, 22 W. Va. 44.

United States. — *Johnson v. Root*, 2 Cliff. (U. S.) 108.

Contra. — *State v. Woodson*, 41 Iowa 425; *State v. Cross*, 95 Iowa 629.

Wilful Misconduct. — In *Colorado* it is held that where the misconduct of the juror is wilful the verdict may be set aside, but when it is inadvertent the complaining party must show injury. *Chicago, etc., R. Co. v. McGraw*, 22 Colo. 363.

After Examination on Voir Dire and Before Swearing. — A new trial has been granted on the ground of misconduct of a juror after he was called, examined on his *voir dire*, and accepted, and before the swearing of the jury. *People v. Turner*, 39 Cal. 370.

2. *Collier v. State*, 20 Ark. 36; *Hutchins v. State*, 140 Ind. 78; *Luttrell v. Maysville, etc., R. Co.*, 18 B. Mon. (Ky.) 291, wherein it is said that a safe rule is to regard the misconduct of the jury as sufficient ground for a new trial,

where the party complaining did not connive at it nor in any manner was instrumental in producing it; *State v. Cucuel*, 31 N. J. L. 249; *State v. Hartmann*, 46 Wis. 248; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25.

Public Policy. — The misconduct of a juror, while largely, is not wholly, determinative of whether a new trial should be granted, since the misconduct may be so gross that public policy would require the court to set aside the verdict although the petitioner does not show that it was specially harmful to him. *Clement v. Spear*, 56 Vt. 401 [citing *Carlisle v. Sheldon*, 38 Vt. 440; *McDaniels v. McDaniels*, 40 Vt. 363; *Peacham v. Carter*, 21 Vt. 515; *Winslow v. Campbell*, 46 Vt. 746].

3. *Alabama.* — *James v. State*, 53 Ala. 380; *Robbins v. State*, 49 Ala. 394; *Williams v. State*, 45 Ala. 57.

Illinois. — *Shelbyville v. Brant*, 61 Ill. App. 153; *Sanitary Dist. v. Cullerton*, 147 Ill. 385.

Indiana. — *Henning v. State*, 106 Ind. 386; *Bosley v. Farquar*, 2 Blackf. (Ind.) 61.

Iowa. — *Shields v. Guffey*, 9 Iowa 322; *State v. Delong*, 12 Iowa 453.

Kentucky. — *Hunt v. Com.*, (Ky. 1889) 12 S. W. Rep. 127.

Louisiana. — *State v. Dorsey*, 40 La. Ann. 739.

Massachusetts. — *Anthony v. Travis*, 148 Mass. 53.

New York. — *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97.

Pennsylvania. — *Owen v. Schmidt*, 37 Leg. Int. (Pa.) 82, 14 Phila. (Pa.) 183.

Tennessee. — *Tinkle v. Dunivant*, 16 Lea (Tenn.) 503; *M'Donald v. Hodge*, 5 Hayw. (Tenn.) 85.

Improper Remarks Made by a Bystander, but not heard by the judge, will not require a new trial, where attention was not called thereto until after the trial.¹

(2) **Acquiescence After Knowledge of Misconduct.** — Where no objection is made and no exception is taken, the counsel practically acquiesce in the manner in which the trial is being conducted and cannot take advantage of misconduct of jurors which occurs in their presence or of which they have full knowledge.²

West Virginia. — *Flesher v. Hale*, 22 W. Va. 44.

Wisconsin. — *Grottkau v. State*, 70 Wis. 462.

United States. — *Meyer v. Cadwalader*, 49 Fed. Rep. 32.

Excuse for Delay. — When a sufficient reason is shown for not moving to set aside a conviction until after sentence, an application then made and based on the separation of the jury is not too late. *State v. Robinson*, 20 W. Va. 713.

1. *Stevens v. State*, 93 Ga. 307; *Tucker v. Sale Flouring Mills Co.*, 13 Oregon 28.

2. *State v. Henry*, 15 La. Ann. 297; *Bruswitz v. Netherlands American Steam Nav. Co.*, 64 Hun (N. Y.) 262; *Vallente v. Bryan*, 66 How. Pr. (N. Y. City Ct.) 302.

Improper Papers Taken by Jury. — *State v. Nichols*, 29 Minn. 357; *Chadwick v. Chadwick*, 52 Mich. 545; *Shields v. Gueffey*, 9 Iowa 322; *Turner v. Kelley*, 10 Iowa 574; *Davenport v. Cummings*, 15 Iowa 219.

Special Objection should be made to papers which are about to be improperly sent to the jury. *Garber v. Doersom*, 117 Pa. St. 162.

In *Hewitt v. Morris*, 37 N. Y. Super. Ct. 18, it was held that the objection and exception of the defendant's counsel to a direction of the court allowing memoranda of testimony to go to the jury, such memoranda including some on his own side which, pursuant to his request, had been seen by the jury, as well as those of the plaintiff's counsel, should have been limited to his opponent's memoranda.

Intoxication. — *Richardson v. Foster*, 73 Miss. 12; *People v. Deegan*, 88 Cal. 602; *Haupt v. Hendler*, 2 Kulp (Pa.) 400.

Inspection of Evidence During Recess. — In *People v. Wilson*, 8 Abb. Pr. (N. Y. Supreme Ct.) 137, on an indictment for murder, a new trial was refused though during recess one of the jurors examined a piece of the skull of the person

who was alleged to have been murdered, the fact being known to the counsel for the accused before the defense was entered upon and the circumstances showing that the jury could not have been influenced by the fact. This judgment was reversed, however, on other grounds. See *Wilson v. People*, 4 Park Cr. Rep. (N. Y. Supreme Ct.) 640.

That a juror picked up and looked over balance sheets which were rejected as inadmissible was held no ground for a new trial where it appeared that the counsel for the party against whom they were offered noticed the fact, but made no objection, and that no prejudice resulted. *Littlefield v. Beamis*, 5 Rob. (La.) 145.

Reading Newspaper. — In *Hunter v. State*, 43 Ga. 484, the court declined to interfere with the judgment for the reason that before completion of the jury some of those selected read a newspaper containing an article reflecting on the defendant's counsel, it appearing that the alleged wrongful conduct was in the presence of the court and of counsel, who failed to object thereto.

Expressions of Bias by Juror. — Where the defendant heard expressions of prejudice against himself by a juror, his failure to communicate the facts to his counsel, that proper objection might be made, will constitute inexcusable negligence. *State v. Burns*, 85 Mo. 47.

Unauthorized Conversation by Juror. — Although a conversation took place between a juror, a defendant, and one of the defendant's witnesses, a new trial is not necessary where it appears that, despite his knowledge of the conversation, the attorney for the adverse party made no attempt to interrogate the juror, the defendant, or the witness, and no request that the juror be removed from the panel or that the case be taken from the jury and tried anew, but continued to try the case for two

(3) *After Verdict.* — If a party has knowledge of the misconduct of the jury or of a juror during the trial and remains silent until after verdict, he is thereby precluded from urging any objection on account of any such misconduct;¹ and if, upon being advised of alleged misconduct on the part of a juror, coun-

days more and until its close. *Hill v. Greenwood*, 160 Mass. 256.

In *Rowe v. Canney*, 139 Mass. 41, during the trial one of the jurors asked a friend of the defendant why the defendant had not settled the case and not allowed it to come into court. The defendant had knowledge of such conversation on the day when it occurred, but failed to bring it to the attention of the court, although the trial continued for two days thereafter. It was held that the objection was waived.

In *Hussey v. Allen*, 59 Me. 269, the defendant, himself summoned as a juror, conversed about his case with several of his associates in advance of the trial, which fact came out on the trial on his cross-examination, and it was held that the plaintiff, by his failure then to object, and by waiting until after the trial, was precluded from insisting on the objection.

Juror Sleeping During Trial. — After trial, a party cannot complain of misconduct by a juror in sleeping while a witness was testifying and during argument, the complaining party having had knowledge of the misconduct at the time of its commission and failing to bring it to the attention of the court. *Scott v. Waldeck*, 12 Neb. 5; *Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 881.

Knowledge of Attorney. — The knowledge of a party's attorney as to misconduct of a juror is the knowledge of the party himself. *Flesher v. Hale*, 22 W. Va. 44; *Harris v. State*, 61 Miss. 304. See also *People v. Deegan*, 88 Cal. 602. But in *Oleson v. Meader*, 40 Iowa 662, it was held that the fact that the attorney of the complaining party knew of the misconduct of a juror and remained silent would not preclude the party from insisting on such misconduct as a ground for a new trial, unless it was made to appear that after knowledge of the misconduct nothing could have been done to avoid the prejudice resulting therefrom. And in *State v. Sanders*, 68 Mo. 202, it was held that the fact that the jury made unauthorized experiments out of court by advice of the counsel for the accused would

not preclude the latter from urging the misconduct as a ground for a new trial.

Trial After Offending Jurors Excused. — Where the alleged misconduct of two jurors and of the plaintiff was brought to the attention of the court, and by consent the jurors were excused, and the trial proceeded with the other ten, the defendant was held to have waived his right to complain of the misconduct. *Young v. Otto*, 57 Minn. 307.

Separation of Jury. — An objection that the jury separated after agreeing on a verdict, and before rendering it, comes too late after the jury has corrected the verdict rendered. *Loudy v. Clarke*, 45 Minn. 477.

And an objection to the temporary separation of jurors drawn before the completion of the jury comes too late if delayed until after the selection of the jurors is completed and the jury is sworn. *James v. State*, 53 Ala. 380; *Robbins v. State*, 49 Ala. 394; *Williams v. State*, 45 Ala. 57.

1. *Georgia.* — *Wynn v. City, etc., R. Co.*, 91 Ga. 344; *Lyman v. State*, 69 Ga. 404; *Kirk v. State*, 73 Ga. 620.

Indiana. — *Henning v. State*, 106 Ind. 386; *Harrington v. State*, 76 Ind. 112.

Iowa. — *Foedisch v. Chicago, etc., R. Co.*, 100 Iowa 728; *Hahn v. Miller*, 60 Iowa 96; *Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 885.

Louisiana. — *State v. Dorsey*, 40 La. Ann. 739.

New York. — *Ahrhart v. Stark*, 10 N. Y. Misc. Rep. (Buffalo Super. Ct.) 448; *Gale v. New York Cent., etc., R. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 385.

Rhode Island. — *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188.

Virginia. — *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130.

West Virginia. — *Dower v. Church*, 21 W. Va. 23.

United States. — *Berry v. DeWitt*, 27 Fed. Rep. 723; *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. Rep. 898.

In *Harrington v. State*, 76 Ind. 112, the court informed the defendant's attorneys that if they would consent he would discharge the jury, whereupon the defendant's attorneys announced

sel offers to excuse the juror, but the other party signifies his willingness to proceed with him, the effect of the alleged irregularity is waived.¹

that they would consent to nothing, but were ready to proceed. It was held that, the cause having proceeded to a conviction, the objection was waived.

Contra. — *McDaniels v. McDaniels*, 40 Vt. 363, holding that the failure to raise the objection sooner will be no more than a circumstance to be considered and weighed with others in determining, in the sound discretion of the court, whether a new trial should be granted. See also *Whitcher v. Peacham*, 52 Vt. 242.

Intoxication. — *Ipswich v. Fernandez*, 84 Cal. 639; *Bradshaw v. Degenhart*, 15 Mont. 267.

Taking Books and Papers to Jury Room. — *Turner v. Kelley*, 10 Iowa 573; *Zeibold v. Foster*, 118 Mo. 349; *State v. Robinson*, 117 Mo. 649; *People v. Morrissey*, Sheld. (N. Y.) 295; *Forbes v. Com.*, 90 Va. 550.

In *Lippus v. Columbus Watch Co.*, (Supreme Ct.) 36 N. Y. St. Rep. 629, the jurors, by consent of the attorneys, were allowed to take with them the case on a former appeal in the action, containing certain letters which they desired to consider. While in their retirement, but prior to the rendition of the verdict, it came to the knowledge of the complaining party that certain letters contained in the book had been underscored by the defendant's counsel, but he took no action until after the verdict was rendered, and it was held that his objection was then too late.

In *Boyer v. Shenandoah*, 16 Pa. Co. Ct. Rep. 75, which was an action to recover for advertising, the jurors were permitted to take with them a bound volume of newspapers containing the advertisement in question, which both parties had used on the trial, but which had not been formally offered in evidence, instructions having been given by the court to consider the advertisements in the case only, and it was held that a motion for a new trial on this ground came too late after verdict.

Instructions. — It is too late on motion for a new trial to raise objection for the first time that the jurors took with them an instruction which had been refused. *Lewis v. McDaniel*, 82 Mo. 577.

After Retirement. — There is no waiver of misconduct alleged to have occurred

the night previous, where the next morning a motion to set the verdict aside is made as soon as it is announced. *Hanrahan v. Ayres*, 10 N. Y. Misc. Rep. (Buffalo Super. Ct.) 435.

Separation. — Where the parties, on the retirement of the jurors to consider their verdict, make no objection as to their previous dispersion, there is no reason for a new trial. *Steward v. Hinkel*, 72 Cal. 187; *Stix v. Pump*, 37 Ga. 332; *Eberhart v. State*, 47 Ga. 598; *Carter v. State*, 56 Ga. 463; *Sanitary Dist. v. Cullerton*, 147 Ill. 385; *Hennings v. State*, 106 Ind. 386; *Bosley v. Farquar*, 2 Blackf. (Ind.) 61; *State v. Walton*, 92 Iowa 455; *Polin v. State*, 14 Neb. 540; *State v. McMahon*, 17 Nev. 365.

But in *Texas* the constitutional provision that a defendant may waive any right secured to him by law except the right to trial by jury precludes him from waiving the mandatory provision of the statute that when the jury separates each juror must be accompanied by an officer of the court. *McC Campbell v. State*, 37 Tex. Crim. Rep. 607; *English v. State*, 28 Tex. App. 500, *citing* *Porter v. State*, 1 Tex. App. 394; *Grisson v. State*, 4 Tex. App. 374; *Defriend v. State*, 22 Tex. App. 570, and *distinguishing* the dictum in *Sterling v. State*, 15 Tex. App. 249, wherein it was said in passing, "True, the defendant might waive the provisions of the law requiring jurors impaneled to be kept together until the determination of the trial."

In *California* it is held that where by a statute the jury is required to be kept together after its retirement, a separation of the jury by order of the court, though with the consent of the defendant, is such a violation of the provision as will require the verdict to be set aside. *People v. Hawley*, 111 Cal. 78. But see *State v. McMahon*, 17 Nev. 365, holding that a similar provision merely prescribes the mode of procedure and does not preclude a waiver of its provisions.

1. *Gale v. New York Cent., etc., R. Co.*, 13 Hun (N. Y.) 1, 76 N. Y. 594.

Presumption of Consent. — Neither party having objected, it will be presumed that an inspection of certain hats referred to in the testimony, made after

Prompt Action upon Rumors. — If rumors affecting the conduct of a juror are of so serious a character as to require a dismissal of the jury and the impaneling of another, it is incumbent on counsel to move in the matter upon information of the prevalence of the rumor, and they cannot sit silently by and speculate upon the result.¹

After Motion for New Trial. — When a party is aware of any misconduct which he does not call to the attention of the court, or object to, it will be too late to raise the objection after the disposal of a motion for a new trial and judgment ordered.²

On Appeal. — And alleged misconduct on the part of a juror will not be considered on appeal where no objection was made below nor any exception reserved.³

(4) New Trial—(a) Misconduct Ground For. — When the objection has not been waived, misbehavior on the part of the jury is properly taken advantage of by a motion for a new trial,⁴ but a

instruction by the court, was by consent of both parties. *People v. McCurdy*, 68 Cal. 576.

1. *State v. Floyd*, 61 Minn. 467.

2. *People v. Lee Chuck*, 78 Cal. 317; *People v. McCoy*, 71 Cal. 397; *Hall v. Haun*, 5 Dana (Ky.) 58; *State v. Henry*, 15 La. Ann. 297.

In *Washington*, where the question of misconduct is not raised on motion for a new trial in the manner required by statute (Code 1881, § 278; Code 1897, § 5074), it will not be considered by the appellate court. *Lybarger v. State*, 2 Wash. 552.

3. *McQueen v. State*, 82 Ind. 72; *People v. Tarm Poi*, 86 Cal. 225; *Schappner v. Second Ave. R. Co.*, 55 Barb. (N. Y.) 497.

Record. — Objections supported by affidavits cannot be raised in the Supreme Court where there is nothing in the record, as certified and settled, showing the facts. *State v. Holmes*, 12 Wash. 170; *People v. McCoy*, 71 Cal. 397; *State v. Howell*, 117 Mo. 307.

The finding of the court below on the question of misconduct in separating without consent will not be considered, where the evidence on the question is not contained in the bill of exceptions. *Bird v. State*, 18 Fla. 493; *State v. Given*, 32 La. Ann. 782.

Where a motion is made on affidavits in the court below to set aside a verdict because of improper conduct on the part of the jury, the Supreme Court will not look into the affidavit; it can only decide on the record presented to it, and if the motion is designed to be submitted to its revision, the facts must be

ascertained by the court below and spread upon the record. The court corrects errors of law committed by the judge, and not those committed by the jury. For errors of the latter kind, the remedy is for the court below to grant a new trial. *State v. Smallwood*, 78 N. Car. 560.

Where the question of the right of jurors to take notes or copies of portions of the written testimony and carry them to their room for consideration during their deliberation is presented to the appellate court, and it is not shown that the complaining party or his counsel was ignorant of the action of the jurors in that respect before the return of the verdict, the showing is insufficient to permit consideration of the point by the court. *Watson v. Roode*, 43 Neb. 348.

4. *Brister v. State*, 26 Ala. 107; *Franklin v. State*, 29 Ala. 14; *Morgan v. State*, 48 Ala. 65; *Morgan v. Bell*, 4 Martin (La.) 615; *State v. Smallwood*, 78 N. Car. 560; *State v. Miller*, 1 Dev. & B. L. (N. Car.) 500, holding that misconduct in a juror, in a capital case, as a separation from his fellows, or eating and drinking, without the permission of the court, before rendition of the verdict, is a reason for applying to the discretion of the judge in the court below for a new trial, and not to render the verdict a nullity, and a venire *de novo* proper. But in *State v. Madoil*, 12 Fla. 151, it was held that if from any cause the mind of a juror is not in a proper and fit state to render an impartial verdict, the presiding judge, in the exercise of a sound legal discretion, may

motion in arrest of judgment is not an available remedy.¹

(b) **Ignorance of Misconduct — Necessity of Showing.** — When a party moves for a new trial on the ground of misconduct which occurred during the trial, he must aver and show affirmatively that both he and his counsel were ignorant of the misconduct charged until after the trial.²

(c) **Affidavit for New Trial.** — An application for a new trial on the ground of misconduct must be supported by affidavits as to the facts.³

award a *venire de novo*. See also *Flesher v. Hale*, 22 W. Va. 44.

Before Whom. — A motion for a new trial based on the misconduct of a juror is not within section 1002 of the *New York Code Civ. Pro.*, requiring motions founded upon an allegation of error in a finding of fact or ruling upon the law, made by the judge on the trial, to be heard at a special term held by the judge who presided at the trial, and also requiring that such error be noticed within the time prescribed by the section. *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97.

1. *Forbes v. Com.*, 90 Va. 550. See article ARREST OF JUDGMENT, vol. 2, p. 807.

Unauthorized separation of the jury which does not appear on the record when the motion is made affords no reason for arresting the judgment; but the fact that the jury did separate, being shown to the appellate court by the transcript filed and proceedings had in the lower court, will be examined as if offered on motion for a new trial, which would be the proper course. *State v. Hornsby*, 8 Rob. (La.) 554.

2. *Georgia.* — *Wynn v. City, etc.*, R. Co., 91 Ga. 344; *Cogswell v. State*, 49 Ga. 103.

Indiana. — *Mergentheim v. State*, 107 Ind. 567; *Long v. State*, 95 Ind. 481.

Minnesota. — *State v. Nichols*, 29 Minn. 357.

Mississippi. — *Harris v. State*, 61 Miss. 304.

Missouri. — *State v. Robinson*, 117 Mo. 649.

Nebraska. — *Peterson v. Skjelver*, 43 Neb. 663.

Tennessee. — *Booby v. State*, 4 Yerg. (Tenn.) 111.

West Virginia. — *Flesher v. Hale*, 22 W. Va. 44.

Wisconsin. — *Jackson v. Smith*, 21 Wis. 26; *Grottkau v. State*, 70 Wis. 462 [citing *Brown v. LaCrosse City Gas Light, etc., Co.*, 21 Wis. 56; *State v.*

Vogel, 22 Wis. 471; *Bennet v. State*, 24 Wis. 57; *Bonneville v. State*, 53 Wis. 680].

See also *Woodruff v. Richardson*, 20 Conn. 240; *McIlvaine v. Wilkins*, 12 N. H. 474; *Barlow v. State*, 2 Blackf. (Ind.) 114. *Contra*, *McDaniels v. McDaniels*, 40 Vt. 363.

In *Booby v. State*, 4 Yerg. (Tenn.) 111, it was held that the mere affidavit of a juror that he had bet upon the result of the trial and that he did not believe that the defendant knew of it at the time he, the juror, was accepted was insufficient evidence of the defendant's ignorance of the fact that the bet was made, and that the defendant himself should have denied his knowledge on oath.

Where it was complained that improper papers were handed to the jury, it was held that it was not enough for the attorney of the party to show that he was "ignorant of the actual character of the papers," but that he should have shown his ignorance of the fact that the papers in respect to which the error was charged were delivered to the jury. *State v. Nichols*, 29 Minn. 357.

3. *Cogswell v. State*, 49 Ga. 103; *Urban v. Kraigg*, 21 Ind. 174; *Temple v. Lasher*, 39 Ind. 203; *Bouslog v. Garrett*, 39 Ind. 338; *State v. La Grange*, 99 Iowa 10; *Hawkins v. New Orleans Printing, etc., Co.*, 29 La. Ann. 134.

Service of Copies of Affidavit. — In *South Carolina* at an early day it was required that copies of the affidavit charging misconduct should be served on the jurors implicated before the adjournment of the court, that they might have an opportunity of explaining the charge or satisfying the court as to its untruth, otherwise the affidavits would not be considered. *State v. Duestoe*, 1 Bay (S. Car.) 377; *State v. Harding*, 2 Bay (S. Car.) 267; *Key v. Holeman*, 2 Bay (S. Car.) 315; *Pulaski v. Ward*, 2 Rich. L. (S. Car.) 119.

Specific Objections. — An affidavit to secure a new trial on account of the misconduct of a juror must clearly set out the facts constituting the alleged irregularity.¹

Information and Belief. — The affidavit should be positive as well as specific, and should be sustained by oath and not merely founded on information and belief.²

(4) **Necessity of Full Proof.** — The allegation of misconduct must be clearly established, as in the absence of full proof a presumption is indulged that the jury properly performed its duty.³

(5) **Competency of Witnesses to Prove Misconduct.** — It is competent for the officer in charge of the jurors during their deliberation to testify, for the purpose of showing misconduct on their part, as to what he saw done or heard said by them in their room;⁴ and it is generally held that the evidence of jurors themselves may be received for the purpose of showing any matters of misconduct occurring out of the jury room, or even misconduct occurring within the jury room, but not connected with their deliberations and which do not essentially inhere in the verdict itself.⁵

(6) **Testimony to Rebut Impeaching Affidavits.** — The trial

1. *Achey v. State*, 64 Ind. 56; *State v. McLaughlin*, 44 Iowa 82; *State v. Tucker*, 68 Iowa 50; *Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291; *Ran-kin v. Nelson*, (Supreme Ct.) 10 N. Y. St. Rep. 337; *People v. Reavey*, 38 Hun (N. Y.) 418; *Stone v. State*, 4 Humph. (Tenn.) 27; *Jack v. State*, 26 Tex. 1.

Identity of Juror. — An affidavit to secure a new trial because of the misconduct of a juror must identify the juror against whom the misconduct is charged. *Cornelius v. State*, 12 Ark. 782; *Achey v. State*, 64 Ind. 56; *Brant v. Lyons*, 60 Iowa 172; *McCash v. Burlington*, 72 Iowa 26; *Lennox v. Knox*, etc., R. Co., 62 Me. 322.

The Particular Misconduct should be set out; thus, in an affidavit charging a misconduct in that a juror discussed the evidence with outsiders, the nature of the discussion or communication should be set out. *Lennox v. Knox*, etc., R. Co., 62 Me. 322; *Brant v. Lyons*, 60 Iowa 172; *Walker v. Dailey*, 87 Iowa 375.

2. *People v. Tarm Poi*, 86 Cal. 225; *Stanley v. Sutherland*, 54 Ind. 339; *State v. Tucker*, 68 Iowa 50; *Mullins v. Cottrell*, 41 Miss. 291; *Stone v. State*, 4 Humph. (Tenn.) 27. But see *Trahan v. McMannus*, 2 La. 216, holding that an affidavit upon information and belief should disclose the name of the person from whom the information was obtained.

3. See *supra*, X. 4. c. (1) *Presumption of Misconduct*.

4. *Wright v. Abbott*, 160 Mass. 395.

5. *Morris v. Howe*, 36 Iowa 493; *Manix v. Malony*, 7 Iowa 81; *Heffron v. Gallupe*, 55 Me. 563; *Harris v. State*, 24 Neb. 803; *Rush v. St. Paul City R. Co.*, (Minn. 1897) 72 N. W. Rep. 733, holding that the affidavit of a juror is competent upon matters occurring outside of the jury room during the progress of the trial, but incompetent upon matters occurring in the jury room.

In *Dare v. Ogden*, 1 N. J. L. 107, the objection was that the jury received evidence of the plaintiff's demand after its departure from the bar. A juror swore that an account of the plaintiff's demand was handed in to the jury, but by whom he did not know. The court rejected the affidavit, on the ground that it was *ex parte*, taken without notice, in the absence of the opposite party and his attorney.

Incompetency of Jurors for Any Purpose. — In *Vaise v. Delaval*, 1 T. R. 11, Lord Mansfield held that the court must derive its knowledge of the misconduct of the jury from some person other than a juror, who had seen the transaction through a window or by some other means. See also *Bunce v. McMahon*, (Wyoming 1895) 42 Pac. Rep. 23; *State v. Rush*, 95 Mo. 199.

For the treatment of impeachment of

court may receive affidavits against a motion for a new trial in rebuttal of affidavits in support of such motion,¹ and the testimony of jurors, officers in charge of the jury, or other persons may be received to contradict evidence of misconduct on the part of the jury and to rebut the presumption arising therefrom.² When once the court has reason to believe that the misbehavior of jurors may have given a wrong direction to their verdict, affidavits of the jurors themselves may be admitted to explain or enlarge the evidence of actual misconduct.³

verdicts by jurors, see article NEW TRIAL.

Information Furnished by Juror to Court.

— It is the right and duty of a juror to inform the court of the misconduct of his fellows. *Morrow v. M'Lennen*, 3 N. J. L. 477.

Improper Communications by parties with the jurors may be shown by affidavit of a juror. *Ritchie v. Walbrooke*, 7 S. & R. (Pa.) 458; *Spurck v. Crook*, 19 Ill. 426.

Hearsay Testimony. — Statements by a juror of what took place during the trial of an action, made after the rendition of the verdict and the separation of the jurors, and not under oath, are simply hearsay evidence, and it is not error for the trial court to overrule a motion for a new trial based upon affidavits of such statements. *Cain Bros. Co. v. Wallace*, 46 Kan. 138.

Affidavits made by parties which purport to contain statements made by jurors during alleged conversations with them after the close of the trial of a case and their discharge therefrom, in reference to acts and discussions which occurred in the jury room while the jurors were deliberating upon their verdict, and in regard to which the affidavits of the jurors would not be received, are incompetent, and insufficient to aid in impeaching the verdict. *Peterson v. Skjelver*, 43 Neb. 663.

1. *Jarrell v. State*, 58 Ind. 293.

Counter-affidavits must fully meet those in support of the motion. *Huston v. Vail*, 51 Ind. 299; *O'Brien v. Merchants' F. Ins. Co.*, 38 N. Y. Super. Ct. 482.

Time of Filing. — Where counter-affidavits directly responsive to affidavits for a new trial, because of misconduct, are prepared, but through inadvertence and excusable neglect are not filed in time, it is discretionary with the court to permit the counter-affidavits to be read on a proper showing that the neg-

lect was excusable. *Smith v. Whittier*, 95 Cal. 279.

2. *People v. Symonds*, 22 Cal. 349; *Smith v. State*, 78 Ga. 72; *State v. Bailey*, 32 Kan. 83; *State v. Cucuel*, 31 N. J. L. 249; *Clement v. Spear*, 56 Vt. 401; *State v. Robinson*, 20 W. Va. 714.

Weight of Evidence. — Although the evidence of the juror himself who held such conversation, and of the person to whom it was addressed, should be received with great allowance, yet the evidence of another juror, who heard the conversation, and was in no manner implicated in a charge of improper conduct, is entitled to the fullest weight. *Kennedy v. Com.*, 2 Va. Cac. 510.

Statements made by a juror to disprove alleged misconduct should be accepted by the court as true. *Harding v. Whitney*, 40 Ind. 379.

Where an affidavit is filed in support of a motion for a new trial in which the affiant states that during the progress of the trial he had a conversation with one of the jurors in regard to the merits of the case, which affidavit is denied by the juror named, and the court below finds that there was no misconduct of the juror — in effect, that the charge is not sustained — the Supreme Court ordinarily will not set aside the verdict. *Everton v. Esgate*, 24 Neb. 235.

3. *People v. Hunt*, 59 Cal. 430; *State v. Rush*, 95 Mo. 199; *State v. Jackson*, 9 Mont. 508; *State v. Hascall*, 6 N. H. 352; *O'Brien v. Merchants' F. Ins. Co.*, 3 N. Y. Super. Ct. 482; *Elliott v. Luengene*, 17 Misc. Rep. (N. Y. City Ct.) 78; *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25, 14 N. Y. 562; *Farrer v. State*, 2 Ohio St. 54; *Hannum v. State*, 90 Tenn. 647; *Downer v. Baxter*, 30 Vt. 467; *Fuller v. Fletcher*, 44 Fed. Rep. 34.

Testimony Confined to Contradiction of Fact of Misconduct. — The testimony of jurors may be received to disprove or

(7) *Exercise of Discretion in Deciding Questions of Misconduct.* — The refusal or denial of a motion for a new trial for alleged misconduct on the part of the jury is, as a general rule, a matter within the discretion of the judge presiding at the trial;¹ and unless it appears that this discretion was abused,² or that there has been palpable error,³ or unless it appears that the trial court

explain any such separation, misconduct, or irregularity; but their testimony will not be received to show by what motive they were actuated, or that any admitted fact, misconduct, or irregularity had no influence or effect upon their minds in producing the verdict. In any case the testimony of jurors, where proper at all, should be received with great caution. *State v. Harrison*, 36 W. Va. 729; *State v. Jackson*, 9 Mont. 508.

Examination of Jurors in Open Court. — On motion for a new trial because of alleged misconduct of the jury, the trial court has a discretion to allow a cross-examination of the affiants. *People v. Lee Chuck*, 78 Cal. 317. And in *Tennessee* this is said to be the better practice. *Whitmore v. Ball*, 9 Lea (Tenn.) 35.

1. *Bird v. State*, 18 Fla. 493; *State v. Dugan*, 52 Kan. 23; *Com. v. White*, 147 Mass. 76, 148 Mass. 429; *Wiest v. Luyendyk*, 73 Mich. 661; *State v. Cucuel*, 31 N. J. L. 249; *Johnson v. State*, 27 Tex. 758; *Peacham v. Carter*, 21 Vt. 515.

2. *People v. Johnson*, 110 N. Y. 134; *Wright v. Clark*, 50 Vt. 130.

3. *Borland v. Barrett*, 76 Va. 128; *State v. Taylor*, 134 Mo. 109.

Record on Appeal. — In *Rinehardt v. Potts*, 7 Ired. L. (N. Car.) 403, wherein the motion for a new trial was upon an uncontradicted affidavit as to the gross misconduct of the jurors, the case on appeal merely stated that the court refused the motion, and failed to show upon what grounds the judge had based his decision. It was held that, nothing appearing to show that the decision was unwarranted, the appellate court could not consider the affidavit offered in the court below. See also *State v. Smallwood*, 78 N. Car. 560, where a similar motion was based upon uncontradicted affidavits, and wherein a similar ruling was made.

Where the court below overrules a motion for a new trial on the ground that a juror served who before his acceptance had formed and expressed an

opinion as to the defendant's guilt, the defendant being ignorant thereof until after the trial, but no facts are found by the trial court, the affidavit on the motion cannot be considered in the appellate court. *State v. DeGraff*, 113 N. Car. 688. See also *State v. Godwin*, 5 Ired. L. (N. Car.) 401, wherein the motion was based on alleged misconduct of the jury, and in which a similar rule was made.

Where the ground for a new trial is the misconduct of a juror, the finding below in support of the verdict will not be set aside unless the evidence of misconduct is clear and convincing. *Omaha Fair, etc., Assoc. v. Missouri Pac. R. Co.*, 42 Neb. 105.

Where the trial court does not award a venire facias *de novo* on the ground that the jurors or some of them misconducted themselves during the progress of the trial, it will be presumed in the absence of proof that no disqualification existed. *Stone v. State*, 4 Humph. (Tenn.) 27.

When it does not appear that misconduct of the jury relative to the use of intoxicating liquors was in consequence of the act of either party, the evidence should be spread upon the record on appeal, that the appellate court can consider the justness of the verdict. *Pelham v. Page*, 6 Ark. 535.

Exception. — In the absence of an exception properly saved, or some authoritative recital by the trial judge, it will be presumed that a motion for a new trial on the ground of separation of the jury was correctly overruled. *State v. Frier*, 118 Mo. 648.

Review of Order Granting New Trial. — Where the misconduct is such as to justify the trial court in setting aside the verdict, the reviewing court will not interfere. *Wightman v. Butler County*, 83 Iowa 691.

Where No Prejudice Resulted. — Where it is apparent that no prejudice has resulted from the misconduct of the jury, the decision below denying a new trial will not be disturbed. *Langworthy v. Myers*, 4 Iowa 23.

refused to review and consider the evidence by which its consideration of the motion should have been guided or controlled,¹ the refusal of the trial judge to grant a new trial on account of alleged misconduct on the part of the jury will not be reviewed on the finding of the facts by him.² Each application must be determined mainly upon its own peculiar facts and circumstances and should be granted or refused with a view not so much to the attainment of exact justice in a particular case as to the ultimate effect of the decision upon the administration of justice in general.³

(8) *Equitable Relief*.—It has also been held that equity will enjoin the enforcement of a judgment entered upon a verdict vitiated by the misconduct of a juror.⁴

1. *Com. v. White*, 147 Mass. 76; *Munde v. Lambie*, 125 Mass. 367.

2. *Alabama*.—*Brister v. State*, 26 Ala. 107.

Arkansas.—*Palmore v. State*, 29 Ark. 248.

Georgia.—*Shaw v. State*, 83 Ga. 92.

Louisiana.—*State v. Brette*, 6 La. Ann. 653; *State v. Tucker*, 10 La. Ann. 501.

Massachusetts.—*Com. v. Poisson*, 157 Mass. 510.

Minnesota.—*Svenson v. Chicago G. W. R. Co.*, (Minn. 1897) 70 N. W. Rep. 795.

Nebraska.—*Cortelyou v. McCarthy*, 37 Neb. 742; *Republican Valley R. Co. v. Boyse*, 14 Neb. 130.

New York.—*People v. Johnson*, 110 N. Y. 134; *Gale v. New York Cent., etc., R. Co.*, 76 N. Y. 594.

North Carolina.—*State v. Fuller*, 114 N. Car. 885; *State v. Crane*, 110 N. Car. 530.

Oregon.—*State v. Becker*, 12 Oregon 318.

Tennessee.—*Turner v. St. John*, 3 Coldw. (Tenn.) 376.

To vitiate and avoid a verdict, it must appear upon the record that undue influence was brought to bear on the jury. All other circumstances of suspicion address themselves exclusively to the discretion of the presiding judge in granting or refusing a new trial. *Moore v. Edmiston*, 70 N. Car. 471; *State v. Perry*, Busb. L. (N. Car.) 330.

Conflicting Evidence.—Where the evidence of the misconduct of a juror before the trial court is conflicting, the conclusion of that court will not be interfered with.

California.—*People v. Deegan*, 88 Cal. 602; *People v. Kramer*, 117 Cal. 647.

Indiana.—*Holloway v. State*, 53 Ind. 554; *De Priest v. State*, 68 Ind. 569; *Catterlin v. Frankfort*, 87 Ind. 45; *Long v. State*, 95 Ind. 481; *Hamm v. Romine*, 98 Ind. 77; *Clayton v. State*, 100 Ind. 201; *Hodges v. Bales*, 102 Ind. 494; *De Hart v. Etnire*, 121 Ind. 242; *Hinshaw v. State*, 147 Ind. 334.

Iowa.—*Langworthy v. Myers*, 4 Iowa 18; *Walker v. Dailey*, 87 Iowa 375; *Perry v. Cottingham*, 63 Iowa 41.

Massachusetts.—*Shea v. Lawrence*, 1 Allen (Mass.) 167; *Clapp v. Clapp*, 137 Mass. 183.

Minnesota.—*State v. Floyd*, 61 Minn. 467; *Hull v. Minneapolis St. R. Co.*, 64 Minn. 402.

Nebraska.—*Carleton v. State*, 43 Neb. 373.

Nevada.—*State v. St. Clair*, 16 Nev. 207.

North Carolina.—*State v. Bailey*, 100 N. Car. 528; *State v. Hester*, 2 Jones L. (N. Car.) 83.

Tennessee.—*Sartin v. State*, 7 Lea (Tenn.) 680.

Texas.—*Gilleland v. State*, 44 Tex. 356.

Wisconsin.—*Grottkau v. State*, 70 Wis. 462.

3. *Hutchinson v. Consumers' Coal Co.*, 36 N. J. L. 24. See also *Austin v. State*, 42 Tex. 355; *Shomo v. Zeigler*, 10 Phila. (Pa.) 611; *Armleder v. Lieberman*, 33 Ohio St. 77.

4. *Platt v. Threadgill*, 80 Fed. Rep. 192, holding that a United States Circuit Court sitting in equity can entertain a bill to enjoin the enforcement of a judgment entered upon a verdict alleged to be vitiated because of misconduct of the jurors where the plaintiff has lost his remedy at law, and although the judgment has been carried to the Supreme Court of the United

5. Circumstances Showing Bias — a. REMARKS OF JURORS —
When Ground for New Trial. — Whenever it can be clearly gathered from remarks made by a juror while sitting in a case that he intends to disregard the duties imposed on him and which he has sworn to perform, the verdict will be set aside.¹

When Not Ground for New Trial. — The fact that, during the progress of a trial, a juror made remarks indicating a leaning towards one or the other of the parties will not of itself furnish ground for a new trial, where the verdict does justice and there is no reason to suppose that the juror's opinion was not derived from the evidence.² Thus, where it was assigned as error that, after retire-

States on writ of error and is there pending under a supersedeas.

1. *State v. White*, 48 La. Ann. 1444; *Perry v. Cottingham*, 63 Iowa 41; *State v. Hopkins*, 1 Bay (S. Car.) 372. And see *Dent v. Hundred of Hertford*, 2 Salk. 645.

Remark that Defendants Ought to be Hanged. — In *Hoard v. State*, 15 Lea (Tenn.) 318, a new trial was awarded where it appeared that a juror had heard the testimony in chief of one of the principal witnesses for the state and had expressed a decided opinion that the defendants ought to be hanged.

Determination to Find for Plaintiff Irrespective of Arguments. — It is ground for reversal that during a trial, and after a portion of the evidence has been introduced, the jurors discussed the merits of the case publicly in the presence of several persons, and stated in substance that there was no merit in the defense, and that they would find for the plaintiff irrespective of the argument of counsel or the instructions of the court. *Jewsbury v. Sperry*, 85 Ill. 56.

Juror Satisfied with Verdict "One Way or the Other." — Where a jurymen, just before entering upon the deliberation, stated in the jury room that a verdict "one way or the other" would suit him, a conviction for manslaughter was set aside. *State v. White*, 48 La. Ann. 1444.

Reflecting on Defendant's Counsel. — A conversation with an outsider during the trial in which a juror stated in effect that the attorney for the defendant had mismanaged the case, that he was not fit to attend to it, and that the plaintiff ought to recover the full amount claimed was held to be ground for a new trial. *Perry v. Cottingham*, 63 Iowa 41.

2. *Chalmers v. Whittemore*, 22 Minn.

305; *Jordan v. State*, 22 Fla. 528; *State v. Allen*, 89 Iowa 49; *Peire v. Martin*, 14 La. 64; *Gleason v. Strauss*, 5 Kan. App. 80.

Remarks as to Introduction of Evidence. — In *People v. Cullen*, (Supreme Ct.) 5 N. Y. Supp. 886, which was a trial of an indictment for an assault with intent to commit rape, one of the jurors, during the cross-examination of the prosecuting witness as to the details of the attempt, exclaimed: "We have heard enough now," and it was held that this did not indicate any partiality of the juror, as such an exclamation might well have been called forth by the repetition of the disgusting evidence in the case.

In *Chicago, etc., R. Co. v. Holland*, 122 Ill. 461, which was an action against a company for damages, a juror, while counsel for the company was stating the case to the jury and making a statement that evidence would be brought out which would prove certain facts, said: "That won't help you a bit — that will not do you any good." It was held that while the remark was improper, and one which might authorize the imposition of a fine on the offending jurymen, it was not sufficient to require a reversal.

In *Mayer v. Liebmann*, 16 N. Y. App. Div. 54, an action for personal injuries, it appeared that one of the jurors in questioning a medical expert said: "We heard what the physician said yesterday. He said what was pretty correct, with all due respect to you." It was held that this remark did not show such bias as required the court to withdraw the juror and suspend the trial, especially in view of the fact that the application to withdraw was not made at the time of the murder, but at the close of the whole evidence on the following day, since if there was

ment, one juror made remarks to another indicating that the speaker had a belief in the guilt of the defendant, the court refused to interfere with the conviction, it not being shown that the juror was so prejudiced as to be unable to give the accused a fair and impartial trial.¹

b. BETTING ON RESULT. — The fact that a juror had previously made a bet on the result of the trial, such fact not having been known until after verdict, is a sufficient ground for granting a new trial,² unless it is manifest that no injury has resulted.³

6. Separation — a. ANCIENT RULE. — It is said that anciently the rule was that on no occasion should jurors separate.⁴

any merit in the motion the defendants waived the right by the delay in making it.

Juror's Mind Made Up Before Argument — It is the duty of jurors to listen to the arguments of counsel touching the facts in issue, as they are not supposed to have viewed the evidence in all the aspects in which counsel may present it. But if a juror said during the trial that the judge would let in no more evidence, that he had made up his mind in the case, and that all he wanted was the judge's charge, and that it did not make any odds what counsel said, without stating in whose favor he had made up his mind, there was no such misconduct shown in the juror as should require the court to order a new trial for that cause. *McAllister v. Sibley*, 25 Me. 474.

Stating Belief of Defendant's Guilt. — In *Com. v. Sallager*, 4 Pa. L. J. 511, a statement by a juror to a friend, after the close of the evidence for the prosecution, and after a portion of the evidence for the defense had been adduced, that he, the juror, believed upon the evidence that the defendant was guilty was held insufficient to justify a new trial.

Threat to Hang Jury. — In *Crawford v. Com.*, (Ky. 1896) 35 S. W. Rep. 114, the appellate court refused to interfere though in the presence of the court and the rest of the jury, after the jury had been told that less than twelve men could not render a verdict, a juror remarked that one of their number had said that he would hang the jury for a thousand years, but was stopped before finishing the sentence.

Remark that Witnesses Had Poor Memories. — A remark by a juror during the trial that some of the witnesses for the state had poor memories was held not to constitute legal misconduct. *Carthaus v. State*, 78 Wis. 560.

Remark that Jury Had Agreed. — In *Nichols v. Bronson*, 2 Day (Conn.) 211, the court refused to set aside the verdict because one of the jurors while deliberating said in the hearing of others that the jury had agreed.

No Impropriety in Questioning Witnesses. — There is no impropriety on the part of the juror in questioning witnesses during the trial, and thus endeavoring properly to understand the facts in evidence. *Schaefer v. St. Louis, etc., R. Co.*, 128 Mo. 64.

1. *Ray v. State*, 35 Tex. Crim. Rep. 354. See also *Berry v. De Witt*, 27 Fed. Rep. 723.

2. In *Seaton v. Swem*, 58 Iowa 41, which was a contested election case, it appeared that prior to the trial one of the jurors had made a small bet upon the result of the contest, which fact he failed to disclose on his *voir dire*, and a verdict in favor of the contestant, upon whose success the juror had made the wager, was set aside. See also *Stafford v. Oskaloosa*, 57 Iowa 748.

Bet of a Necktie. — In *Essex v. McPherson*, 64 Ill. 349, the plaintiff was held entitled to a new trial because a juror who had served in the trial had previously made a bet of a necktie that the verdict would be in favor of the defendant, which fact was unknown to the plaintiff until after the trial.

3. In *Goodright v. M'Causland*, 1 Yeates (Pa.) 372, a new trial was refused though before the trial a juror had bet on each side of the case, it not appearing that the betting had biased him. The bet was one half-pint of wine on the successful party and one gallon and one pint on the unsuccessful party.

4. *Com. v. M'Caul*, 1 Va. Cas. 271; *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25 [*citing* Co. Lit. 227, 4 Black. Com. 360].

b. RELAXATION OF RULE IN MISDEMEANORS AND CIVIL CASES.—But this strict rule was at a very early day relaxed in civil cases and misdemeanors,¹ in which classes of cases an unauthorized separation was held not to vitiate a verdict without evidence of irregularity or abuse;² and that is the rule in this country in regard to misdemeanors,³ between which and civil cases there is held to be no distinction.⁴

c. GENERAL RULES OF MODERN PRACTICE—(1) *Criminal Cases*—(a) *Separation Allowed.*—It is the practice in the *United States* for the court to permit the dispersion of jurors in criminal cases, under proper instruction and admonition,⁵ and where this is proper the action of the court, based upon each particular case, rests within its discretion.⁶

1. *The Earliest Case Reported* was an issue between the bishop and another, in the Year Book 14 Henry VII., folio 29, 15 Henry VII., folio 1, wherein it appeared that while the evidence was being introduced there came such a storm that some of the jurors, who it appears were hearing the case in the open street, departed, without leave of the justice; that one of them went into a house, where he was told that the matter was better for the earl than the bishop and was requested to drink, which he did; that after the storm the jurors returned, no challenge was taken to them, and thereafter they agreed for the bishop. The justices, being in doubt, adjourned the case into the Exchequer before all the judges, where there was a difference of opinion; a considerable majority of the judges decided that though the jurors might be finable, the verdict was good.

2. *Effect on Verdict.*—In *Rex v. Woolf*, 1 Chit. Rep. 401, 18 E. C. L. 115, Abbott, C. J., said: "The only difference that can exist between the fact of the jury separating with or without the approbation of the judge, as it seems to me, is this, that if it be done without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished." See also *Rex v. Kinnear*, 2 B. & Ald. 462; *St. John v. Abbot*, Barnes 441.

3. *State v. Dugan*, 52 Kan. 23; *McLean v. State*, 8 Mo. 153.

In *People v. Ransom*, 7 Wend. (N. Y.) 417, it was said that the effect of the separation of the jurors is the same in criminal and even in capital cases as in civil cases.

After Admonition.—In a misdemeanor case, during the progress of the trial,

the jurors may separate for meals after being admonished. *Kruget v. State*, 1 Neb. 365.

4. *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *Beebe v. People*, 5 Hill (N. Y.) 32; *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25; *Prewitt v. State*, 65 Miss. 437; *Cannon v. State*, 3 Tex. 31; *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338.

5. *Florida.*—*Frances v. State*, 6 Fla. 306.

Indiana.—*Henning v. State*, 106 Ind. 386.

Iowa.—*State v. Rainsbarger*, 74 Iowa 196.

Kansas.—*State v. Palmer*, 40 Kan. 474.

Louisiana.—*State v. Magee*, 48 La. Ann. 901.

Michigan.—*People v. Considine*, 105 Mich. 149.

Minnesota.—*State v. Ryan*, 13 Minn. 370.

Nebraska.—*St. Louis v. State*, 8 Neb. 405.

New York.—*Beebe v. People*, 5 Hill (N. Y.) 32.

Ohio.—*Bergin v. State*, 31 Ohio St. 111.

Pennsylvania.—*McCreary v. Com.*, 29 Pa. St. 323; *Moss v. Com.*, 107 Pa. St. 267.

South Carolina.—*State v. Way*, 38 S. Car. 333; *State v. M'Elmurray*, 3 Strobb. L. (S. Car.) 33.

Utah.—*People v. Callaghan*, 4 Utah 63.

Wisconsin.—*Baker v. State*, 88 Wis. 140.

6. *Davis v. State*, 15 Ohio 72. See also the cases cited in the last preceding note.

Refusal to Allow Separation.—Where by statute the court has a discretion to

Capital and Lesser Felonies. — In capital cases jurors should not be permitted to separate.¹ The right to permit separation in criminal cases is generally confined to those involving offenses not capital.² In capital cases it has been held that a separation cannot be permitted even with the consent of the prisoner;³ and while in civil cases and in misdemeanors separation will not vitiate the verdict without evidence of irregularity or abuse, greater strictness is observed when the higher grades of offenses are involved, and especially in capital cases a separation will be given the effect of vitiating a verdict, unless it is positively shown that injury could not have been sustained.⁴ The right to permit a

permit the jurors to separate before submission of the cause or to require them to be kept together in charge of an officer, there is no error in the refusal of the court to adopt the latter course on the application of the defendant. *State v. Gillick*, 10 Iowa 98.

Cautious Exercise of Discretion. — The discretion of the court in allowing jurors to separate should be very cautiously exercised. *Berry v. State*, 10 Ga. 511.

In cases of high misdemeanor, or when excitement prevails, or when there is reason to suspect that improper influences may be brought to bear on the jury, the court may refuse, and in the last-named instance it would be its duty to refuse, to permit separation of the jurors at any time during the trial, up to the time of the rendition of the verdict, directing the sheriff to furnish them proper comforts and keep them in close custody. *Sargent v. State*, 11 Ohio 472; *Hotelling v. State*, 3 Ohio Cir. Ct. Rep. 630.

In *People v. Dinsmore*, 102 Cal. 381, a judgment was reversed because, against the objection of the defendant, the court made an order adjourning the case on trial for a period of sixty-three days, for the reason that, a witness on the stand having become indisposed, it was reported by the physicians who had examined her that it would not be safe for her to continue her testimony within the next two months, the jurors being allowed in the meantime to return to their homes until the expiration of the continuance, the offense charged being of such a nature as would be likely to arouse the feelings and passions of the people of the surrounding country.

Reason for Adjournment — Presumption. — In the absence of any showing to the contrary, it will be presumed that

an adjournment of the trial for two days and the separation of the jurors for that time, by permission, were for a sufficient reason. *State v. Palmer*, 40 Kan. 474.

1. *Morgan v. State*, 48 Ala. 65; *State v. Brown*, (Del. 1896) 36 Atl. Rep. 458; *State v. Godfrey*, Brayt. (Vt.) 170; *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338.

2. *Florida*. — *Frances v. State*, 6 Fla. 306.

Georgia. — *Monroe v. State*, 5 Ga. 85. *Illinois*. — *Sutton v. People*, 145 Ill. 279.

Louisiana. — *State v. Crosby*, 4 La. Ann. 434; *State v. Desmond*, 5 La. Ann. 398; *State v. Frank*, 23 La. Ann. 213; *State v. Evans*, 21 La. Ann. 321; *State v. Dubois*, 24 La. Ann. 310; *State v. Hornsby*, 32 La. Ann. 1268, 8 Rob. (La.) 554; *State v. Dallas*, 35 La. Ann. 899; *State v. Pierre*, 38 La. Ann. 91; *State v. Foster*, 45 La. Ann. 1176; *State v. Warren*, 43 La. Ann. 828.

Massachusetts. — *Com. v. Costello*, 128 Mass. 88.

Missouri. — *State v. Murray*, 91 Mo. 95; *State v. Gray*, 100 Mo. 523.

New Jersey. — *State v. Cucuel*, 31 N. J. L. 249.

Pennsylvania. — *Moss v. Com.*, 107 Pa. St. 267.

Utah. — *People v. Shafer*, 1 Utah 260.

3. *Woods v. State*, 43 Miss. 364; *Peiffer v. Com.*, 15 Pa. St. 468; *Wesley v. State*, 11 Humph. (Tenn.) 502. See *infra*, X. 6. c. *Separation by Consent*.

4. *Louisiana*. — *State v. Evans*, 21 La. Ann. 321; *State v. Frank*, 23 La. Ann. 213; *State v. Moss*, 47 La. Ann. 1514.

Mississippi. — *Green v. State*, 59 Miss. 501; *Russell v. State*, 53 Miss. 368.

Missouri. — *State v. Steifel*, 106 Mo. 129.

separation has sometimes been restricted to offenses less than felonies.¹ On the other hand, the trial judge is sometimes vested with a discretion to permit the separation of the jurors during the trial, even in capital cases,² or to permit a separation from time to time in such cases with the assent of the accused.³

(b) *Separation without Prejudice.* — A mere separation, even though it be unauthorized and improper, will not of itself justify a new trial unless prejudice actually resulted or may reasonably be inferred from the circumstances,⁴ although the conduct of a juror in improperly separating from his associates without the court's

New York. — *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25.

Pennsylvania. — *Peiffer v. Com.*, 15 Pa. St. 468.

West Virginia. — *State v. Robinson*, 20 W. Va. 714.

Wisconsin. — *Keenan v. State*, 8 Wis. 132.

1. *Grable v. State*, 2 Greene (Iowa) 559; *Nelson v. State*, 47 Miss. 621; *Prewitt v. State*, 65 Miss. 437; *Cantwell v. State*, 18 Ohio St. 477; *King v. State*, 91 Tenn. 617.

2. *State v. Belcher*, 13 S. Car. 461; *State v. M'Kee*, 1 Bailey L. (S. Car.) 651; *State v. Anderson*, 2 Bailey L. (S. Car.) 565; *Walrath v. State*, 8 Neb. 80; *Territory v. Chenowith*, 3 N. Mex. 225; *Hotelling v. State*, 3 Ohio Cir. Ct. Rep. 630; *State v. Shaffer*, 23 Oregon 555.

3. *Stephens v. People*, 19 N. Y. 549. See also *Quinn v. State*, 14 Ind. 589.

4. *Arkansas.* — *Dobson v. State*, (Ark. 1891) 17 S. W. Rep. 3; *Wright v. State*, 35 Ark. 639; *Wilder v. State*, 29 Ark. 294; *Binns v. State*, 35 Ark. 119.

California. — *People v. Mitchell*, 100 Cal. 328.

Colorado. — *Elkin v. People*, 5 Colo. 508 [citing *Stephens v. People*, 19 N. Y. 549; *McKianey v. People*, 7 Ill. 540; *Jumpertz v. People*, 21 Ill. 409].

Dakota. — *Territory v. King*, 6 Dakota 131.

Florida. — *Tervin v. State*, 37 Fla. 396.

Georgia. — *Roberts v. State*, 14 Ga. 8.

Indiana. — *Drew v. State*, 124 Ind. 9; *Riley v. State*, 95 Ind. 446; *Porter v. State*, 2 Ind. 435; *Cooper v. State*, 120 Ind. 377.

Iowa. — *State v. Thompson*, 87 Iowa 670; *State v. Wright*, 98 Iowa 702; *State v. Wart*, 51 Iowa 587. See also *State v. Bowman*, 45 Iowa 418; *State v. Fertig*, 70 Iowa 272; *State v. Griffin*, 71 Iowa 372; *State v. Fertig*, 84 Iowa 79.

Kansas. — *State v. Hendricks*, 32 Kan. 559.

Kentucky. — *Holly v. Com.*, (Ky. 1896) 36 S. W. Rep. 532; *Blyew v. Com.*, 91 Ky. 200.

Louisiana. — *State v. Richmond*, 42 La. Ann. 299; *State v. Bellow*, 42 La. Ann. 586; *State v. Vines*, 34 La. Ann. 1073; *State v. Johnson*, 30 La. Ann. 921; *State v. Frugé*, 28 La. Ann. 657; *State v. Turner*, 25 La. Ann. 573; *State v. Forney*, 24 La. Ann. 191; *State v. Tucker*, 10 La. Ann. 501; *State v. Brette*, 6 La. Ann. 653; *State v. Summers*, 4 La. Ann. 26.

Minnesota. — *Eich v. Taylor*, 20 Minn. 378; *Bilansky v. State*, 3 Minn. 427; *State v. Ryan*, 13 Minn. 370.

Mississippi. — *Organ v. State*, 26 Miss. 78; *Green v. State*, 59 Miss. 501; *Hare v. State*, 4 How. (Miss.) 187.

Missouri. — *State v. Brannon*, 45 Mo. 329; *State v. Matrassey*, 47 Mo. 295; *Whitney v. State*, 8 Mo. 165; *State v. Murray*, 126 Mo. 611.

Nebraska. — *Caw v. People*, 3 Neb. 357.

Nevada. — *State v. Ward*, 19 Nev. 297; *State v. Harris*, 12 Nev. 414.

New Hampshire. — *State v. Prescott*, 7 N. H. 287.

New Jersey. — *State v. Cucuel*, 31 N. J. L. 249. See also *Titus v. State*, 49 N. J. L. 36.

New Mexico. — *Territory v. Chenowith*, 3 N. Mex. 225.

New York. — *People v. Ransom*, 7 Wend. (N. Y.) 417; *People v. Buchanan*, (Gen. Sess.) 25 N. Y. Supp. 490. See also *People v. Menken*, 36 Hun (N. Y.) 91; *People v. Douglass*, 4 Cow. (N. Y.) 26; *People v. Draper*, 28 Hun (N. Y.) 1; *People v. Carnal*, 1 Park. Cr. Rep. (N. Y. Oyer & T. Ct.) 256; *People v. Montgomery*, 13 Abb. Pr. N. S. (Monroe County Oyer & T. Ct.) 207; *People v. Gaffney*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 36.

consent and mingling with the community at large may be a contempt and punishable as such.¹

Discharge. — The separation of the jurors after the evidence has closed and before the argument has commenced is not a ground for discharging the accused, though it may be reason for granting a new trial.²

(c) **Presumption and Proof of Prejudice.** — While jurors should not be permitted to separate and mingle with the community generally, without explanation showing that they have not been tampered with, the effect of such a separation without more is not in all jurisdictions considered the same with regard to the presumption arising therefrom. Thus, many cases hold that the mere fact of a temporary separation pending trial, unauthorized or without permission of the court, is *prima facie* ground for a new trial because of a presumption of injury arising from such separation.³ In such cases it is not necessary for the prisoner to

North Carolina. — *State v. Carstaphen*, 2 Hayw. (N. Car.) 238.

Ohio. — *Bainbridge v. State*, 30 Ohio St. 264.

Rhode Island. — *State v. O'Brien*, 7 R. I. 340.

South Carolina. — *State v. Way*, 38 S. Car. 333.

Tennessee. — *King v. State*, 91 Tenn. 617.

Texas. — *Goode v. State*, 2 Tex. App. 520; *Ogle v. State*, 16 Tex. App. 361; *Davis v. State*, 3 Tex. App. 92; *Wakefield v. State*, 41 Tex. 556; *Cox v. State*, 7 Tex. App. 1; *Jack v. State*, 26 Tex. 1.

Virginia. — *Martin v. Com.*, 2 Leigh (Va.) 745.

West Virginia. — *State v. Harrison*, 36 W. Va. 729; *State v. Cartright*, 20 W. Va. 32.

Wisconsin. — *Crockett v. State*, 52 Wis. 211.

Wyoming. — *Cook v. Territory*, 3 Wyoming 110.

See also *State v. Miller*, 1 Dev. & B. L. (N. Car.) 500; *Wyatt v. State*, 1 Blackf. (Ind.) 256; *State v. Babcock*, 1 Conn. 401; *Com. v. McCauley*, 156 Mass. 49.

Even in Capital Cases, a mere separation where there is no prejudice or injury will not vitiate the verdict.

Louisiana. — *State v. Evans*, 21 La. Ann. 321; *State v. Frank*, 23 La. Ann. 213; *State v. Moss*, 47 La. Ann. 1514.

Mississippi. — *Green v. State*, 59 Miss. 501; *Russell v. State*, 53 Miss. 368.

Missouri. — *State v. Brannon*, 45 Mo. 329; *State v. Steifel*, 106 Mo. 129.

New Hampshire. — *State v. Prescott*, 7 N. H. 287.

New York. — *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25.

Pennsylvania. — *Peiffer v. Com.*, 15 Pa. St. 468.

Rhode Island. — *State v. O'Brien*, 7 R. I. 336.

Texas. — *Davis v. State*, 3 Tex. App. 92; *Cox v. State*, 7 Tex. App. 1; *Russell v. State*, 11 Tex. App. 288.

West Virginia. — *State v. Robinson*, 20 W. Va. 714.

Wisconsin. — *Keenan v. State*, 8 Wis. 132.

1. *Binns v. State*, 35 Ark. 118; *State v. Madoil*, 12 Fla. 151; *State v. Helvenston*, R. M. Charl. (Ga.) 48; *People v. Douglass*, 4 Cow. (N. Y.) 26.

The officer in charge permitting such separation may be in contempt and be punished therefor. *Binns v. State*, 35 Ark. 118.

2. *Williams v. State*, 45 Ala. 57.

3. *Arkansas.* — *Cornelius v. State*, 12 Ark. 782; *Coker v. State*, 20 Ark. 53; *Binns v. State*, 35 Ark. 118; *Maclin v. State*, 44 Ark. 115.

California. — *People v. Brannigan*, 21 Cal. 338; *People v. Symonds*, 22 Cal. 349.

Georgia. — *Silvey v. State*, 71 Ga. 553; *Daniel v. State*, 56 Ga. 653; *Monroe v. State*, 5 Ga. 85; *Westmoreland v. State*, 45 Ga. 225.

Kansas. — *Madden v. State*, 1 Kan. 341.

Louisiana. — *State v. Foster*, 45 La. Ann. 1176; *State v. Hornsby*, 32 La. Ann. 1268.

Tennessee. — *King v. State*, 91 Tenn.

prove that the jurors were tampered with during their separation, or that prejudice actually resulted, but the onus is on the state to show the contrary; ¹ or if the separation is such that the jurors might have been improperly influenced by others, the verdict should be set aside.² On the other hand, the presumption of prejudice is indulged only when the separation is attended with suspicion of abuse or of some improper influence,³ while it is held as a general proposition in other cases that a defendant complaining of an improper separation must show that he was injured thereby, and that the mere showing of a separation will not be sufficient to justify the setting aside of the verdict.⁴

617; *Taylor v. State*, 11 Lea (Tenn.) 708; *Griffie v. State*, 1 Lea (Tenn.) 41. *Virginia*. — *Com. v. M'Caul*, 1 Va. Cas. 271.

1. *Georgia*. — *Silvey v. State*, 71 Ga. 553; *Kirk v. State*, 73 Ga. 620.

Kansas. — *State v. Bailey*, 32 Kan. 83.

Mississippi. — *Green v. State*, 59 Miss. 501; *Russell v. State*, 53 Miss. 368.

Missouri. — *State v. Orrick*, 106 Mo. 111; *State v. Steifel*, 106 Mo. 129; *State v. Howland*, 119 Mo. 419.

New Hampshire. — *State v. Prescott*, 7 N. H. 288.

New Jersey. — *State v. Cucuel*, 31 N. J. L. 249.

Tennessee. — *King v. State*, 91 Tenn. 617; *Stone v. State*, 4 Humph. (Tenn.) 27; *M'Lain v. State*, 10 Yerg. (Tenn.) 241; *Hines v. State*, 8 Humph. (Tenn.) 602; *Wesley v. State*, 11 Humph. (Tenn.) 502.

Virginia. — *Com. v. M'Caul*, 1 Va. Cas. 302.

West Virginia. — *State v. Harrison*, 36 W. Va. 729.

Wisconsin. — *Keenan v. State*, 8 Wis. 132; *Rowan v. State*, 30 Wis. 129; *State v. Dolling*, 37 Wis. 396. And see *Crockett v. State*, 52 Wis. 211.

2. *People v. Thornton*, 74 Cal. 483; *People v. Backus*, 5 Cal. 275; *Com. v. Roby*, 12 Pick. (Mass.) 519; *Organ v. State*, 26 Miss. 78.

Separation of the jurors under such circumstances as will afford an opportunity of tampering with them will vitiate the verdict. *Russell v. State*, 53 Miss. 368; *Green v. State*, 59 Miss. 501; *Whitney v. State*, 8 Mo. 165; *Monroe v. State*, 5 Ga. 85; *Cartwright v. State*, 12 Lea (Tenn.) 620; *M'Lain v. State*, 10 Yerg. (Tenn.) 241; *Com. v. M'Caul*, 1 Va. Cas. 271.

The mingling of the jurors with

bystanders and with the community generally after the case has been commenced is an evil always to be avoided when practicable, as such a course is almost inevitably prejudicial to a fair and impartial trial. *State v. Williamson*, 42 Conn. 261.

3. *State v. O'Brien*, 7 R. I. 340.

The least suspicion of abuse on separation of the jurors is sufficient to warrant setting aside a verdict. *People v. Douglass*, 4 Cow. (N. Y.) 26. See also *State v. Madoil*, 12 Fla. 151.

Presumption from Length of Separation. — It may be presumed that jurors were tampered with from the fact of separation from their fellows for a considerable time. *State v. Fox*, Ga. Dec., pt. 1, 35.

Discretion of Court. — Where the circumstances are such as merely to cast suspicion on the verdict by showing not that there was, but that there might have been, undue influence brought to bear upon the jury because of the opportunity for it, the granting of a new trial is in the discretion of the trial judge. *State v. Brittain*, 89 N. Car. 505.

4. *Palmore v. State*, 29 Ark. 248; *Wilder v. State*, 29 Ark. 294; *State v. Way*, 38 S. Car. 333; *Stewart v. State*, 31 Tex. Crim. Rep. 153; *Ogle v. State*, 16 Tex. App. 361. See also *Reins v. People*, 30 Ill. 256.

Difference According to Degree of Offense. — In all cases other than capital felonies the verdict should stand unless the party against whom it is given can show that improper influences were used to produce it. *State v. Madoil*, 12 Fla. 151; *Moss v. Com.*, 107 Pa. St. 267.

So it is held that in case of felony the separation of a juror from his fellows pending the trial casts upon the state the burden of showing that no im-

(d) **Absence of Prejudice — Rebuttal of the Presumption.** — The separation of a juror from his fellows in the jury room by going therefrom is not a ground for relief, if it is shown that the juror was not subjected to improper influences.¹ The presumption of improper influence arising from the fact of separation may be rebutted by an affirmative showing that no injury resulted to the unsuccessful party.²

proper influence was brought to bear upon him during his absence. *Maclin v. State*, 44 Ark. 119, *citing* *Cornelius v. State*, 12 Ark. 782, and stating that the rule was followed in *Stanton v. State*, 13 Ark. 317; *Collier v. State*, 20 Ark. 36; *Coker v. State*, 20 Ark. 53; *Thompson v. State*, 26 Ark. 323; *Kee v. State*, 28 Ark. 155; *Wood v. State*, 34 Ark. 341; *Binns v. State*, 35 Ark. 118.

1. *Arkansas*. — *Stanton v. State*, 13 Ark. 317; *Cornelius v. State*, 12 Ark. 810.

California. — *People v. Moore*, 41 Cal. 238; *People v. Bonney*, 19 Cal. 427; *People v. Bemmerly*, 98 Cal. 299.

Colorado. — *Chesnut v. People*, 21 Colo. 512.

Delaware. — *State v. Harrigan*, 9 Houst. (Del.) 369.

Georgia. — *Westmoreland v. State*, 45 Ga. 225.

Indiana. — *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

Missouri. — *State v. Carlisle*, 57 Mo. 102; *State v. Dougherty*, 55 Mo. 69; *State v. Barton*, 19 Mo. 227; *State v. Bell*, 70 Mo. 633.

Montana. — *Territory v. Hart*, 7 Mont. 489.

Nevada. — *State v. Jones*, 7 Nev. 408; *State v. Ward*, 19 Nev. 297.

New Jersey. — *Clarke v. Cole*, 2 N. J. L. 259.

New Mexico. — *Territory v. Nichols*, 3 N. Mex. 76.

New York. — *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *People v. Douglass*, 4 Cow. (N. Y.) 26.

North Dakota. — *State v. Kent*, 5 N. Dak. 516.

Texas. — *Jones v. State*, 13 Tex. 168.

2. *California*. — *People v. Symonds*, 22 Cal. 349.

Georgia. — *Daniel v. State*, 56 Ga. 653.

Missouri. — *State v. Sansone*, 116 Mo. 1; *State v. Orrick*, 106 Mo. 128; *State v. Avery*, 113 Mo. 475; *State v. Steifel*, 106 Mo. 129; *State v. Payton*, 90 Mo. 220; *State v. Collins*, 86 Mo. 250.

Nebraska. — *Caw v. People*, 3 Neb. 357.

Pennsylvania. — *Com. v. Eisenhower*, 181 Pa. St. 470; *Moss v. Com.*, 107 Pa. St. 267.

Capital Cases. — The presumption of prejudice arising from separation in a capital case may be rebutted. *Thompson v. Com.*, 8 Gratt. (Va.) 637, holding that, it appearing by the testimony of a juror called by the defendant that he separated from his fellows in the morning for the purpose of meeting some one who would take a message from him to his family, but that seeing no one he returned to his fellows, the presumption that he was tampered with or was guilty of any prejudicial impropriety was negated. See also *Caw v. People*, 3 Neb. 357; *King v. State*, 91 Tenn. 617.

Character of Communication. — The verdict will not be interfered with if all that occurred during the separation can be fully explained, and it can be clearly seen that there was no opportunity for improperly influencing the jurors, or that the communication was not calculated to affect them improperly. *King v. State*, 91 Tenn. 617 [*citing* *Greenlow v. State*, 4 Humph. (Tenn.) 25; *Riley v. State*, 9 Humph. (Tenn.) 646; *Hines v. State*, 8 Humph. (Tenn.) 601; *Rowe v. State*, 11 Humph. (Tenn.) 492; *Cartwright v. State*, 12 Lea. (Tenn.) 625]. See also *infra*, X. 9. *Communications with Outsiders*, and notes.

Where it is affirmatively shown that no one was with a juror, who had separated from his fellows, with whom he could communicate, and that he was at no great distance from the other jurors and their officer, and where the officer says that he believes that no outside party, except the judge, had had any communication with the jurors during their deliberation, the probability of such communication is too remote to warrant the appellate court in finding that the defendant may have been prejudiced. *Cartwright v. State*, 12 Lea. (Tenn.) 620.

(e) **Permissible and Prejudicial Separation.** — While the separation of a jury is defined to be the departure of one or more jurors from their fellows, or all of the jurors departing from each other,¹ not every withdrawal of a juror from the immediate presence of his fellows constitutes such separation as will affect a verdict.² This question may be considered in two aspects, either as depending upon the character of the particular separation in affording an opportunity for improper conduct or in establishing such conduct,³

The Affidavit of a Juror, who had separated from his fellows, that he had not been tampered with during his absence has been held insufficient evidence of that fact in a capital case. *Hines v. State*, 8 Humph. (Tenn.) 597.

In *Kelly v. State*, 28 Tex. App. 120, after a witness for the state had been examined, and an adjournment taken until the next morning, one of the jurors, understanding the court to excuse the jury until the next morning, separated himself from his fellows and remained away from them until that time. His affidavit in exculpation did not state where he was, nor with whom he associated, but stated that no one said anything to him about the case, and that his separation in no manner had anything to do with, nor in any manner influenced, him in finding the verdict. There was held to be ground for a new trial.

But it has also been held that if, on a trial of an indictment for perjury, jurors leave the court room during the progress of the trial, without leave of the court and without an officer, the verdict will not be vitiated for that reason, if it appears by the affidavit of the jurors that they spoke to no one during their absence. *State v. Carstaphen*, 2 Hayw. (N. Car.) 238.

Where No Objection is Made to the sufficiency of the explanation of a juror who has separated himself for a short time from his fellows during the progress of a criminal case, the conviction will not be disturbed, especially where it is shown that no prejudice resulted. *Barrow v. State*, 80 Ga. 191.

1. *State v. Perry*, Busb. L. (N. Car.) 330.

A Technical Separation of the jurors is established by the fact that one of the jurymen was so situated that he could exchange a single word with a stranger without being overheard by the bailiff. *State v. Harris*, 12 Nev. 414.

3. Separation of Jurors Into Squads Within Jury Room. — In *State v. Turner*,

6 Baxt. (Tenn.) 201, it was held that in the absence of any intimation that there was tampering with jurors by outsiders, the fact that in their deliberations the jurors were not at all times gathered into one compact body, but gathered into small squads and talked about the case, always in view of the officer in charge, was not misconduct.

3. See *supra*, X. 6. c. (1) (b) *Separation without Prejudice.*

A Mere Momentary Withdrawal of a juror out of the presence of the officer does not establish a presumption of misconduct where it is not shown that he had any communication with outsiders, *State v. Turner*, 25 La. Ann. 573; *State v. Miller*, 1 Dev. & B. L. (N. Car.) 500; *People v. Wheatley*, 88 Cal. 114; or even where communications altogether foreign to the case are had with outsiders, as where a juror separated a short distance from his fellows and the officer and told a servant to take care of his horse. *M'Carter v. Com.*, 11 Leigh (Va.) 663.

Absence During Delivery of Immaterial Testimony. — In *State v. Parsons*, 7 Nev. 57, the absence of a juror while immaterial testimony was given was held not to be such an irregularity as would require reversal, the testimony having been repeated to the full jury thereafter, and the attention of the court having been called to the fact that the juror had been absent.

Return Before Commencement of Argument. — That after the close of the evidence, and before the closing argument for the state, one of the jurors separated himself from his fellows for a few minutes, without consent, will not require reversal, where the absence of the juror was discovered and the argument deferred until his return. *State v. Bell*, 70 Mo. 633.

Sudden Illness. — Where, during the trial, a witness fainted and fell, the fact that some of the jurors sitting near carried the witness into an adjoining chamber is no such misconduct

or upon the fact that the separation does not fall within the technical prohibition of the law.

(f) **Separation in Company with Bailiff** — *aa. GENERALLY.* — The presumption will not be indulged that a separated juror was tampered with in the immediate presence of the officer having him in charge.¹

as is entitled to consideration by the appellate court, especially where it further appeared that the sheriff accompanied them. *People v. Lee*, 17 Cal. 76. See also *People v. Buchanan*, (Gen. Sess.) 25 N. Y. Supp. 490.

Withdrawal of Juror for Examination in Court. — In *State v. Washburn*, 91 Mo. 571, there was held to be no ground for interference with the verdict where it appeared that a juror, who was considering a verdict with his fellows, was brought from the jury room into court and questioned by the prosecuting attorney in the presence of the defendant and his attorney as to the whereabouts of a witness in a case then on trial, and in which the juror in question was also to be a witness, nothing whatever being said with reference to the case in which the juror had served.

In *People v. Kalkman*, 72 Cal. 212, it appeared that the district attorney, having received information of the attempted bribery of a juror, called one of the jurors, and in the presence of the court questioned him as to the alleged charge, which he failed to prove, but at the request of the court stated the information he had received, whereupon the jurors were discharged and dismissed from the court room, and the charge was investigated and ascertained to be unfounded. It was held that there was no error in the refusal of the court to allow the jurors to be present at the investigation, as requested by the attorney for the defendant, where they were fully instructed that no weight should be given to the occurrence in considering their verdict.

Improper Conduct. — In *Heller v. People*, 22 Colo. 11, the judgment was reversed on a showing that the officers in charge of the jurors allowed them to separate, permitted intoxicants in the jury room, and engaged in conversation with members of the jury which resulted in an altercation, so that a breach of the peace was narrowly averted.

In *State v. Sherbourne*, Dudley (Ga.) 28, a new trial was granted where dur-

ing recess a bailiff permitted the jurors to separate, and allowed several persons to enter the jury room and have free intercourse with the jury.

Where a part of the jurors in a capital case, the trial of which lasted several days, frequently separated themselves at night from their fellow-jurors, for fifteen or twenty minutes at a time, without being under the charge of an officer, there was held to be such an irregularity as to vitiate the verdict. *M'Lain v. State*, 10 Yerg. (Tenn.) 241.

1. *State v. Jones*, 7 Nev. 408; *State v. Harper*, 101 N. Car. 761; *Evans v. State*, 7 Ind. 271; *Crockett v. State*, 52 Wis. 211.

Visiting Home. — It is competent for the court to authorize a juror to visit his home in the company of one of its sworn officers. *State v. Cucuel*, 31 N. J. L. 249; *State v. Sansone*, 116 Mo. 1; *Boyett v. State*, 26 Tex. App. 689, wherein a juror was permitted to visit his sick wife, with whom and a young girl he was allowed to remain alone for some time. No conversation having occurred with reference to the case, except that the juror's wife asked about and received an answer as to the probable duration of the trial, it was held that an objection to the separation was without merit.

In Sight and Hearing of Officer. — Separation of jurors conversing with outsiders on matters foreign to the cause, being all the time in the custody and within the sight and hearing of the officer and of each other, is not such a separation as will vitiate the verdict. *Cook v. Territory*, 3 Wyoming 110.

Misconduct While Out in Charge of Officer. — In *Jenkins v. State*, 41 Tex. 128, a capital case, there was held to have been no such separation as would require reversal where a juror left the main body of the jury and the officer on the street, stepped into a saloon in their full view and hearing, and procured a cigar.

But in *Burris v. State*, 37 Tex. Crim. Rep. 587, a conviction was re-

bb. WALKING OR RIDING FOR EXERCISE. — It is competent for the court to permit the jurors or any number thereof to ride or walk out for exercise in company with its sworn officers.¹

cc. HOTEL ACCOMMODATIONS. — That jurors occupied different rooms in a hotel has been held not to be a separation in contemplation of law where they were all under the supervision of the officers of the court.²

dd. SEPARATION FOR MEALS. — There is no separation when jurors are permitted to go to a hotel or restaurant for their meals in charge of officers, no communications being had with outsiders,³ although there may be an actual separation of the jurors in their positions at the dining tables while remaining in view and under

versed because ten of the jurors came into the jail and talked to the prisoners, some of them discussing the various phases of the defendant's case, the outer door of the jail being locked at the time and the other jurors remaining in the jail office.

That a juror, while on the public street, left his fellows and went into a store, and there procured writing materials and wrote a note, is such misconduct as, if not explained, will require a new trial. *Cartwright v. State*, 71 Miss. 82.

1. *State v. Cucuel*, 31 N. J. L. 249; *State v. Griffin*, 71 Iowa 372, holding that a verdict should not be disturbed because during the deliberation of the jury one of the jurors was taken ill and was permitted to separate from his fellows and walk in the open air accompanied by an officer, no communication having been had by him with any outsider.

Jury Taken Beyond Jurisdiction. — It has been held to be no dispersion of the jurors in legal effect where they were taken beyond the border of the state, it appearing that they were in fact in charge of an officer for necessary exercise and that they did not separate or disperse in fact, communicate with outsiders, nor question the authority of their custodian. *King v. State*, 91 Tenn. 617. And the same conclusion was reached where the jury was conducted from the county in which the trial was pending into an adjoining county. *Thompson v. Com.*, 8 Gratt. (Va.) 637.

2. *State v. Robinson*, 20 W. Va. 713; *Wright v. State*, 35 Ark. 639, wherein it was held to be no abuse of discretion to refuse a motion for a new trial on the ground that the jurors before

and after final submission were permitted to sleep at night in separate rooms, unlocked and unguarded.

Adjoining Rooms. — Where the separation consisted in the jurors' sleeping in two adjoining but noncommunicating rooms, one-half of their number in each, and it also appeared that their custodians slept in a room connecting with one of the rooms, that the doors were locked, and that the jurors were not in any way tampered with, the court declined to interfere. *Com. v. Manfredi*, 162 Pa. St. 144.

Rooms Opening into Common Passage. — In *Kennedy v. Com.*, 2 Va. Cas. 510, the jurors, on their retirement for the night, were placed upstairs in a tavern, in five lodging rooms, which were separated from each other by a common passage, into which they all opened; the doors of the lodging rooms were generally open; the doors to the common passage were kept constantly shut, so as to exclude other persons. This disposition of the jurors was held to be a strict compliance with the law, which requires that the jury should be kept together.

Where, during a protracted trial, the jurors were committed at night, during adjournment, to the sheriff, who placed them in a hotel, as the best accommodation he could find, in five different rooms, having the doors unlocked for fear of fire, opening upon a common passage, communicating with the street below by two flights of stairs, there was held to be no such separation of the jury as would require conviction of murder in the second degree to be set aside. *Thompson v. Com.*, 8 Gratt. (Va.) 637.

3. *State v. Nockum*, 41 La. Ann. 689; *State v. Riley*, 41 La. Ann. 693.

the supervision of the officer in charge,¹ and though some of the jurors are left behind in the jury room under the charge of another officer.² An unauthorized separation may occur, however, on occasions of this kind, as where jurors withdraw themselves entirely from the sight or control of the officer in attendance.³

“SEPARATION FOR NECESSARY PURPOSES. — The temporary retirement or separation from his fellows of a juror or jurors, for a necessary purpose and in company of a bailiff, is not an illegal or irregular separation,⁴ although the juror withdraws from the presence of

1. *Coleman v. State*, 17 Fla. 206.
Negro Fed Apart from Other Jurors. — Where one of the jurors was a negro, it was held that the fact that he took his meals with other colored men in a room separate from the other jurors, but communicating by an open doorway with the room in which the latter ate, was not a ground for a new trial, the whole body of the jury being on such occasions under the observation of the officer in charge and none of the jurors being approached or communicated with on the subject of the trial, *Wright v. State*, 35 Ark. 639; *Kee v. State*, 28 Ark. 155.

2. *Com. v. Gagle*, 147 Mass. 576.
 3. **Illustrations.** — In *State v. Murray*, 91 Mo. 95, a conviction for murder was reversed because some of the jurors were suffered to remain in the dining room of a hotel while others of them went to the bar of a saloon, out of sight of their fellows, the sheriff in charge standing inside of the saloon.

In *People v. Schad*, 58 Hun (N. Y.) 571, a conviction was set aside where it appeared that, without leave of the court, the officer having charge of the jurors took them some distance from the court house to dinner; that one of the jurors separated from his fellows and drank intoxicating liquors; that another went alone to another part of the hotel, and other jurors in the meantime having set out to return to the court house, he followed, but did not overtake them until arrival at the court house; that thereafter, when taken to the hotel for another meal, the first mentioned juror again separated from the rest and drank intoxicating liquor.

In *People v. Thornton*, 74 Cal. 482, it was held that a new trial should have been granted for a separation where it appeared that after retiring, and before agreeing upon a verdict, the

jurors left their room, accompanied by an officer, went to a restaurant and ordered supper, and while the same was being prepared three of them went to a bar about twenty-five feet distant from the officer and the other jurors, and drank, and thereafter rejoined their fellows and the officer, partook of the supper, and returned to the court house, but instead of going into the jury room went into the court room, and there continued their deliberations until they had agreed on a verdict of guilty. *Following People v. Brannigan*, 21 Cal. 337.

4. *Arkansas*. — *Maclin v. State*, 44 Ark. 115.

Georgia. — *Neal v. State*, 64 Ga. 272.

Indiana. — *Masterson v. State*, 144 Ind. 240.

Iowa. — *State v. Bowman*, 45 Iowa 418.

Kansas. — *State v. Flack*, 48 Kan. 146.

Louisiana. — *State v. Nockum*, 41 La. Ann. 689; *State v. Riley*, 41 La. Ann. 693; *State v. Nelson*, 32 La. Ann. 842.

Massachusetts. — *Chemical Electric Light, etc., Co. v. Howard*, 150 Mass. 495.

Minnesota. — *State v. Conway*, 23 Minn. 291.

Mississippi. — *Green v. State*, 59 Miss. 501.

Missouri. — *State v. Rush*, 95 Mo. 199; *State v. Woodward*, 95 Mo. 129; *State v. Collins*, 86 Mo. 250; *State v. Payton*, 90 Mo. 220; *State v. Crawford*, 99 Mo. 74; *State v. Dyer*, 139 Mo. 199.

Montana. — *Territory v. Clayton*, 8 Mont. 1.

New Mexico. — *Roper v. Territory*, 7 N. Mex. 255.

North Carolina. — *State v. Lytle*, 5 Ired. L. (N. Car.) 58 [citing *State v. Kimbrough*, 2 Dev. L. (N. Car.) 431];

the officer or is out of his sight for the short time required for the purpose.¹

(2) *In Civil Cases.* — In the absence of injury, a mere separation of the jury in civil cases without the consent of the court is not *per se* sufficient ground for a new trial.² It is not the general practice in the *United States* to isolate jurors in civil cases during necessary adjournments which take place during the progress of the trial, but it is the general practice to permit them to separate after receiving due admonition from the court not to converse or receive communications touching the case on trial.³

State v. Miller, 1 Dev. & B. L. (N. Car.) 500].

Tennessee. — *Rowe v. State*, 11 Humph. (Tenn.) 492.

Texas. — *Cox v. State*, 7 Tex. App. 1; *Soria v. State*, 2 Tex. App. 297; *Jack v. State*, 26 Tex. 1.

Virginia. — *Thomas v. Com.*, 2 Va. Cas. 479.

Washington. — *Edwards v. Territory*, 1 Wash. Ter. 195.

But where it appeared that, five of the jurors having been permitted to retire from the court room in charge of an officer, another juror left the box, without the knowledge of the court, passed out of the court room, and did not return until after the officer who had been sent for him, and who during the separation had not seen him, met him quickly returning to the court room and escorted him back, it was held that the verdict should have been set aside, although the absentee in question testified that he had no communication with any person during his absence. *Overbee v. Com.*, 1 Rob. (Va.) 819.

Officers Not Specially Sworn. — There is no reversible error in the fact that during the progress of the trial, and before all the evidence was in, a juror withdrew for a short time for a necessary purpose, in charge of an officer of the court who was not specially sworn for that purpose, *Wilhelm v. People*, 72 Ill. 468, *distinguishing McIntyre v. People*, 38 Ill. 514, and *Lewis v. People*, 44 Ill. 453, wherein the jury had retired to consider its verdict, and was unaccompanied by a sworn officer, as required by statute. See *supra*, X. 1.

b. (1) *Necessity for Special Oath.*

Jurors Left Without Bailiff. — Temporary separation of jurors from their fellows, in a capital case, ten going out in charge of an officer for a necessary purpose and two remaining locked in

the jury room, is not ground for a new trial. *State v. Collins*, 86 Mo. 250. See also *State v. Payton*, 90 Mo. 220.

That two jurors left the jury room in charge of the bailiff for a necessary purpose, and were absent ten or fifteen minutes, the other jurors during the time remaining in the room unguarded, with the doors and windows closed, but not locked, will not vitiate the verdict, where it is shown that none of the jurors had any communication with an outsider during the separation. *Cornwall v. State*, 91 Ga. 277.

1. *State v. Forney*, 24 La. Ann. 192; *State v. Lytle*, 5 Ired. L. (N. Car.) 58; *Skates v. State*, 64 Miss. 644.

Attendant Suspicious Circumstances. — That two jurymen went into a water-closet where a stranger was, and that another stranger went in afterwards, and that all four were in the closet for some time and out of the view of the officer, was held to be of itself such a separation as required a conviction of murder in the first degree to be set aside. *State v. Robinson*, 20 W. Va. 714.

2. *Stutsman v. Barringer*, 16 Ind. 363; *Drummond v. Leslie*, 5 Blackf. (Ind.) 453; *New Albany v. McCulloch*, 127 Ind. 500; *Vicksburg, etc., R. Co. v. Elmore*, 46 La. Ann. 1237; *Graves v. Monet*, 7 Smed. & M. (Miss.) 45; *Anthony v. Smith*, 4 Bosw. (N. Y.) 503.

Discretion of Court. — A motion for a new trial upon the ground of a separation of the jury is addressed to the discretion of the court. *Downer v. Baxter*, 30 Vt. 467; *Edgell v. Bennett*, 7 Vt. 534.

3. *Dozenback v. Raymer*, 13 Colo. 451; *Stancell v. Kenan*, 33 Ga. 56; *Compton v. Arnold*, 54 Mo. 149; *Oram v. Bishop*, 12 N. J. L. 153; *Edward Thompson Co. v. Gunderson*, (S. Dak. 1897) 71 N. W. Rep. 764; *Ragland v. Wills*, 6 Leigh (Va.) 1. But see *Meyer*

d. SEPARATION BEFORE COMPLETION OF JURY. — It is a matter of discretion with the trial court to permit the separation of jurors who have already been selected while the trial panel is being made up, and no error is assignable unless injury has resulted.¹ And even in a capital case it has been held that

v. Cadwalader, 49 Fed. Rep. 32, holding that where the jurors separated at each session of the court, it will be presumed that they saw and read published statements in the daily issues of leading journals respecting the case on trial which would calculate to prejudice them against the plaintiffs and deprive the latter of a fair trial.

Absence from Jury Box. — The temporary absence of a juror from the jury box is not a ground for disturbing the verdict where there is nothing in the record to indicate that the defendant or his counsel was not fully aware of the fact. *Steward v. Hinkel*, 72 Cal. 187 [citing *Berry v. De Witt*, 27 Fed. Rep. 723; *Parsons v. Huff*, 38 Me. 141].

In *Eastman v. Tuttle*, 1 Cow. (N. Y.) 248, it was held that there was no reversible error, no injury having resulted, because, without the knowledge of the justice or the parties, a juror absented himself during the examination of a witness, when as soon as the absence was discovered the examination was suspended until the juror's return, upon which and without objection the examination was proceeded with *de novo*.

It is Contempt for a juror to leave his seat without the consent of the court or its knowledge or that of the parties. *Ex p. Hill*, 3 Cow. (N. Y.) 355.

Separation on View. — On a view of premises had by consent, it was held not to constitute misconduct that one of the jurors, who by reason of lameness was unable to walk over the premises, remained in a carriage on a highway alongside and in view of a greater part of the premises. *Keller v. Bley*, 15 Oregon 429.

1. *Maclin v. State*, 44 Ark. 115; *Frances v. State*, 6 Fla. 306; *Smith v. State*, 63 Ga. 168; *State v. Burns*, 33 Mo. 483; *Curtis v. Com.*, 87 Va. 589; *Toole v. Com.*, 11 Leigh (Va.) 749; *State v. Voorhies*, 12 Wash. 53, wherein it was held that a statutory provision that jurors, in criminal cases, shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, would not re-

quire reversal of a conviction because, against the objection of the defendant, jurors who had been passed for cause by both sides, but who had not been sworn, were allowed to separate during a recess taken to await the return of an additional venire ordered for the purpose of completing the panel.

In *Nomaque v. People*, 1 Ill. 145, the court, while declining to give a positive opinion, said that it was an act of great indiscretion on the part of the trial court to permit jurors who were accepted and sworn to go out before the completion of the jury.

Prejudice. — In the absence of any showing of prejudice, it is held that the mere fact that the jurors selected were permitted to separate before the completion of the jury is not available error. *State v. Clifford*, 58 Wis. 113.

Where a juror who has been accepted separates from his fellows pending the completion of the jury, but remains seated in the bar, while the other jurors selected retire in charge of an officer, and there remain for some time, there is no necessity for disturbing the verdict, it not being shown that the juror in question was approached or engaged in conversation with any person. *Bailey v. State*, 26 Tex. App. 706.

The venire may be quashed, the jurors selected discharged, and a new venire awarded when before the completion of the trial jury there is an unauthorized separation and conversation is held between a witness and some of the jurors. *McKenzie v. State*, 26 Ark. 334.

Re-examination. — Where members of the panel who have been selected as trial jurors are allowed to separate until the completion of the jury they may be sworn without being again examined on their *voir dire*. *Curtis v. Com.*, 87 Va. 589.

In *Smith v. State*, 63 Ga. 168, it was held that the prisoner had a right to have the impartiality of the jurors who had been separated tested again before they were sworn, but that his failure to ask for or propose the same was a waiver of the right.

where several days are consumed in forming the panel it is not necessary that jurors who have been accepted should be committed to the custody of the sheriff until the completion of the jury.¹

c. SEPARATION BY CONSENT. — Where the practice in criminal cases is to allow the jurors to separate during the progress of the trial, with the consent of the parties,² a motion for the discharge of the jury because of the separation of the jurymen for the night is properly denied where it appears that the separation was on the defendant's motion and with his consent.³ The practice is often fixed by statute under which consent is required in certain cases,⁴ and under such statutes it is error to permit a separation in a criminal case against the objection of the parties.⁵

Where Jurors Required to be Kept Together. — In cases of such a grade as

1. *Frances v. State*, 6 Fla. 306; *Eppe's Case*, 5 Gratt. (Va.) 676.

2. *McCorkle v. State*, 14 Ind. 39; *Evans v. State*, 7 Ind. 271. See *infra*, X. 6. *g. Separation After Finding of Verdict.*

3. *People v. Hawley*, 111 Cal. 78.

Where There Is No Prejudice, it not appearing that there was any misconduct during the separation, such separation, occurring with the consent of the accused as well as that of the prosecution, cannot be complained of. *People v. Tarm Poi*, 86 Cal. 225.

Discretion of Court. — Where parties consent to the separation, its allowance is held to be discretionary with the court. *State v. Mix*, 15 Mo. 153.

4. *State v. Frier*, 118 Mo. 648.

Who May Consent. — In *Texas*, where by statute the jurors cannot be permitted to separate except with the consent of the accused, it was held that the attorney for the accused had no power to give such consent. *Brown v. State*, 38 Tex. 482.

Scope of Consent. — Consent to a separation cannot be taken as a consent that a juror may absent himself, and so necessitate the discharge of the other jurors. *State v. Ward*, 48 Ark. 36.

Consent upon Condition. — In *Wilson v. State*, 18 Tex. App. 576, the judgment was reversed because of the violation of an express condition imposed by the defendant upon his consenting to a separation, that the separating juror should be accompanied by the sheriff.

Asking Consent in Presence of Jury. — It has been held to be error to ask consent in the presence of the jurors that they be allowed to disperse. *Lyman v. State*, 69 Ga. 404; *Mitchell v. State*, 41 Ga. 527.

But in *State v. Holedger*, 15 Wash. 443, it was held that while it is reprehensible conduct on the part of the court in asking counsel in the presence of the jury if they had any objection to the separation of the jurors, yet in the absence of any showing of prejudice there is not for that reason sufficient ground to call for a reversal.

5. Conditions under Mandatory Statutes. — Where by statute the jurors in the trial of an indictment for a felony are expressly forbidden to separate, unless by permission of the court and the consent of the prosecuting attorney and counsel for the defendant, and then only in the custody of an officer, the court cannot permit a separation over the objection of the defendant irrespective of the question of prejudice or injury. *Defriend v. State*, 22 Tex. App. 570; *Robinson v. State*, 30 Tex. App. 459; *Grissom v. State*, 4 Tex. App. 374; *Cox v. State*, 7 Tex. App. 1; *Early v. State*, 1 Tex. App. 248; *Wright v. State*, 17 Tex. App. 152; *Walker v. State*, 37 Tex. 366; *Brown v. State*, 38 Tex. 482.

The *Texas* statute (Code Crim. Pro., § 687) forbidding the separation of jurors in certain cases, unless under conditions therein prescribed, is mandatory, and where, in a capital case, jurors have become separated from an officer who has taken them from the main body, there must be a new trial. *Warren v. State*, 9 Tex. App. 620.

Disregard of a mandatory provision that the jurors shall not be permitted to separate without the consent of the defendants will require reversal of a conviction. *State v. Place*, 5 Wash. 773; *State v. Smith*, 102 Iowa 656; *State v. Garrity*, 98 Iowa 101.

to require the jurors to be kept together, consent, in the absence of a statute, will not obviate the error of an unauthorized separation,¹ as, for instance, in prosecutions for capital offenses;² but the legislature may allow the separation of the jurors, even in a capital case, with the consent of the defendant, and if the separation takes place with the free consent of the prisoner under such a law, there is no cause for complaint.³

f. AFTER SUBMISSION AND DELIBERATION — *Criminal Cases.* — In capital cases the jurors should not be permitted to separate except during the progress of the trial, if at all, and not after the case is finally submitted to them,⁴ any more than a separation should be permitted in other criminal prosecutions, the general rule being that in criminal cases, even where separation may be permissible during the trial, the jurors should be kept together after the case is submitted to them and until they are finally discharged from its consideration.⁵

1. *Wiley v. State*, 1 Swan (Tenn.) 256; *Cantwell v. State*, 18 Ohio St. 477.

In *Com. v. Costello*, 128 Mass. 88, it was said that if a court cannot lawfully allow a jury to separate without the consent of the defendant, it is at least doubtful whether such consent will cure the difficulty. *Citing* *Rex v. Woolf*, 1 Chit. Rep. 401, 18 E. C. L. 115, *sub nom.* *Rex v. Kinnear*, 2 B. & Ald. 462; *Peiffer v. Com.*, 15 Pa. St. 468.

2. *Woods v. State*, 43 Miss. 364; *State v. Cucuel*, 31 N. J. L. 249 [*denying* the doctrine of *Stephens v. People*, 19 N. Y. 549]; *Peiffer v. Com.*, 15 Pa. St. 468; *Wesley v. State*, 11 Humph. (Tenn.) 502; *People v. Shafer*, 1 Utah 260. But see *Hilands v. Com.*, 111 Pa. St. 1, wherein the jurors after being sworn were allowed to separate over night by consent of the accused, and the next morning the court discharged the jury, considering the irregularity as one which was not cured by the consent of the prisoner. It was held that the separation did not give rise to such an absolute necessity as justified the discharge of the jury, and that such discharge operated as an acquittal.

In *Elkin v. People*, 5 Colo. 508, it was held that the practice of permitting jurors to separate during the trial of important criminal cases of the grade of felony, and especially in murder cases, though not of itself error, is highly improper, even though done with the consent of the prisoner.

3. *Hartigan v. Territory*, 1 Wash. Ter. 447.

4. *State v. Hendricks*, 32 Kan. 559;

Walrath v. State, 8 Neb. 80; *Bergin v. State*, 31 Ohio St. 111; *People v. Reagle*, 60 Barb. (N. Y.) 527. But see *State v. Babcock*, 1 Conn. 401, to the contrary.

In *State v. Senn*, 32 S. Car. 392, a verdict was set aside because the jurors, while deliberating, and without permission, left their room, took possession of the court room, and there came into contact with constables of the court who were present.

White and Colored Men Placed in Different Rooms. — In *State v. Foster*, 45 La. Ann. 1176, the jury consisted of ten white and two colored jurors, who, during their deliberation, were placed in different rooms about thirty-five feet apart, unaccompanied by an officer; the doors were unlocked, and such conditions obtained that the jurors could leave without the knowledge of the deputy sheriff. It was held that misconduct would be presumed, and that the verdict should be set aside.

With the Consent of the accused the presiding judge may permit the jurors to separate from time to time until the final submission of the case. *Stephens v. People*, 19 N. Y. 549; *Elkin v. People*, 5 Colo. 508.

5. *Georgia.* — *Berry v. State*, 10 Ga. 511.

Iowa. — *State v. Fertig*, 84 Iowa 79.

Kansas. — *State v. Bailey*, 32 Kan. 83.

Minnesota. — *Maher v. State*, 3 Minn. 444.

Missouri. — *State v. Avery*, 113 Mo. 475; *State v. Orrick*, 106 Mo. 124; *State v. Frier*, 118 Mo. 648; *State v. Howland*, 119 Mo. 419.

Separation to Testify in Another Suit. — A temporary separation of a juror from his fellows, after submission and retirement, which separation is by direction of the court for the purpose of procuring his testimony in a pending case, the juror immediately returning to the jury room on a continuance of such case, will not vitiate the verdict.¹

In Civil Cases it is held that a jury charged with the final consideration of a cause should not be permitted to disperse without the consent of the parties² or the permission of the court,³

Nebraska. — *Walrath v. State*, 8 Neb. 80.

Ohio. — *Parker v. State*, 18 Ohio St. 88.

Washington. — *Anderson v. State*, 2 Wash. 183; *State v. Rogan*, (Wash. 1897) 50 Pac. Rep. 582.

After Charge, but Before Retirement. — It is held that the court may permit a separation of the jurors after the instructions during the arguments of counsel and at any time before they finally retire in charge of their bailiff for deliberation. *State v. McKinney*, 31 Kan. 570; *State v. Hendricks*, 32 Kan. 559.

But it is also held that after the charge a just protection of the prisoner's rights and those of the state forbids a separation, the reason of the rule, as well as the rule itself, applying to cases which are not capital as well as to capital cases. *State v. Populus*, 12 La. Ann. 710.

Indispensable Necessity. — After the jury has been instructed and has retired to deliberate, it should be kept in, unless in a case of indispensable necessity. *State v. Nelson*, 32 La. Ann. 842.

Absence of Prejudice. — It is also held that the separation of the jurors is not of itself ground for a new trial if no injury is occasioned thereby, notwithstanding a statute requiring a jury in a criminal case to be kept together after submission of the case to it. *State v. Wright*, 98 Iowa 702; *Riley v. State*, 95 Ind. 446.

Where, after final submission of the cause and retirement of the jury, and before verdict, a separation occurs which is of such a character that one or more of the jurors might have been improperly influenced, and there is nothing trustworthy to show that such influence was not exercised to the prejudice of the accused, the verdict should be vacated and the cause retried. *State v. Church*, 7 S. Dak. 289, *overruling* 6 S. Dak. 89.

The separation of a juror from his

fellows after final submission, and before agreement, for the purpose of obtaining and drinking intoxicating liquors, when not explained or shown to be excusable, is such misconduct as will entitle the defendant in a criminal proceeding to a new trial. *Weis v. State*, 22 Ohio St. 486; *State v. Baldy*, 17 Iowa 39.

In *State v. Tilghman*, 11 Ired. L. (N. Car.) 513, the reviewing court declined to interfere though three different members of the jury several times separated themselves from their fellows, after retirement for deliberation; and it appeared that notes were thrown from the windows of the jury room, persons were admitted thereto, refreshments taken therein, and that one juror conversed with a stranger outside the jury room.

Where the Verdict Appears to Be Right, it is held in *Indiana* that even if there is a separation without leave of court after retirement of the jury, in violation of the statute in that regard, a new trial will not be granted for that cause. *Masterson v. State*, 144 Ind. 240; *Creek v. State*, 24 Ind. 151.

1. *State v. Durham*, 72 N. Car. 447; *State v. Fertig*, 70 Iowa 272; *State v. Adams*, 20 Kan. 311.

The court may refuse to call as a witness a juror engaged in deliberation in an important criminal case. *State v. Rodrigues*, 45 La. Ann. 1040.

2. *Stix v. Pump*, 37 Ga. 332; *Richards v. Page*, 81 Me. 563; *Shepherd v. Baylor*, 5 N. J. L. 954; *Nickelson v. Smith*, 15 Oregon 200.

One of the Most Important Reasons for requiring jurors to remain together after the cause is finally committed to them until they have agreed upon their verdict is that they may reach their conclusions only upon the law and the evidence given them, uninfluenced by other matters. *Spencer v. Williams*, 160 Mass. 17.

3. *Murphy v. Wilson*, 46 Ind. 537; *Moore v. Edmiston*, 70 N. Car. 471.

under the common-law rule requiring jurors to be kept together until agreement;¹ and where an order of court permitting the jurors to separate is made in the presence of counsel for both parties, without objection, it will be inferred that the parties consented to the order.² On the other hand, the mere separation of the jurors after they have been charged with the case, and before verdict, will not *per se* constitute a ground for setting aside the verdict and granting a new trial, but a probability must appear that they were subject to some influence.³ So the court may, in its discretion, permit the jurors to separate,⁴ and where the court instructs the jurors that if they do not agree upon a verdict within a certain time they may separate and come together again the next day further to consider their verdict, there is no ground for disturbing the judgment where no injury has been shown.⁵

g. SEPARATION AFTER FINDING OF VERDICT — (1) In Criminal Cases. — The mere dispersion of the jurors after finding and sealing their verdict and delivering it to the clerk is held to be

In *Obear v. Gray*, 68 Ga. 182, it was held reversible error to take a jury to a public resort on Sunday and allow the jurors their freedom to pass about and separate for a considerable time.

From the fact that after a time some of the jurors separated from their fellows and conversed with strangers for some hours, there is a legal presumption of injury to the unsuccessful party which, unless overcome, will require a new trial. *Robinson v. Donehoo*, 97 Ga. 702.

1. *Lester v. Stanley*, 3 Day (Conn.) 287; *Offit v. Vick, Walk.* (Miss.) 99, holding that it was no excuse for the separation of a juror from his fellows that he was attended by a sworn officer, where the separation was without permission.

2. *Menzies v. Kennedy*, 9 Nev. 152; *Parmlee v. Sloan*, 37 Ind. 469; *Riggins v. Brown*, 12 Ga. 271.

3. *Dozenback v. Raymer*, 13 Colo. 451; *Alexander v. Dunn*, 5 Ind. 122; *Perkins v. Ermel*, 2 Kan. 325; *Oram v. Bishop*, 12 N. J. L. 153; *Smith v. Thompson*, 1 Cow. (N. Y.) 221; *Pulaski v. Ward*, 2 Rich. L. (S. Car.) 119; *Downer v. Baxter*, 30 Vt. 467.

Separation for Necessary Purpose. — The separation of jurors for a short time and for a necessary purpose, by permission of the bailiff, after retirement and before agreement, is not a ground for disturbing the verdict, where it is not made to appear that during the separation the jurors had any com-

munication with one another or with outsiders, or that their verdict could have been in any manner influenced by the fact of separation. *Boggs v. Chicago, etc., R. Co.*, 29 Iowa 577.

Technical Violation of Statute. — A separation after retirement because of a fire in the immediate vicinity of the jury room, an alarm as to which was heard therein, while technically a violation of the statutes prohibiting the separation during retirement, will not vitiate the verdict, where no moral wrong was involved. *Armleder v. Lieberman*, 33 Ohio St. 77.

Directory Statute. — The *Vermont* statute (Comp. Stat., p. 222, § 23) requiring the confining of a jury in charge of a sworn officer until agreement or their discharge by the court was held to be directory only, and where a separation of the jury had taken place after final submission it was held that the verdict would not be set aside, if it appeared that the separation was not prejudicial, and that the verdict was clearly right. *Downer v. Baxter*, 30 Vt. 467.

4. *Dozenback v. Raymer*, 13 Colo. 451; *Haynes v. Thomas*, 7 Ind. 38.

5. *Madison Coal Co. v. Beam*, 63 Ill. App. 178; *Morrow v. Saline County*, 21 Kan. 484.

Punishment. — The separation of the jury before agreement, when unauthorized, may be punished. *Murphy v. Wilson*, 46 Ind. 537; *Brown v. McConnell*, 1 Bibb (Ky.) 265.

insufficient to vitiate the verdict in the absence of any showing of prejudice resulting therefrom;¹ and it is often held that the court may direct a retiring jury that after agreeing on a verdict and signing and sealing the same the jurors may separate and return the sealed verdict at the reconvening of the court,² when no objection is made,³ or by consent of the parties.⁴ On the other hand, it is held that a statute which provides that jurors in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorneys, authorizes such

1. *James v. State*, 55 Miss. 57; *Territory v. Hexter*, 3 Mont. 206; *Com. v. Desmond*, 141 Mass. 200.

Contra.—In *State v. Callahan*, 55 Iowa 364, it was held that where, without an order of the court or the consent of the parties, the jurors sealed up their verdict, handed it to the officer, and separated, a new trial should have been ordered for the reason that the defendant was deprived of his right to poll the jury. *Silvey v. State*, 71 Ga. 553. See also *U. S. v. Vigol*, 2 Dall. (U. S.) 346.

2. *Beyerline v. State*, 147 Ind. 125; *State v. Engle*, 13 Ohio 490; *Kennon v. Territory*, 5 Okla. 685.

Must Be a Verdict.—Where the jurors, by permission of the court and consent of the parties, sealed their verdict and separated in the night, and upon reconvention of the court a verdict was returned which consisted of the statement signed by the foreman that "We, the jury, agree to disagree. So say we all," it was held that there was no error on the part of the trial judge in declaring a mistrial and discharging the jury. *Tervin v. State*, 37 Fla. 396.

3. *Jarrell v. State*, 58 Ind. 293; *State v. Hodges*, 45 Kan. 389; *State v. Emmons*, 45 Kan. 397.

4. *Reins v. People*, 30 Ill. 256; *Farley v. People*, 138 Ill. 97; *Sanders v. State*, 2 Iowa 230.

In *Com. v. Hayden*, 163 Mass. 453, the jurors agreed, sealed their verdict, and were allowed to separate. The next morning the foreman handed the clerk a sealed envelope, which was found to contain private papers. He then stated that he had placed the sealed verdict in his safe with other sealed envelopes exactly similar, and had, by mistake, brought the wrong envelope; and there was held to be no error in allowing the jury to separate again while the foreman went to his home and procured the verdict.

Degree of Offense Involved.—In *Massa-*

chusetts, in a criminal case not capital, the jury may be authorized by the court, without the consent of the defendant, to separate after agreeing upon, signing, and sealing up a paper in the form of a verdict, and afterwards to return an oral verdict in open court in accordance with the result stated in the sealed verdict. *Com. v. Carrington*, 116 Mass. 37. See also *Com. v. Costello*, 128 Mass. 88.

In *Maine*, in any criminal case where the punishment is not death or imprisonment for life, the jurors may lawfully seal up their verdict when agreed upon, and then separate during the temporary adjournment of the court. *Anonymous*, 63 Me. 590. See *State v. Fenlason*, 78 Me. 495.

Irregularity Waived by Consent.—By consenting that the sheriff may receive a sealed verdict during the night and allow the jurors to separate until the session of the court on the next morning, the defendant waives the irregularity in such a proceeding. *People v. Kelly*, 46 Cal. 355.

Oral and Sealed Verdicts Must Accord.—In *Com. v. Durfee*, 100 Mass. 146, the exceptions were sustained solely because the paper signed and sealed up by the jurors before they separated was not read in court, and it did not therefore appear that their oral verdict accorded with the result upon which they had agreed before their separation. See also *U. S. v. Swan*, 7 N. Mex. 306.

Where the verdict indorsed on the indictment was: "Guilty as charged in the indictment," and in response to the usual inquiry and request from the clerk the jury rendered its verdict of guilty orally and in open court, and the sealed verdict was also affirmed in the usual manner, it was held that the written verdict, though abbreviated in form, could refer only to the respondent named in the indictment. *State v. Webber*, 90 Me. 108.

a separation only during the trial, and not after submission of the case, and does not allow them to separate, even with such consent, after agreeing upon and sealing their verdict, but before its return.¹

(2) *In Civil Cases.* — By agreement the jury in a civil case may be allowed to seal up the verdict, return it to the clerk, and disperse,² or the court may permit such a course to be pursued.³ And even an unauthorized separation after an agreement upon a verdict will not of itself be sufficient ground for a new trial where no prejudice results,⁴ though the separation is without the consent of either court or parties.⁵

(3) *Effect on Future Power of Jury.* — Where the jurors, by permission of the court and consent of the parties, have separated after returning a sealed verdict, it has been held in a criminal case that they cannot be sent back thereafter to complete their verdict.⁶

In Civil Cases, where there is an authorized separation after the finding and sealing of the verdict, the jury may be allowed to retire upon a reconvention of the court for the purpose of

1. *State v. Rogan*, (Wash. 1897) 50 Pac. Rep. 582; *Anderson v. State*, 2 Wash. 183; *State v. Anderson*, 41 Minn. 104; *State v. Fertig*, 84 Iowa 79.

Contra.—*Bainbridge v. State*, 30 Ohio St. 264, holding that under a statute providing that jurors must be kept together until they agree on a verdict or are discharged by the court, their separation after they have agreed is within the discretion of the court; *Clayton v. State*, 100 Ind. 201, holding that where by a statute the misconduct of jurors in separating, without leave, after their retirement, is made ground for a new trial, yet a new trial may be properly refused where it appears that the jurors had permission to separate after agreeing and sealing their verdict, and upon the reassembling of the court they were sent back for the purpose of affixing the name of the foreman, notwithstanding they had been actually separated for about seven hours, since the error was purely a technical one, and could not in any way prejudice substantial rights.

2. *Sage v. Brown*, 34 Ind. 464; *Tyrrell v. Lockhart*, 3 Blackf. (Ind.) 136; *Bushee v. Wright*, 1 Pin. (Wis.) 104; *Burlingame v. Burlingame*, 18 Wis. 285.

Effect upon Right to Poll. — The dispersion of a jury after a verdict is handed to the clerk and before it is received by the court is a good reason for

refusing to permit the jury to be polled. *Smith v. Mitchell*, 6 Ga. 458.

Presumption of Consent.—Where it appears that the permission to disperse was given in the presence of the counsel of the parties and without objection by them, it will be presumed that they assented thereto. *Parmlee v. Sloan*, 37 Ind. 469.

3. *Kohn v. Kennedy*, 6 Colo. App. 388; *Chicago v. Langlass*, 66 Ill. 361; *Lucas v. Marine*, 40 Ind. 289; *Leas v. Cool*, 68 Ind. 166; *Harter v. Seaman*, 3 Blackf. (Ind.) 27; *Crocker v. Hoffman*, 48 Ind. 207; *Walker v. Dailey*, 87 Iowa 375; *Winslow v. Draper*, 8 Pick. (Mass.) 170; *Scott v. Chope*, 33 Neb. 41; *Green v. Bliss*, 12 How. Pr. (N. Y. Supreme Ct.) 428; *Welch v. Welch*, 9 Rich. L. (S. Car.) 133.

4. *Evans v. Foss*, 49 N. H. 490; *Sartor v. McJunkin*, 8 Rich. L. (S. Car.) 451; *Shaver v. Beates*, 7 Alb. L. J. 204; *Wright v. Burchfield*, 3 Ohio 53; *Sutliff v. Gilbert*, 8 Ohio 405.

5. *Walker v. Dailey*, 87 Iowa 375; *Cook v. Watters*, 4 Iowa 73; *Heiser v. Van Dyke*, 27 Iowa 359.

The slightest suspicion of abuse has been held sufficient to vitiate a verdict upon such an unauthorized separation. *Oliver v. First Presb. Church*, 5 Cow. (N. Y.) 283; *Horton v. Horton*, 2 Cow. (N. Y.) 589.

6. *Farley v. People*, 138 Ill. 97; *U. S. v. Swan*, 7 N. Mex. 306.

reconsidering and correcting the verdict.¹

h. ADMONITION UPON SEPARATION — Criminal Cases. — Failure to admonish jurors as to their duty during the hours of separation as required by statute is objectionable practice,² but unless the record affirmatively shows to the contrary, it will be presumed that when the jurors were permitted to separate they were duly admonished as to their duty.³ A failure to admonish the jury

1. *Tyrrell v. Lockhart*, 3 Blackf. (Ind.) 136; *Maclin v. Bloom*, 54 Miss. 365; *Luttrell v. Martin*, 112 N. Car. 593; *Winslow v. Draper*, 8 Pick. (Mass.) 170; *Chapman v. Coffin*, 14 Gray (Mass.) 454; *Scott v. Choate*, 33 Neb. 41; *Sutliff v. Gilbert*, 8 Ohio 405. *Contra*, *Trout v. West*, 29 Ind. 51.

In *Luttrell v. Martin*, 112 N. Car. 593, it appeared that the jurors, having agreed on a finding as to an issue submitted, failed to answer, and thereafter separated and conversed with several persons relative to the case. It was held that the court, first having found by the statements of the jurors that they had not been influenced by anything said to them during the separation, did not commit error in permitting them to retire and answer the issue in question.

Disagreement. — Where the jurors separate after agreeing on a verdict, under a direction by the court that they shall do so, but on their appearing before the court and being polled they do not assent to the verdict rendered, they may be sent out for further consideration of the case, under a statute (Code Iowa, § 2803) providing that if any jury disagree it may be sent out for further deliberation. *Jessup v. Chicago, etc., R.Co.*, 82 Iowa 243.

But where the jurors, for the purpose of entitling them to separate, falsely represented that they had agreed, and upon reassembling they delivered a paper signed by them stating: "The jurors, after due deliberation, do not agree," it was held error to permit them to reconsider their verdict. *Oliver v. First Presb. Church*, 5 Cow. (N. Y.) 283. And in *Short v. West*, 30 Ind. 367, it was held that the complaining party was entitled to a new trial on a showing that in their retirement, and without the consent of such party or the permission of the court, the jurors agreed to return as a finding that they agreed to disagree, sealed it up, disbanded, and did not meet until the next morning, when they destroyed the find-

ing agreed upon and brought into court a general and a special verdict.

Consideration of Specific Questions. — Where the jury arrived at a general verdict and reduced it to writing, and the foreman signed it before separation, it was held that it would be inferred that before separation the jury considered specific questions submitted and arrived at an agreement as to the answer to be given. *Spencer v. Williams*, 160 Mass. 17.

2. *People v. Coyne*, 116 Cal. 295; *Walrath v. State*, 8 Neb. 80. But see *People v. Ebanks*, 117 Cal. 652, holding that such admonition is discretionary with the court.

Sufficiency of Admonition. — It is not essential that the admonition to be given to the jury at the time of each adjournment be in the very language of the statute; it is enough that the duty of the jurors is fully and clearly disclosed to them by the court; and an admonition not to converse "in regard to this case" is, when no objection is made at the time, sufficient, although the language of the statute is "on any subject connected with the trial." *State v. McKinney*, 31 Kan. 570.

Construction of Statute. — Where by statute jurors were permitted to separate upon being admonished by the court as to their duty not to converse among themselves or suffer others to converse with them on any subject connected with the trial, etc., it was held, where the admonition had been given at each adjournment, and where the trial was apparently fair and impartial, that a judgment should not be reversed because during the session of the court several recesses of from three to five minutes were taken without the preliminary admonition, although the record was silent as to what took place during such recesses. *State v. Stackhouse*, 24 Kan. 455. See also *People v. Colnere*, 23 Cal. 631.

3. *Langford v. State*, 32 Neb. 782; *Caw v. People*, 3 Neb. 357; *St. Louis*

will not require a reversal where no injury results to the accused during the separation.¹

In Civil Cases. — On dispersion of the jurors during trial, it is the duty of the court, especially in cases of magnitude, to caution them,² but a failure in this regard will not necessarily be fatal.³

i. RECORD. — Where the separation of the jurors is relied on as ground for a new trial it should be shown by the record.⁴

7. Receiving Evidence Out of Court — *a. IN GENERAL.* — It is a well-settled rule of law, declared by statute in some states, that the reception by a jury of evidence out of court will, if influential in determining the verdict, require the granting of a new trial.⁵ But where it appears that the fairness of the trial

v. State, 8 Neb. 405; *Evans v. State*, 7 Ind. 271.

Where the record shows that on each separation of the jurors the presiding judge instructed them as to their duty, it will be presumed that they were properly instructed as to the rights of the prisoner and as to all of their duties in the premises. *Hartigan v. Territory*, 1 Wash. Ter. 452.

1. *People v. Coyne*, 116 Cal. 295; *People v. Colmere*, 23 Cal. 632; *State v. Gray*, 19 Nev. 212; *People v. Draper*, 28 Hun (N. Y.) 1.

Presumption of Injury. — But it is also held that while the mere failure to admonish the jury as imperatively required by statute may not in itself be substantial error, it will raise a presumption of injury on a motion for a new trial which must be overcome, and that the overruling of such a motion in the face of this presumption without proof that no injury resulted is reversible error. *State v. Mulkins*, 18 Kan. 16.

Where the Jurors are Kept Together a failure to admonish them at recess is not a ground for reversal. *Pritchett v. State*, 92 Ga. 65.

2. *Crocker v. Hoffman*, 48 Ind. 207; *Territory v. Doty*, 1 Pin. (Wis.) 396.

On dispersion during the trial, it is the duty of the court in all cases, but especially in cases of magnitude, or involving much feeling, to caution the jurors and promptly to punish for violation of the instructions so given. *Brandon v. Mullenix*, 11 Heisk. (Tenn.) 446.

In civil cases the mere fact that the jurors have been permitted to separate during a few minutes' recess, without being then admonished, where the court had previously admonished them as to their conduct during such separations, should not be regarded as reversible

error, nor should a new trial be granted in such case, unless the facts touching such separations are such as to raise a reasonable suspicion of abuse. *Gleason v. Strauss*, 5 Kan. App. 80; *Stager v. Harrington*, 27 Kan. 414.

3. *Territory v. Doty*, 1 Pin. (Wis.) 396.

Failure to Object. — When the party, acting as his own counsel, is present when the court permits the separation without admonishing the jury, he waives the objection by failing to call the court's attention to the omission until the next meeting of the court. *Musselman v. Pratt*, 44 Ind. 126; *Crocker v. Hoffman*, 48 Ind. 207.

Presumption of Admonition. — In the absence of anything to the contrary, it will be presumed that jurors were duly admonished when allowed to separate before rendering their verdict and their discharge by the court. *Dozenback v. Raymer*, 13 Colo. 451.

Presumption of Prejudice. — In *Kansas*, that the jurors separated and mingled with the public without being duly admonished casts the burden on the prevailing party to show that they were not submitted to any improper influence. *Murphy v. Hindman*, 37 Kan. 267; *Ehrhard v. McKee*, 44 Kan. 715; *Pracht v. Whittridge*, 44 Kan. 710.

4. *State v. Wilson*, 121 Mo. 434; *Maling v. Crummey*, 5 Wash. 222; *Bosley v. Farquar*, 2 Blackf. (Ind.) 61.

Where the record shows that an absent juror came into court while a witness was testifying, it may fairly be presumed that the juror was absent by permission of the court, and in charge of its officer. *State v. Parsons*, 7 Nev. 57. And if the record precludes the supposition that the juror was tampered with, the verdict will not be disturbed. *Whitney v. State*, 8 Mo. 165.

5. *People v. Gallo*, 149 N. Y. 106;

has been in no way affected by such improprieties, the verdict will not be disturbed.¹

6. TESTIMONY OF JURORS — When New Trial Granted. — Under the rule forbidding juries to receive evidence out of court, a juror should not be allowed to impart to his fellows facts within his personal knowledge which were not given in evidence.² And where a juror on deliberation states to his fellows of his personal knowledge material facts not adduced in evidence, which statements are received by the jury as evidence and considered in reaching the verdict, a new trial should be granted.³ Thus, ver-

Hudson v. State, 9 Yerg. (Tenn.) 408. See also the cases cited under the specific heads following.

Reporter Reading Testimony in Jury Room. — It is error for the shorthand reporter to go to the jury room without the consent of the parties, and there read testimony to the jurors. *Fleming v. Shenandoah*, 67 Iowa 505. But where the parties consent, there is no error. *Hahn v. Miller*, 60 Iowa 96.

1. *State v. Allen*, 89 Iowa 49. See also the following sections.

Examining Hotel Register. — In *State v. Beasley*, 84 Iowa 83, the court condemned the action of a juror in examining a hotel register to see if a name was contained therein, but declined to interfere with the action of the court below in denying a new trial, it appearing from the testimony of the juror himself and one of his fellows that no prejudice resulted.

Additional and Important Fact Stated by Witness. — Where a jury had retired to consider the verdict, and afterwards came into court to hear explanations from a witness, who stated an additional and important fact, not before stated by him, but which fact the court immediately told the jury it was to disregard, it was held that the affidavit of a juror stating that he founded his verdict entirely upon this additional fact would not authorize a new trial. *Hudson v. State*, 9 Yerg. (Tenn.) 408.

Reading Report of Former Trial. — In *Fuller v. Fletcher*, 44 Fed. Rep. 34, the court refused to disturb the verdict, although during the trial of the cause two of the jurors read a copy of the opinion of the Supreme Court of the United States on an appeal from a former judgment, where it appeared that the opinion was not furnished by the prevailing party, nor in any way by his procurement, and that no copy was taken into the jury room or laid before the jury.

Reading Charge Given in Former Trial. — In *Cartwright v. State*, 12 Lea (Tenn.) 620, the error assigned was that the presiding judge, before the argument of the cause, handed to some of the jurors a written charge given to the jury on the former trial. It appeared that a part of the charge which was inspected by the jurors contained part of the definition of murder, and was not handed to them as containing instructions by which they were to be governed in the trial of the cause, but merely to ascertain whether it would be expedient to have the charge written more plainly than the judge would write, and it was held that there was no prejudice of which the defendant could complain.

2. *Wood River Bank v. Dodge*, 36 Neb. 708; *Richards v. State*, 36 Neb. 17; *Anderson v. Barnes*, 1 N. J. L. 235; *Bowler v. Washington*, 62 Me. 302; *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190; *Hall v. Robison*, 25 Iowa 91; *State v. Beam*, 1 Kan. App. 688. Compare *Purcell v. Tibbles*, 101 Iowa 24.

3. *Connecticut*. — *Talmadge v. Northrop*, 1 Root (Conn.) 522.

Iowa. — *Griffin v. Harriman*, 74 Iowa 436.

Kansas. — *Murphy v. Hindman*, 37 Kan. 267; *Atchison, etc., R. Co. v. Boyes*, 42 Kan. 609; *State v. Woods*, 49 Kan. 237.

Tennessee. — *Wade v. Ordway*, 1 Baxt. (Tenn.) 229; *Sam v. State*, 1 Swan (Tenn.) 61; *Booby v. State*, 4 Yerg. (Tenn.) 111; *Ryan v. State*, 97 Tenn. 206.

Texas. — *Anschicks v. State*, 6 Tex. App. 524; *Mason v. State*, (Tex. App. 1891) 16 S. W. Rep. 766; *McWilliams v. State*, 32 Tex. Crim. Rep. 269; *Burleson v. State*, (Tex. App. 1890) 15 S. W. Rep. 175.

And see *Edney v. Baum*, 44 Neb. 294. In *Murphy v. Hindman*, 37 Kan. 267, it was held that a new trial was prop-

dicts have been set aside where members of the jury made prejudicial statements to their fellows concerning the credibility of witnesses¹ or stated facts reflecting on the character of a party to the action and calculated to prejudice the jury against him.²

erly granted because, among other things, a juror having information as to one of the disputed facts in the case, which he had failed to disclose on his *voir dire*, had stated to his fellow-jurors, after testimony to the facts had been given, that he knew more about the facts than the witness did.

In *Ryan v. State*, 97 Tenn. 206, the judgment was reversed and a new trial ordered because one of the jurors stated in the presence of several of his fellows, during the progress of the trial, that he had been a member of the grand jury that indicted the defendant, and informed them of the evidence produced before that body as to the offense charged.

Juror Induced to Change His Vote.—Statements of a juror to his fellows, on deliberation, of facts within his own personal knowledge which did not appear in evidence, and which induced a juror to change his vote, will require a new trial. *State v. Woods*, 49 Kan. 237; *Mason v. State*, (Tex. App. 1891) 16 S. W. Rep. 766.

Prejudice Presumed.—To vitiate the verdict rendered, where one of the jurors has made material statements to his fellows which were not in evidence, the onus is not on the prisoner to show that he was prejudiced, but it is enough that he might have been prejudiced, and the law will so presume. *Sam v. State*, 1 Swan (Tenn.) 61. See also *McWilliams v. State*, 32 Tex. Crim. Rep. 269.

1. *Lucas v. State*, 27 Tex. App. 322; *McKissick v. State*, 26 Tex. App. 673; *Donston v. State*, 6 Humph. (Tenn.) 275; *Pumphrey v. Walker*, 71 Iowa 383.

2. *Hargrove v. State*, 33 Tex. Crim. Rep. 431; *Morton v. State*, 1 Lea (Tenn.) 498; *State v. Andrews*, 29 Conn. 100.

In *Nile v. State*, 11 Lea (Tenn.) 694, the judgment was reversed and a new trial ordered because one of the jurors stated to his fellows in the jury room that he had been a juror in a case against the defendant before, about some fodder; that it was very common for the defendant to be in court, or that he was there every few courts with some charge against him, and he be-

lieved that the defendant ought to be convicted in this case.

Stating That Prisoner Was "a Hard Case."—On trial of an indictment for an assault with intent to kill, one of the standing jurors of the term, but who was not sitting in the case, said to one of the sitting jurors after they had retired for the night to a room which they occupied together, and when no one else was present, that he guessed that prisoner was a hard case; that he had heard that he was in the book business at the South, and on a person refusing to take a book he had subscribed for, the prisoner drew two pistols and threatened to blow his brains out if he did not take it; and the verdict was set aside, although the communication was made without corrupt motive, and the juror in question testified that he had paid but little attention to it, and that it had no effect on his mind. *State v. Andrews*, 29 Conn. 100.

Stating Former Conviction for Like Offense.—In *State v. McCormick*, 57 Kan. 440, the judgment was reversed because, among other things, while in their retirement, one of the jurors stated as a fact that the defendant had been convicted on a former trial, and another stated that the defendant had defrauded a witness who had testified.

Rape—Stating Former Attempt.—Under a statute requiring a new trial where the jury on its deliberation should receive outside testimony, a conviction of rape was set aside because, at a time when the jury was evenly divided, one of the jurors informed the others that some three years before the defendant went into the bedroom of one of his neighbors, where such neighbor's wife was; that he (the juror) heard the woman's husband threaten to kill the defendant if he did not leave the country, and that the defendant left the neighborhood. *Ellis v. State*, 33 Tex. Crim. Rep. 508.

Criminal Case—Remarks Prejudicial to Defendant.—Where, by statute, a new trial is required where on their deliberation the jurors received outside testimony, it was held that a conviction for murder should be reversed where it appeared that after retirement, at a time

When New Trial Not Granted. — Statements by jurors to their fellows of matters outside the evidence are not necessarily prejudicial,¹ and it has been held that, although jurors make improper remarks regarding the case in hand, this will not be a sufficient ground for a new trial where it appears that no injury resulted therefrom.² In some cases the courts have gone so far as to hold that even statements regarding the character of a party will not

when two-thirds of the jurors were for acquittal, two of the other jurors made statements as to the bad character of the defendant and his brothers, and that the defendant had shot a man in the back, while he was sitting down, because the man had been a witness in a case about some cattle. *Mitchell v. State*, 36 Tex. Crim. Rep. 278.

1. *Gonzales v. State*, 32 Tex. Crim. Rep. 611; *Borer v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 951.

Irrelevant Statements by jurors while in retirement will not be presumed to have influenced the verdict. *Steward v. Hinkel*, 72 Cal. 187.

Harmless Conversation. — The law does not demand that the jury should sit mute, and when jurors are observed to be talking among themselves, it will not be presumed that the act involves impropriety; but to predicate misconduct of the fact it must be made to appear that the conversation had improper reference to the offense, or to the merits of the case. *People v. Kramer*, 117 Cal. 647.

Statement of a Self-evident Fact by one juror to some of his fellows during the progress of the trial, to which no objection was made at the time, and which could not have influenced the verdict, is not a ground for a new trial. *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190.

2. *State v. Cowan*, 74 Iowa 53; *McTyler v. State*, 91 Ga. 256; *Hall v. Robison*, 25 Iowa 91; *State v. Wright*, 98 Iowa 702; *Paramore v. Lindsey*, 63 Mo. 63; *Cutler v. Cutler*, 43 Vt. 660; *Cherry v. Sweeny*, 1 Cranch (C. C.) 530.

If There Is Sufficient Evidence to Sustain a Finding of the jury, the court will not grant a new trial because of statements made by a juror to his fellows. *Davis v. Lowman*, 9 Ga. 504.

Remarks Favorable to Unsuccessful Party. — Where, after agreeing to find for the plaintiff, and before the determination of the amount, remarks were made by some of the jurors to others of the panel as to the mental condition, conduct, and disposition of the defend-

ant, and with respect to the amount of the verdict returned, it was held that even if the matters could be considered the defendant could not complain, it appearing that he was not prejudiced by the statements, but that if on the contrary they had any effect it was to rouse sympathy for him and to reduce the amount of the verdict. *Noble v. White*, (Iowa 1897) 72 N. W. Rep. 556.

After Sealing of Verdict. — In a murder case, neither the defendant nor his wife testified in his behalf, and it appeared that after the verdict had been agreed upon, reduced to writing, signed by the foreman, and placed in a sealed envelope, and while the jury was waiting to be called into the court room, there was some conversation between the jurors as to the fact that the defendant's wife did not testify, and it was remarked that if certain facts bearing strongly against the defendant were not true she should have contradicted or explained them. It was held that, notwithstanding the last proviso in section 215 of the *Kansas Code Crim. Pro.*, there was no error in refusing to set aside the verdict. *State v. McKinney*, 31 Kan. 570.

A statement by a juror to his fellows after agreement upon a verdict, that he knew one of the witnesses to be a responsible man, and worthy of credit, is not ground for setting aside the verdict, when it is shown that such statement was not made until after the verdict was found. *Wise v. Bosley*, 32 Iowa 34. See also *Parker v. State*, (Tex. Crim. App. 1895) 30 S. W. Rep. 553.

Representations Regarding Sentence. — The fact that the jurors were induced to agree upon a verdict of murder in the first degree upon the representation of one of them that the judge might sentence the accused to imprisonment for life instead of imposing the death penalty is not such misconduct as will require a reversal, since the sentence is not within the province of the jury. *State v. Holmes*, 12 Wash. 170.

warrant the setting aside of the verdict unless it appears that prejudice resulted therefrom.¹

c. PRIVATE EXAMINATION OF WITNESSES. — Where the jurors in their retirement call witnesses before them and examine them privately, a new trial should be granted.²

d. UNAUTHORIZED VIEW OF LOCUS IN QUO. — Where the gist of an action on trial is the condition of the *locus in quo*, or where a view of it will enable the jurors the better to determine the credibility of the witnesses, or any other disputed fact, if the jurors, without the permission of the court or knowledge of the parties, examine the locality for the express purpose of acquiring such information, a new trial should be granted, unless it is clear that such misconduct could not have influenced their verdict.³ But where there is no controversy as to the locality inspected and no probability of prejudice resulting from the inspection, the verdict should not be disturbed.⁴

1. *Cox v. State*, 28 Tex. App. 92; (Supreme Ct.) 3 N. Y. Crim. Rep. 142. *Austin v. State*, 42 Tex. 355; *Taylor v. State*, 52 Miss. 84. But see *Gilmore v. H. W. Baker Co.*, 12 Wash. 468.

Discussing Other Offenses. — That a juror during the deliberation stated that the defendant had been guilty of a similar offense before is not ground for a new trial, where the circumstances under which the statements were made and the number of jurors who heard them are not shown, and no claim is made that the jury was influenced by them. *State v. Cross*, 95 Iowa 629. See also *Testard v. State*, 26 Tex. App. 260; *Mitchell v. State*, 36 Tex. Crim. Rep. 278.

2. *Metcalf v. Deane*, Cro. Eliz. 189; *Luttrell v. Maysville, etc.*, R. Co., 18 B. Mon. (Ky.) 291; *Vanmeter v. Kitzmiller*, 5 W. Va. 380. But see *State v. Martin*, Tappan (Ohio) 323.

By the Consent of the Parties, a witness may be examined privately by the jury in its retirement. *Brown v. Cowell*, 12 Johns. (N. Y.) 384.

3. *Kansas.* — *Ortman v. Union Pac. R. Co.*, 32 Kan. 419.

Maine. — *Bradbury v. Cony*, 62 Me. 223; *Bowler v. Washington*, 62 Me. 302; *Winslow v. Morrill*, 68 Me. 362.

Massachusetts. — *Harrington v. Worcester, etc.*, St. R. Co., 157 Mass. 579.

Minnesota. — *Rush v. St. Paul City R. Co.*, (Minn. 1897) 72 N. W. Rep. 733; *Aldrich v. Wetmore*, 52 Minn. 164; *Woodbury v. Anoka*, 52 Minn. 329.

New Jersey. — *Deacon v. Shreve*, 22 N. J. L. 176.

New York. — *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25, 14 N. Y. 562; *People v. Tyrrell*,

Probability of Prejudice. — The court is not called upon, where an act of misconduct, as an unauthorized view, has taken place, to enter minutely into the details and determine exactly what was seen on the authorized view and what on the unauthorized view, but it is enough that the court is satisfied that the act of misconduct might have influenced the mind of the juror. The question is not whether he was influenced, but whether he might have been influenced. *Harrington v. Worcester, etc.*, St. R. Co., 157 Mass. 579.

By Consent of Counsel for the Defendant a jury may be permitted to view the scene of the crime. *People v. Johnson*, 110 N. Y. 134.

4. *Bowman v. Western Fur Mfg. Co.*, 96 Iowa 188.

In *State v. Brown*, 64 Mo. 367, the jurors were seen on and looking at the ground where the deceased, for the killing of whom the defendant was on trial, lost his life, but the witnesses were unable to state that the jurors were looking at the ground with the view of understanding how the killing was done, nor was it shown that the jurors said anything about it, or that they conversed among themselves in regard to the ground. It was held that not enough was shown to require interference, there being no doubt as to the locality and no possibility that the defendant could have been prejudiced by the conduct of the jury.

No Prejudicial Misconduct. — Where,

2. EXAMINATION OF DEMONSTRATIVE EVIDENCE.—The mere fact that the members of the jury inspect or take to the jury room tangible objects introduced in evidence is generally held not to warrant the setting aside of the verdict where it appears that no prejudice has resulted therefrom.¹ And this is especially true where the fact is known to the counsel for the unsuccessful party

on the trial of a capital case, the jury, while walking with an officer at recess, went into a lane or alley where the alleged murder was committed, remained there not more than a minute or two looking at the premises, and came out of the lane when requested by the officer, there was held to be no prejudicial misconduct, it further appearing that no one spoke to the jury during the walk nor at the premises. *Com. v. Brown*, 90 Va. 671.

Measurements Taken by Juror.—The fact that during a trial one of the jurors made measurements at a place where an alleged injury occurred will not furnish ground for a new trial, where the juror under oath says that he did not consider the measurements in arriving at his verdict, nor communicate the fact to any member of the jury, and it was further shown that the measurements made corresponded to those testified to by a witness. *Carbon v. Ottumwa*, 95 Iowa 524.

1. *People v. Tipton*, 73 Cal. 405; *Kenyon v. Territory*, 5 Okla. 685; *Hendricks v. State*, 28 Tex. App. 416; *Spencer v. State*, 34 Tex. Crim. Rep. 238; *Gresser v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 595; *Powell v. State*, 61 Miss. 319; *Trafton v. Pitts*, 73 Me. 408. See also *Louisville, etc., R. Co. v. Berry*, 96 Ky. 604. But compare *McCoy v. State*, 78 Ga. 490; *Consolidated Ice-Mach. Co. v. Trenton Hygienic Ice Co.*, 57 Fed. Rep. 898.

Magnifying Glass to Examine Papers.—In *Hatch v. State*, 5 Tex. App. 384, there was held to be no error in permitting the jury to take with it in its retirement a magnifying glass for the examination of papers submitted in evidence.

Clothing of Deceased.—In *Bell v. State*, 32 Tex. Crim. Rep. 436, no injury having resulted to defendant, a new trial, applied for on the ground that the clothing worn by the deceased at the time of the homicide was taken by the jury in its retirement, was held properly refused, it appearing that the clothing had been introduced in evidence, was thoroughly examined during the trial

and that the witnesses were rigidly questioned in regard to the same.

Hat and Bloodstained Shirt.—In *Doctor Jack v. Territory*, 2 Wash. Terr., it was held not to be error to allow the jurors in a capital case to take to their room a hat belonging to the defendant, and a bloodstained shirt, both of which were found near the place where the crime was committed, and which had been introduced in evidence.

Stolen Clothing.—In *Adams v. State*, 93 Ga. 166, the reviewing court refused to disturb a conviction for perjury where the alleged error charged was that the jurors were allowed to take with them a pair of trousers identified as having been burglariously stolen, and which the accused had testified on the trial of an indictment for the burglary that he had given to the mother of the defendant in that indictment long prior to the alleged commission of that offense.

Identity Not Disputed.—In *Titus v. State*, 49 N. J. L. 36, the jurors in their retirement procured a magnifying glass, examined wooden fibres sticking to the dress of the woman claimed to have been murdered, and compared them with those of a wooden platform, the dress and platform both having been introduced in evidence and sent to the jury room, and it was held that as the identity of the fibres was an undisputed fact, the irregularities in question could not in the faintest degree have prejudiced the defendant.

Object Not Admitted in Evidence.—In *Illinois Silver Min., etc., Co. v. Raff*, 7 N. Mex. 336, an imperfect model of a mine, which had been used by two witnesses to explain their testimony, but which was not admitted in evidence, was allowed to go to the jury under proper instructions by the court.

Model Used to Explain Testimony.—In *Blazinski v. Perkins*, 77 Wis. 9, which was an action to recover for personal injuries received by the falling of a building scaffold, it was held to be no error that the jurors were allowed to take with them a model of the scaffold, the correctness of which was undis-

and no objection because of it is made at the proper time.¹

f. MAKING EXPERIMENTS. — The rule forbidding the jury to receive evidence out of court renders it improper for jurors to make experiments for the purpose of testing the truth or weight of the evidence,² and the making of such experiments will generally be a good ground for a new trial.³

8. Books and Papers in Jury Room — *a. PAPERS IN EVIDENCE* — (1) *Old Rule.* — In the early cases at common law the rule was

puted, and which, though not introduced in evidence, had been used to explain the testimony of the witnesses.

1. *Littlefield v. Beamis*, 5 Rob. (La.) 145; *Whitcher v. Peacham*, 52 Vt. 242; *People v. Wilson*, 8 Abb. Pr. (N. Y. Supreme Ct.) 137; *People v. Mahoney*, 77 Cal. 529. See *supra*, X. 4. *d. Objections—When and How Made.*

Bloodstained Garments. — Where, on the trial of an indictment for murder, on the retirement of the jury the court inquired if there was any objection to the jurors' taking with them the exhibits in the case, and no objection was made, a contention by the defendant that he understood that the paper exhibits only were to be given to the jury, and not the bloodstained garments of the deceased, which had been placed in evidence, was held to be unavailable. *People v. Hughson*, 154 N. Y. 153.

Testing Quality of Ice. — In *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. Rep. 898; an action to recover the price of an ice-machine plant, in which the defense contended that in consequence of the impure character of the ice produced by the machine great loss had ensued, etc., it was held that the action of some of the jurors at recess in examining, tasting, criticising, etc., ice made from the plant in question and taken from a passing wagon, was such misconduct on the part of the jury that if it had been then called to the attention of the court the trial would have been then and there terminated.

2. Court Should Not Allow Experiment. — It is proper to refuse an application on the part of a street-railway company to allow the jury to witness, out of court, experiments having for their object disproof of an alleged collision. *Smith v. St. Paul City R. Co.*, 32 Minn. 1.

Experimenting Misconduct. — The conduct of a jury in experimenting by imitating a signature alleged to be a

forgery is misconduct. *Christy v. Keefer*, 2 Cleve. (Ohio) 164.

3. *Forehand v. State*, 51 Ark. 553; *Yates v. People*, 38 Ill. 527. But see *Taylor v. Com.*, 90 Va. 109, wherein the experimenting was held not to have been improper.

In *Jim v. State*, 4 Humph. (Tenn.) 289, a capital case, a new trial was granted because of experiments made by the jurors in sending the constable out of the room, closing the door, and then talking with a view to ascertaining whether their voices could be heard out of doors, or running with a view to ascertaining whether their tracks would be longer or shorter when walking, and the like.

As to Nature of Footprints in Certain Soil. — In *State v. Sanders*, 68 Mo. 202, the verdict was invalidated because a juror experimented with boots of a kind described by witness for the state, for the purpose of ascertaining the nature of tracks or footprints which might be made in a particular kind of soil.

As to Distance Powder Marks Carried. — In a capital case wherein the distance between the deceased and the defendant at the time of the fatal shot was a vital issue, and the clothing worn by the deceased at the time and place in evidence showed no powder marks, the fact that during the trial two jurors experimented with a rifle for the purpose of determining at what distance powder marks would be carried was held reversible error. *People v. Conkling*, 111 Cal. 616.

Testing Strength of Crossing. — In an action against a municipal corporation for personal injuries alleged to have been sustained by the negligence of the defendant in permitting a gutter crossing to become rotten and unsafe, a new trial was refused, though two of the jurors, while viewing the locality by permission, apparently tested the soundness of a portion of the crossing in question. *Indianapolis v. Scott*, 72 Ind. 196.

laid down that the jurors on retiring for deliberation could take with them only such evidence as was under seal, and unsealed documentary evidence could not be taken except by consent of the parties.¹

(2) *Modern Rule* — (a) *In General*. — The old rule as to what documentary evidence might be sent out with the jury has been almost universally departed from in modern times,² and it is now the general doctrine that all papers and documents given in evidence, with the exception in some jurisdictions of depositions,³ may properly be allowed to go out with the jury.⁴

1. Co. Litt. 227 *b*; 2 Roll. Abr. 676, 686; Vicary *v.* Farthing, Cro. Eliz. 411; Petre *v.* Heneage, 12 Mod. 520; Rex *v.* Burdett, 1 Ld. Raym. 148. See also Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Offit *v.* Vick, Walk. (Miss.) 99; Langworthy *v.* Connelly, 14 Neb. 340.

Failure to Observe This Rule, however, did not vitiate the verdict. Co. Litt. 227 *b*; Vicary *v.* Farthing, Cro. Eliz. 411; Petre *v.* Heneage, 12 Mod. 520; Rex *v.* Burdett, 1 Ld. Raym. 148.

2. *Reason of the Rule*. — In Alexander *v.* Jameson, 5 Binn. (Pa.) 238, it is said: "We are somewhat in the dark as to the reason of this distinction between sealed and unsealed writings [being permitted to go to the jury], but it is certain that it originated under circumstances not applicable to the present time. The best account of it is to be found in the writings of Lord Hale and Lord Gilbert. They say that in ancient times men of rank and property had seals by which their families were distinguished. Those were not numerous, and as causes were tried by men in the neighborhood, it was supposed that the seals were so notorious as to be well known to the jury. Papers under seal, therefore, carried their own evidence along with them."

3. See *infra*, X. 8. *b.* *Depositions*.

4. *Arkansas*. — Hurley *v.* State, 29 Ark. 17.

Iowa. — Miller *v.* Dickinson County, 68 Iowa 102.

Massachusetts. — Burghardt *v.* Van Deusen, 4 Allen (Mass.) 374.

Mississippi. — Taylor *v.* Sorsby, Walk. (Miss.) 97.

Missouri. — State *v.* Tompkins, 71 Mo. 613; Hanger *v.* Imboden, 12 Mo. 85; Cornelius *v.* Grant, 8 Mo. 59.

New York. — Porter *v.* Mount, 45 Barb. (N. Y.) 422; Schappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497;

Hardy *v.* Norton, 66 Barb. (N. Y.) 527; Sanderson *v.* Bowen, 2 Hun (N. Y.) 153.

Pennsylvania. — Adderzook *v.* Com., 76 Pa. St. 340; Kliner *v.* Huntingdon First Nat. Bank, (Pa. 1888) 15 Atl. Rep. 433; Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Hendel *v.* Berks, etc., Turnpike Road, 16 S. & R. (Pa.) 97; White *v.* Bisbing, 1 Yeates (Pa.) 400; Mullen *v.* Morris, 2 Pa. St. 85; Carson *v.* Watson, 4 Phila. (Pa.) 88; Riddleburg Iron, etc., Co. *v.* Rogers, 65 Pa. St. 416; Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507.

And see Mercer *v.* Harris, 4 Neb. 77.

Where All the Evidence Is in Writing, the court may permit the jurors to take it with them, but where the evidence is partly oral and partly written, it is discretionary with the court to permit or to refuse to permit any portion of that which is in writing to go to the jury room. Hairgrove *v.* Millington, 8 Kan. 480.

Need Not Take All Papers. — It is not a good objection that the jurors had not all the papers with them when they retired, when they did have the promissory note upon which the action was brought. Phillips *v.* Runnells, 1 Morr. (Iowa) 391.

Not Tendered for Inspection of Adverse Party. — It is not reversible error that a paper admitted in evidence without objection was sent to the jury over an objection that it had been previously tendered to the adverse party for inspection. Hudspeth *v.* Mears, 92 Ga. 525.

Records of Former Proceedings. — It is generally held that allowing records of former proceedings to go to the jury will not furnish grounds for disturbing the verdict. State *v.* Taylor, 36 Kan. 329; Green *v.* State, 38 Ark. 313; Com. *v.* Nash, 135 Mass. 541. But see People *v.* Dowdigan, 67 Mich. 92; Lotz *v.* Briggs, 50 Ind. 346.

The Term "Papers in Evidence" is construed to embrace almost all kinds of documentary evidence. Thus the jurors have been allowed to take with them promissory notes sued on,¹ insurance policies,² wills,³ and account books;⁴ and under a statute permitting jurors to take with them all papers in evidence, with certain specified exceptions, it has been held that any exhibit other than those specially excepted, whether moist or dried, solid or liquid, may go to the jury.⁵

1. *Snyder v. Braden*, 58 Ind. 143.

Note with Calculation of Interest.— There is no error in permitting a promissory note sued on, together with a calculation of the interest thereon, to be taken by the jurors on their retirement. *Nott v. Thomson*, 35 S. Car. 461.

2. *People v. Formosa*, 61 Hun (N. Y.) 272.

Application, Policy, and Proof of Loss.— In an action on a fire insurance policy, it is within the discretion of the court to permit the jurors to take with them, against the objection of the defendant company, the application, policy, and proof of loss, which were admitted in evidence and were not impeached. *Tubbs v. Dwelling-house Ins. Co.*, 84 Mich. 646.

Sworn Statement of Loss.— Within a statute allowing the jurors to take documentary evidence with them on their retirement, it is proper to allow them to take a sworn statement of loss by fire, made by the insured, having attached thereto a certificate of a justice in accordance with the contract of insurance. *Clark v. Phoenix Ins. Co.*, 36 Cal. 168.

3. A paper purporting to be a will with the probate indorsed, and admitted in evidence on the trial of a feigned issue of *devisavit vel non* to try the validity of the paper writing as the last will and testament, may properly be taken by the jury. *Sholly v. Diller*, 2 Rawle (Pa.) 177.

4. **Memorandum Book of Car Inspector.**— In *Davis v. State*, 91 Ga. 167, there was held to be no error in allowing the jurors to take with them a car inspector's memorandum book, which was admissible in evidence, to aid them in their deliberations, nor in the court's directing marks to be placed beside the numbers in the book to aid the jury in finding the number of certain cars in dispute, there being other numbers in the book.

Copy of Accounts Used by Witness.— There is no error in allowing the jury

to take with them in their retirement the copy of accounts used by witnesses in giving their testimony. *Mooney v. Hough*, 84 Ala. 80.

Criminal Case — Evidence Found on Defendant's Person.— In the absence of any statute prohibiting jurors in criminal cases from taking account books with them, there is no error in permitting the jurors in such a case to take with them an account book (a memorandum book containing a diary and a table of distances between certain points) and bill of sale found in the defendant's possession on his arrest, although in a civil case and by statute the jurors are not allowed to take account books with them. *Territory v. Doyle*, 7 Mont. 245.

5. *Doctor Jack v. Territory*, 2 Wash. Ter. 101.

A Written Receipt containing a memorandum relative to the transaction is within a statute providing that unsealed papers read in evidence may be carried from the bar by the jury. *Humphries v. McCraw*, 5 Ark. 61.

A Deed in Evidence as Proof of the Plaintiff's Title may be taken by the jurors to their room under proper instructions concerning the extent of proof to which the instrument is entitled. *Moore v. Davis*, 49 N. H. 45.

Daily Commercial Price Current.— Under the *Iowa* statute permitting the jurors to take to their room papers in evidence, except depositions, in an action to recover for a quantity of wheat it was held that the court properly sent out to the jurors, at their request, copies of a daily commercial price current which had been placed in evidence. *Peterson v. Haugen*, 34 Iowa 395.

Manuscript Found in Decedent's Trunk.

— In *Alexander v. Jameson*, 5 Binn. (Pa.) 238, a manuscript book found in the trunk of the deceased and offered in evidence was allowed to go out with the jury.

Propriety of Rule Questioned. — In some cases the propriety of allowing papers in evidence to go to the jury has been questioned,¹ and the old rule, forbidding such papers to go out, except by consent of parties, upheld.² But in any case the taking of such papers will not furnish ground for a new trial where no injury has resulted to the unsuccessful party.³

Comparison of Handwriting. — The jurors should not ordinarily be allowed to take papers in evidence into the jury room, so as to make a comparison of handwriting, and therefrom draw such inferences as their imaginations may suggest, because the interested party ought to have an opportunity to reply to any suggestion or influence contrary to the evidence given in court.⁴

(b) **Discretion of Court.** — Allowing the jurors to take with them in their retirement papers in evidence is a matter resting largely in the sound discretion of the trial court,⁵ and its action will not

Malicious Prosecution — Information by Defendant. — In *Seibert v. Price*, 5 W. & S. (Pa.) 440, which was an action for malicious prosecution, it was held proper to send out with the jury the information made by the defendant.

Photograph of Defective Walk. — Under a statute permitting jurors to take documentary evidence with them there is no error in allowing them to take a photograph of an alleged defective walk, which was admitted in evidence, together with a magnifying glass to enable them to examine it minutely. *Barker v. Perry*, 67 Iowa 146.

Bill. — The court may permit the jurors to take with them a bill introduced in evidence, after an instruction as to how much of it they might receive in evidence. *Waltz v. Robertson*, 7 Blackf. (Ind.) 499.

Due Bill. — It is not reversible error that the court permitted a due bill introduced in evidence to be taken by the jurors to their room, no prejudice appearing to have resulted. *Bulen v. Granger*, 63 Mich. 311.

1. *Chadwick v. Chadwick*, 52 Mich. 545; *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327; *Hewitt v. Flint, etc.*, R. Co., 67 Mich. 61; *Farmers', etc., Bank v. Whinfield*, 24 Wend. (N. Y.) 419.

In *Outlaw v. Hurdle*, 1 Jones L. (N. Car.) 150, it was said that writings should not be submitted to the inspection of the jury, but should be read. All evidence should be addressed to the hearing of the jurors, and not to their sight.

2. *Hewitt v. Flint, etc.*, R. Co., 67 Mich. 61; *Nichols v. State*, 65 Ind. 512.

See also *Benson v. Clark*, 1 Cow. (N. Y.) 258; *Moore v. McDonald*, 68 Md. 321.

In *Williams v. Thomas*, 78 N. Car. 47, the judgment was reversed because the jurors were allowed to take important papers which had been read in evidence, over the objection of the unsuccessful party, the court saying that while the decisions in the different states do not agree on this subject, "the practice has never been recognized in this state, and the rule against it has been uniform, unless by consent."

3. *Bersch v. State*, 13 Ind. 434. See also *infra*, X. 8. g. *Effect of Papers Improperly in Jury Room*.

4. *Watson v. Davis*, 7 Jones L. (N. Car.) 178; *Chester v. State*, 23 Tex. App. 577; *Phillips v. State*, 62 Ark. 119; *Matter of Foster*, 34 Mich. 21.

In *Kruidenier v. Shields*, 70 Iowa 428, a new trial was granted because there had been sent to the jury, attached to the petition, a copy of the note, the execution of which had been admitted, and upon the examination of which copy by the jurors they drew inferences against the veracity of a witness, based on their inspection of the handwriting.

5. *People v. Cochran*, 61 Cal. 548; *English v. State*, 31 Fla. 340, 356; *Wood v. Wood*, 47 Kan. 617; *Burghardt v. Van Deusen*, 4 Allen (Mass.) 374; *Canning v. Harlan*, 50 Mich. 323; *Langworthy v. Connelly*, 14 Neb. 340; *Osburn v. State*, 7 Ohio, pt. 1. 212; *Jackson v. Pittsburgh Times*, 152 Pa. St. 406; *Cavanaugh v. Buehler*, 120 Pa. St. 441; *Kittanning Ins. Co. v.*

ordinarily be interfered with, where there appears to have been no abuse of discretion.¹ But it has been held that the ruling of the trial judge on a request to send papers to the jury room is subject to review.²

6. DEPOSITIONS — (1) *When in Evidence*. — It has been frequently stated as a general rule that in cases where some of the evidence is oral, depositions read in evidence should not be allowed to go to the jury.³ But the question rests largely in the sound discretion of the trial court,⁴ and it is held in several states that depositions read in evidence may properly be allowed to go to the jury.⁵ Where depositions are taken out by the jury with

O'Neill, 110 Pa. St. 548; Ott v. Oyer, 106 Pa. St. 19; McCully v. Barr, 17 S. & R. (Pa.) 445; Starke v. Wolf, 90 Wis. 434.

1. Starke v. Wolf, 90 Wis. 434; McCully v. Barr, 17 S. & R. (Pa.) 445; Osburn v. State, 7 Ohio, pt. i. 212; Jackson v. Pittsburgh Times, 152 Pa. St. 406; People v. Cochran, 61 Cal. 548.

2. Bulen v. Granger, 63 Mich. 311. See also Hendel v. Berks, etc., Turnpike Road, 16 S. & R. (Pa.) 92; Alger v. Thompson, 1 Allen (Mass.) 453.

3. Illinois. — Rawson v. Curtiss, 19 Ill. 485; Fein v. Covenant Mut. Ben. Assoc., 60 Ill. App. 274; Pittsburgh, etc., R. Co. v. Dahlin, 67 Ill. App. 99.

Maryland. — Jerry v. Townshend, 9 Md. 159.

Pennsylvania. — Hendel v. Berks, etc., Turnpike Road, 16 S. & R. (Pa.) 92; Spence v. Spence, 4 Watts. (Pa.) 168; White v. Bisbing, 1 Yeates (Pa.) 400; Alexander v. Jameson, 5 Binn. (Pa.) 238.

Texas. — Chamberlain v. Pybas, 81 Tex. 511.

West Virginia. — State v. Cain, 20 W. Va. 707; Welch v. Franklin Ins. Co., 23 W. Va. 288; State v. Lowry, 42 W. Va. 205.

United States. — U. S. v. Clarke, 2 Cranch (C. C.) 152.

By the English Practice, depositions were never sent to the jury. See Suites v. McKibben, 2 Ohio St. 588; Welch v. Franklin Ins. Co., 23 W. Va. 288.

The Reasons for Excepting Depositions from those papers which may be taken by the jury is stated to be that their possession would give the party whose testimony was reduced to writing an advantage over the adversary who had given oral testimony, by enabling the jurors to peruse the one in their retirement and compelling them to depend on their memory for the other. Wake-

man v. Marquand, 5 Martin N. S. (La.) 265.

4. Exercise of Discretion Not Ground of Exception. — It is not a matter of right that depositions used in the trial of a cause shall be delivered to the jurors upon their retirement, but it is a matter of discretion, the exercise of which by a judge is not a legal ground of exception. Whithead v. Keyes, 3 Allen (Mass.) 495.

Remedy by Motion to Set Aside Verdict. — The action of the trial judge in permitting the jurors to take with them a deposition read in evidence is not subject to exception, but if the permission were wrongfully given, it will be rather an irregularity, which of itself will not avoid the verdict. The remedy of the party deeming himself injured in such a case is by motion to set aside the verdict. Howland v. Willetts, 5 Sandf. (N. Y.) 219.

There Is No Error in Refusing to allow a deposition to go to the jury room on the application of one juror, all the others dissenting when inquired of as to whether it was their wish. Lafoon v. Shearing, 95 N. Car. 391.

5. Hurley v. State, 29 Ark. 17; Baker v. Com., (Ky. 1891) 17 S. W. Rep. 625; Newport News, etc., R. Co. v. Mendell, (Ky. 1896) 34 S. W. Rep. 1081; Howland v. Willetts, 9 N. Y. 170; Hansbrough v. Stinnett, 22 Gratt. (Va.) 593.

Immaterial Depositions. — In Shomo v. Zeigler, 10 Phila. (Pa.) 611, 31 Leg. Int. (Pa.) 205, it was held that there was no error in allowing the jury to take a certified record of bankruptcy offered in evidence, although attached thereto were depositions relative to the bankruptcy, but immaterial to the controversy.

Where All Evidence in Writing. — In cases where all the evidence is reduced to writing, the reason for the rule ex-

the knowledge of the unsuccessful party and without any objection from him, the verdict will not be disturbed.¹

Papers Attached to Deposition. — Where a deposition cannot properly be sent to the jury, it is equally improper to send to it papers forming part of such deposition and attached thereto.² But where such papers are offered and admitted as independent evidence they do not fall within the rule concerning depositions.³

(2) **When Not in Evidence.** — Depositions not read in evidence, or partly excluded, fall under the general rule regarding papers and documents not in evidence.⁴ If such depositions, containing facts material to the case which may have influenced the minds of the jurors, are sent to the jury room without the knowledge or consent of the unsuccessful party, the verdict will not be allowed to stand.⁵ But where such depositions, or such excluded portions, are irrelevant and immaterial to the issue, and no prejudice has resulted from the irregularity, the verdict will not be disturbed.⁶

cluding depositions from the jury room does not exist. *Wakeman v. Marquand*, 5 Martin N. S. (La.) 265; *Hairgrove v. Millington*, 8 Kan. 480.

In Ohio it has been held that, unless special reasons exist for a different course, the refusal to send to the jurors on their demand a deposition containing neither irrelevant nor incompetent evidence is error. *Greene v. Davis*, 4 Ohio Cir. Ct. Rep. 84. See also *Post v. Gazlay*, 1 Cinc. Super. Ct. Rep. 105; *Stites v. McKibben*, 2 Ohio St. 588.

1. *Shields v. Guffey*, 9 Iowa 322; *Turner v. Kelley*, 10 Iowa 574; *State v. DeLong*, 12 Iowa 453; *Davenport v. Cummings*, 15 Iowa 219. See *supra*, X. 4. *d. Objections—When and How Made.*

2. *Gulf, etc., R. Co. v. Hughes*, (Tex. Civ. App. 1895) 31 S. W. Rep. 411; *Snow v. Starr*, 75 Tex. 411; *Toohy v. Sarvis*, 78 Ind. 474.

In *Oskaloosa College v. Western Union Fuel Co.*, 90 Iowa 380, the plaintiff objected to permitting the jurors, at the defendant's request, to take with them a plat and field notes attached forming a part of a deposition, unless the entire deposition was given to them; but on the defendant's refusal that this course should be pursued, the court permitted the jury to take the plat only. The plat and field notes did not agree. It was held that the plat was improperly given to the jury without the consent of both parties, and that the defendant was not precluded, because of the request made by him,

from objecting that the plat was improperly sent out.

Leaf from Family Bible. — In an action of trespass to try title, there was held to be error in permitting the jurors to take with them a leaf from a family Bible, which had been detached from the deposition of a witness, which leaf purported to contain a record of the births and deaths of the children. *Chamberlain v. Pybas*, 81 Tex. 511.

3. *Sargent v. Lawrence*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1075; *Cockrill v. Hall*, 76 Cal. 192.

4. See *infra*, next section.

5. *Coffin v. Gephart*, 18 Iowa 256; *Stewart v. Burlington, etc., R. Co.*, 11 Iowa 62; *Taylor v. Sorsby*, Walk. (Miss.) 97; *Bronson v. Metcalf*, 4 Wkly. L. Gaz. (Ohio) 115, 1 Disney (Ohio) 21.

Given to Jury by Prevailing Party. — Where the deposition was given to the jury by the counsel for the prevailing party the verdict was set aside although the deposition had not been read by the jury. *Pratt's Case*, 21 Vin. Abr. 451. And see 2 Hale P. C. 308. See also *infra*, X. 8. g. (3) *Where Given by Prevailing Party.*

6. *Lonsdale v. Brown*, 4 Wash. (U. S.) 148; *Morris v. Howe*, 36 Iowa 493; *Foster v. McO'Brien*, 18 Mo. 88; *Gardner v. Kimball*, 58 N. H. 202.

No Prejudice Presumed. — Where certain excluded depositions were taken out by the jury, it was held that in the absence of any showing that the excluded matter was read by the jury, or

c. PAPERS NOT IN EVIDENCE—(1) *In General*.—It is the general rule that the jurors should not be allowed to take with them on their retirement papers bearing on the case and not read in evidence;¹ and where it is probable that such papers influenced the jury in arriving at the verdict, a new trial will be granted.²

Exceptions to Rule.—Notwithstanding the rule against papers not in evidence going to the jury, it is customary to send out papers, such as itemized accounts, commented on during the trial, to assist the jurors by way of aid to their memory.³

that the fact of taking the papers had the slightest influence on the verdict rendered, it will be presumed that the jurors considered only the testimony permitted by the court to go to them, rather than that they violated their duty. *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424.

A Party Cannot Complain of Error in allowing the jurors to take with them depositions which he himself offered and failed to get in evidence. *Shomo v. Zeigler*, 10 Phila. (Pa.) 611.

1. *Palmore v. State*, 29 Ark. 248; *Steadwell v. Morris*, 61 Ga. 97; *Eden v. Lingenfelter*, 39 Ind. 19; *Hewitt v. Morris*, 37 N. Y. Super. Ct. 18; *Howland v. Willetts*, 9 N. Y. 170; *Kittanning Ins. Co. v. O'Neill*, 110 Pa. St. 548; *Bellas v. Lloyd*, 2 Watts (Pa.) 401; *Hamilton v. Glenn*, 1 Pa. St. 340. See also *supra*, X. 8. b. (2) *When Not in Evidence*.

The Minutes of the Testimony of a witness should not be sent to the jury to enable the jurors to settle a difference of opinion regarding the testimony in question. *State v. Griffin*, 71 Iowa 372. See also *Com. v. Ware*, 137 Pa. St. 465.

Testimony Taken in a Former Proceeding, but not given in evidence, should not be allowed to go to the jury. *McLeod v. Humeston, etc., R. Co.*, 71 Iowa 138; *Atkins v. State*, 16 Ark. 568.

2. See *infra*, X. 8. g. *Effect of Papers Improperly in Jury Room*.

If the Jurors Did Not in Fact Take an Account with them to the jury room, the mere fact that the judge instructed them as to their right to do so is not available error. *Porter County First Nat. Bank v. Williams*, 4 Ind. App 501.

3. **Statement of Plaintiff's Claim.**—It is generally held that the jury may take with it a statement of the plaintiff's claim. *Allen v. Philadelphia*, 1 Pa. Dist Rep. 216; *Phillips v. Stroup*, (Pa.

1889) 17 Atl. Rep. 220; *Rowand v. Clark*, 34 Leg. Int. (Pa.) 232; *Ege v. Kille*, 84 Pa. St. 333; *Avery v. Moore*, 133 Ill. 74; *Treff v. Blake*, 16 Iowa 222; *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.) 396. But see *Burton v. Wilkes*, 66 N. Car. 604; *Himes v. Kiehl*, 154 Pa. St. 190; *Whitehall Mfg. Co. v. Wise*, 119 Pa. St. 484.

Statement to Show Payments.—In *Ott v. Oyer*, 106 Pa. St. 19, it was said that in cases like an action on a promissory note, the practice of permitting statements for the purpose of showing payments to be sent out is almost, if not altogether, uniform.

Statement of Injuries.—In an action for personal injuries alleged to have been caused by a defective highway, there is no error in permitting the jury to have the statement of the alleged injuries and their extent which by law is required to be filed with the municipal authority. *Felch v. Weare*, 66 N. H. 582.

Itemized Account.—The jurors may take with them an itemized account used by counsel and referred to during the trial, though not offered in evidence, where there has been proof of the items and instruction by the court that the account shall not be used by the jurors except by way of aid to their memory. *Hutchinson v. Consumers' Coal Co.*, 36 N. J. L. 24; *Rorer v. Rorer*, 48 N. J. L. 51.

Copy of Memorandum.—There is no error in permitting the jury to copy a memorandum made by counsel which is but a copy of the account proved and admitted in evidence. *Cowles v. Hayes*, 71 N. Car. 230.

Memorandum of Accounts.—In *Harroun v. Chicago, etc., R. Co.*, 68 Mich. 208, there was held to be no error on the part of the court in permitting the jury to take with it a memorandum by the plaintiff's counsel of the highest

(2) *Papers Partly in Evidence.* — Papers which have been partly admitted in evidence should not be sent to the jury in their entirety, unless proper precautions have been taken to protect the portions not in evidence from the inspection of the jury.¹

(3) *Judge's Minutes.* — Under the rule forbidding papers not in evidence to go to the jury room it is improper for the jurors to take with them the judge's minutes taken on the trial.² But where it appears that no injury has resulted therefrom the verdict will not be disturbed on that account.³

(4) *Jurors' Notes.* — It has been held in *Indiana* that the action of jurors in taking notes of the evidence will warrant a new trial.⁴ But it seems to be the more general doctrine that such action on the part of the jury is not sufficient ground for disturbing the verdict,⁵

amounts given by any witness as to the damage claimed, the court stating that the defendant's counsel might have the same privilege. *Overruling Millar v. Cuddy*, 43 Mich. 274. See also *Alexander v. Dunn*, 5 Ind. 122.

Plan of Lots Used to Explain Claim. — In *Hale v. Rich*, 48 Vt. 217, wherein the location of a division line between two lots was in issue, it was held that the jury was properly allowed to take with it a plan of the lots made by the plaintiff's attorney, who was not a surveyor, and which plan it was admitted was not made from a survey, but which was used on the trial for the purpose of explaining to the jury the claim made by the plaintiff.

Papers Commented On. — On a murder trial it is not error to permit the jury to take with it papers which were commented on during the trial. *State v. Harris*, 34 La. Ann. 119.

1. *Sargent v. Lawrence*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1075.

Pamphlet Containing Libelous Matter. — In *People v. Thornton*, 74 Cal. 482, which was an action for libel, it appeared that a pamphlet containing the alleged libelous matter was admitted in evidence, and by consent considered read that it might be referred to in the arguments of counsel, but it did not appear that it was read to the jury before its retirement. The alleged libel was based upon a single paragraph embracing two or three lines only of the pamphlet, which consisted of many pages of libelous matter, and it was held that the action of the jury in reading a copy of the pamphlet in the jury room, the original not having been taken out, was the reception of evidence out of court within the meaning of a statutory provision entitling the

defendant to a new trial "when the jury has received any evidence out of court other than that resulting from a view of the premises."

Instruction Not to Look at Unproved Part. — In *Bates v. Preble*, 151 U. S. 149, a memorandum book was allowed to go to the jury, though but a portion of it was in evidence, the court directing the jury not to examine any part of the book except that which had been put in evidence. This was held to be error, in view of the fact of the importance of the contents of the book, and that the objectionable portions were very likely to catch the eyes of the jurors, who, through accident or curiosity, might read them; and it was held that by sealing, or in some other manner, the portions not in evidence should have been protected from the inspection of the jury.

In *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327, an entire book was permitted to be taken by the jurors to their room, though but three pages were in evidence, and it was held that instructions not to look at the unproved part would not cure the error of allowing the book to go to the jury room. But see *Jackson v. State*, 76 Ga. 553.

2. *Neil v. Abel*, 24 Wend. (N. Y.) 185; *Mitchell v. Carter*, 14 Hun (N. Y.) 448.

3. *Ball v. Carley*, 3 Ind. 577; *Chapman v. Chicago, etc., R. Co.*, 26 Wis. 295; *Graves v. Gans*, 25 Wis. 41. See also *infra*, X. 8. *Effect of Papers Improperly in Jury Room.*

4. *Cheek v. State*, 35 Ind. 492.

5. *Tift v. Towns*, 63 Ga. 237; *Lilly v. Griffin*, 71 Ga. 535; *Thomas v. State*, 90 Ga. 437.

In *Omaha F. Ins. Co. v. Crighton*, 50 Neb. 314, which was an action on a

especially where no objection is raised¹ and no injury results therefrom.²

(5) *Blank Forms of Verdict.* — It is no reason for disturbing a verdict that blank forms of verdicts were sent to the jury to be filled out by it.³

d. PLEADINGS. — The pleadings being intended for the consideration of the parties and the court, the practice of allowing them to be taken to the jury room is one of doubtful propriety.⁴ But it is the general rule that where the jury has been correctly instructed as to the issues in the case, there is no error in taking with it, by direction of the court, the pleadings in the cause.⁵

fire insurance policy, it was held that there was no abuse of discretion on the part of the trial court in permitting jurors, during the trial, to make memoranda of insured articles destroyed and the value placed thereon by the evidence.

1. *Cluck v. State*, 40 Ind. 263.

Objection Must be Raised in Time. — Where a new trial is sought on the ground that a juror took notes of the evidence, which he read on retirement, it must be made to appear that both the party and his attorney were, at the time, ignorant of the fact that the notes were taken. *Long v. State*, 95 Ind. 481. See *supra*, X. 4. d. *Objections — When and How Made.*

2. **Notes Not Used.** — It is not sufficient proof of misconduct of a juror to justify the setting aside of the verdict of the jury that he had taken, during the progress of the trial, a memorandum of parts of the testimony of some of the state witnesses, it fully appearing that the memorandum was not exhibited to other members of the jury, and was destroyed by him without making use of it himself. *State v. Joseph*, 45 La. Ann. 903. See *infra*, X. 8. g. *Effect of Papers Improperly in Jury Room.*

3. *State v. Fenlason*, 78 Me. 495.

It Is in the Discretion of the Court to permit the attorney for the plaintiff to furnish the jury with skeleton forms of a verdict. *Snyder v. Braden*, 58 Ind. 143.

4. *Good v. Martin*, 1 Colo. 166; *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258.

Not Required to Be Sent. — A statute permitting the jury to take with it all papers, with certain exceptions, not including the pleadings, will not require the pleadings to be sent out that the jury may determine from them what matters were admitted and what

matters were not. *Spaulding v. Saltiel*, 18 Colo. 86.

Where, by statute, the jury may be permitted to have all papers used in evidence received as evidence, except depositions, there is no error in refusing to allow it to take with it on its retirement affidavits filed at a previous term for a continuance, or pleadings to which demurrers had been sustained and which had not appeared in evidence. *McClintock v. Crick*, 4 Iowa 453.

Not to be Used for Fixing Amount. — In *Drew v. Andrews*, 8 Hun (N. Y.) 23, the jury having found for the plaintiff without specifying the amount, it was held error to direct the jury to take the pleadings with it for the purpose of fixing the amount, the pleadings not being evidence beyond the admissions in the answer.

5. *McGinty v. Keokuk*, 66 Iowa 725; *Masterson v. State*, 144 Ind. 240; *Stout v. State*, 90 Ind. 1; *Shulse v. McWilliams*, 104 Ind. 512; *International, etc., R. Co. v. Leak*, 64 Tex. 654.

In *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258, it was said that while the propriety of sending the pleadings to the jury in its room, or permitting them to be taken, might well be doubted, yet as it had been practiced in many of the circuits in the state, in the absence of some improper use of them, or some prejudicial result, the case would not be reversed upon that ground.

Motion for Increase of Damages in Writ.

— In *Smith v. Holcomb*, 99 Mass. 552, it was held that the defendant had no ground of exception because, after the jury had retired by order of the judge, on the plaintiff's motion, the sheriff delivered to the jurors a motion for an increase of damages in the writ which had been granted before the trial, had

Showing Result of Former Trial. — Where it is permissible for the jury to take the pleadings with it on its retirement, the fact that the verdict on a former trial appears on one of the pleadings will not be ground for a new trial.¹

c. WRITTEN INSTRUCTIONS. — In the absence of any controlling statute or absolute rule of practice, it is a matter of discretion with the trial judge to permit the jury to take the written instructions with it on its retirement.² It is now the usual practice to let the written instructions go out,³ and in some states

been referred to by the plaintiff in his opening, and which the jurors had omitted to take with them on their retirement.

Attested Copy of Complaint. — On an appeal wherein a trial *de novo* was had, it is not reversible error to allow an attested copy of the complaint to go to the jury instead of a full copy of the papers containing a record of the conviction and sentence below. *Com. v. Crawford*, 111 Mass. 422.

Copy Containing Clerical Error. — In *Com. v. Keenan*, 140 Mass. 481, the defendant was held to have no ground of exception because a copy of the complaint taken by the jury contained a clerical error, it not appearing that the jury was misled or that the defendant had been prejudiced.

An Account Annexed to the Petition and made part of it may go to the jury where by statute it is contemplated that the jury may take the pleadings with it. *Wakeman v. Marquand*, 5 Martin, N. S. (La.) 265. See also *State v. Delong*, 12 Iowa 453.

1. *Harrold v. Com.*, (Ky. 1888) 8 S. W. Rep. 194; *Cargill v. Com.*, 93 Ky. 578; *St. Louis, etc., R. Co. v. Higgins*, 53 Ark. 458; *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550; *Clapp v. Clapp*, 137 Mass. 183.

In *State v. Shores*, 31 W. Va. 491, it appeared that on an indictment of three persons, one of them being convicted a verdict of guilty was indorsed on the indictment, but on the trial of another of the defendants the indictment so indorsed was taken by the jurors to their room, and it was held that there was no error in refusing a motion to take the indictment out of the possession of the jury.

Verdict Illegible. — A conviction for murder will not be reversed because the jury was permitted to take out, on the back of the indictment, a verdict of a former jury in the case, where it appears that the verdict so indorsed was

illegible, and could not be read by the naked eye. *Lancaster v. State*, 36 Tex. Crim. Rep. 16.

In *Harvey v. State*, 35 Tex. Crim. Rep. 545, it was assigned as error that the jury, on its retirement, was permitted to take with it an indictment having indorsed thereon a verdict rendered at a former term; but it was held that a new trial was not required, it appearing that the verdict had been rendered illegible to ordinary observation by smearing ink over it. It also appeared that the verdict was not commented on by any of the jurors.

2. *Hurley v. State*, 29 Ark. 17; *Benton v. State*, 30 Ark. 328; *State v. Tompkins*, 71 Mo. 613; *Scoville v. Salt Lake City*, 11 Utah 60.

3. *Dixon v. State*, 13 Fla. 636; *Coleman v. State*, 17 Fla. 206; *State v. Tompkins*, 71 Mo. 613; *Edwards v. Territory*, 1 Wash. Ter. 195; *Wood v. Aldrich*, 25 Wis. 695. See also *People v. Cummings*, 57 Cal. 88. *Contra*, *Hewitt v. Flint, etc.*, R. Co., 67 Mich. 61.

In *Smith v. Lownsdale*, 6 Oregon 79, the court said that although it was considered bad practice to allow the written instructions to go to the jury room, still, as there was no statute forbidding it, a verdict would not be disturbed on that account if the charge stated the law correctly and the substantial rights of the complaining party were not prejudiced.

Mere Irregularity. — To allow the written charge of the court to go out with the jury is at most a mere irregularity which, if not objected to, is no cause for a new trial. *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50.

Charge on Separate Paper. — In *Mitchell v. Com.*, 89 Va. 826, it was held to be no error that at the suggestion of the clerk the jurors took with them a charge as to the punishment, which was on a separate piece of paper and which had been read to them along with the balance of the charge, there

there are statutes directing that it be done, which statutes are generally construed to be mandatory.¹

f. BOOKS — (1) *Legal Works*. — Where jurymen desire information touching the law involved in a case submitted to them, they should apply to the presiding judge in open court for instruction, and should not be furnished with law books for the purpose of independent research.² Whether or not a new trial

being no pretense of any incorrect statement of law thereon.

Instructions Refused. — In *Langworthy v. Connelly*, 14 Neb. 340, a verdict for the plaintiff was sustained though an instruction marked "Asked for by defendant. Refused," signed officially and read to the jury, was permitted to be taken by it to its room over the objection of the defendant, and there considered in arriving at the verdict.

Not Considered. — In *Goode v. Linecum*, 1 How. (Miss.) 281, the plaintiff's counsel moved for certain instructions to the jury which were refused. The paper containing them was taken out by the jury, but it not appearing by the record that it was considered by the jurors the motion for a new trial was overruled.

No Prejudice Resulting. — Error in allowing the jurors to take into their retirement, against the defendant's objection, instructions asked by him and refused cannot be complained of by him, for the reason that he could not have been prejudiced. *People v. Cummings*, 57 Cal. 88.

Instructions Should be Read. — All instructions which are proper to be given to the jury should be read by the court, and, if it is clearly shown that instructions asked on behalf of a party have been handed to the jury without reading, thus placing them under a cloud, the verdict against such party will be set aside. *Veneman v. McCurtain*, 33 Neb. 643.

1. Ground for New Trial. — Where, by statute, it is required that the charge of the judge shall be in writing and shall be taken by the jury on its retirement, the failure or refusal to allow the jury to take the charge with it will necessitate a new trial. *Duncan v. State*, 7 Baxt. (Tenn.) 387; *Miller v. Hampton*, 37 Ala. 342; *State v. Thompson*, 83 Mo. 257, *overruling State v. Phelps*, 74 Mo. 128, and *State v. Butterfield*, 75 Mo. 297.

Objection Too Late. — An objection in a civil case that the jury did not take

the instructions with it comes too late on motion for a new trial, it appearing that the jurors did not request them; that counsel did not ask that they be allowed to take them; that the court did not refuse to let them have them; that they were read and commented on at the trial by both parties, and that when the jury returned without them no objection was made by the unsuccessful party or his counsel. *Grove v. Kansas City*, 75 Mo. 672.

In Ohio special instructions given to the jury in writing, after argument, are not required to be taken by the jury to the jury room, when the principal charge is not required to be in writing. *Griffin v. State*, 34 Ohio St. 299.

Alabama — Charges Refused. — Under the provisions of the Alabama Code of 1876, § 3109, the jury may take with it charges "refused" as well as those "given." *Beard v. Ryan*, 78 Ala. 37.

2. State v. Nelson, 32 La. Ann. 842; *Johnson v. State*, 27 Fla. 245; *Barker v. Pool*, 6 Mo. 260; *Hardy v. State*, 7 Mo. 607; *Harrison v. Hance*, 37 Mo. 185. But see *U. S. v. Vigol*, 2 Dall. (U. S.) 347, which was a trial for high treason. In a note thereto it is stated that, by consent, Foster's Crown Law and the Acts of Congress were sent to the jury.

In *Burrows v. Unwin*, 3 C. & P. 310, 14 E. C. L. 322, after the trial the jury asked for Selwyn's Law of Nisi Prius, and though counsel on both sides stated that they had no objection, Lord Ten-terden observed that the regular way was for the jury to come in and receive their law from the court, and, for the sake of precedent, the book was not sent.

Marked Passages. — There is no impropriety in allowing the jurors to take with them a law book when the paragraph applicable to the cause may be separately marked out, as in the case of a statutory provision. *Hardy v. State*, 7 Mo. 607. But see *State v. Gunter*, 30 La. Ann. 536.

will be granted because the jurors have read law books bearing on the case in hand will depend largely on the circumstances of the particular case. In some cases, where the jurors have consulted such books the verdict has been set aside.¹ But the mere fact that a jury deliberated in a room containing law books has been held insufficient to warrant a new trial where it did not appear that the jurors consulted such books.² And although the jury obtain and consult law books bearing on the case, it will not be a ground for disturbing the verdict if it does not appear that any prejudice resulted from the irregularity.³

1. Statute Books.—In *Merrill v. Nary*, 10 Allen (Mass.) 416, a verdict was set aside because, without the knowledge of the parties, the judge, at the request of the jurors, allowed them to have in their room a copy of the General Statutes.

In *State v. Smith*, 6 R. I. 33, a verdict of conviction for a statutory offense was set aside because the jurors, after their retirement, without the knowledge of the court, procured through the bailiff, for use in their deliberations, a copy of the Revised Statutes.

In a prosecution under section 14 of the *Nebraska Criminal Code*, for an assault with intent to commit rape, the person upon whom the assault was alleged to have been made having been shown to be a female child of tender years, after the cause was submitted to the jury one of the jurors procured a copy of the Compiled Statutes, took the same into the jury room, and read therefrom section 12 of the Criminal Code, and especially the latter clause thereof, which refers to the carnal knowledge or abuse of a female child under the age of fifteen years, and also read from chapter 46 of the Criminal Code, which provides for motions for new trials. It was held that such conduct was sufficient to vitiate the verdict. *Harris v. State*, 24 Neb. 803.

Volume of State Reports.—In *Jones v. State*, 89 Ind. 82, a new trial was granted because it appeared that in some manner the jurors had obtained, and had in their possession for some time, a volume of the state reports containing the report of a former appeal in the same case, although it did not affirmatively appear that they read or considered the opinion on the former appeal while such book was in their possession, nor was any proof adduced on their part to show that they did not in fact read or consider the opinion.

Text Book on Criminal Law.—In *New-*

kirk v. State, 27 Ind. 1, a new trial was granted, the misconduct consisting in the fact that the bailiff, without consent of the defendant or the leave of the court, furnished to the jury during deliberation a volume of a text book on criminal law.

2. State v. Tanner, 38 La. Ann. 307. See also *State v. Nelson*, 32 La. Ann. 842; *State v. Harris*, 34 La. Ann. 118.

Deliberating in Court Room.—It is not ground for disturbing the judgment that the jurors were allowed to deliberate in the court room, in which there was a set of state reports and the usual "paraphernalia" of a court room. *State v. Hopper*, 71 Mo. 425.

Waiver of Objection.—During the trial of a criminal case, by the consent and under the express wish of counsel for the defendant, the jurors were allowed to use the court room at night for their comfort. The presiding judge called the attention of counsel to the fact that the jurors might have access to the code and other law books in the court room, and expressed doubts as to the propriety of allowing them to remain there, but counsel for the defendant replied that he did not care if they did have access to the books, and insisted on their being allowed to remain. Under these circumstances it was held to furnish no ground for a new trial that one of the jurors in fact read to his fellow jurors from the code the definitions of murder, express and implied malice, and manslaughter, and commented on the same from the judge's seat in the court room. The direct waiver of the defendant's counsel was binding on him. *Durham v. State*, 70 Ga. 264.

3. People v. Draper, 28 Hun (N. Y.) 1; *People v. Hartung*, 17 How. Pr. (N. Y. Oyer & T. Ct.) 85; 4 Park Cr. Rep. (N. Y. Supreme Ct.) 319; *Munos v. State*, 24 Tex. Crim. Rep. 472.

Statute Books.—It is not error to per-

(2) *Other Books.* — It is improper for a jury to examine books, scientific or otherwise, for the purpose of obtaining information concerning the case in hand.¹ But where no prejudice appears to have resulted from such examination, a new trial will not be granted.²

g. EFFECT OF PAPERS IMPROPERLY IN JURY ROOM—

(1) *Where Prejudice Results.* — Where a paper capable of influencing the jury on the side of the prevailing party is improperly sent out with the jury in its retirement, and is read by the jurors,³ the verdict will be set aside although the jurors may

mit the jury to examine the statutes relative to the offense with which the defendant stands charged. *Loew v. State*, 60 Wis. 559; *Findley v. People*, 1 Mich. 234; *Edwards v. Territory*, 1 Wash. Ter. 195.

In *People v. Gaffney*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 36, which was a capital case, the court refused to disturb the conviction because the jurors had with them, during their deliberations, the statute defining the offense for which the accused was tried.

In *Gandolfo v. State*, 11 Ohio St. 114 a capital case, there was held to be no impropriety on the part of the trial court in sending to the jurors, at their request, in the absence of the defendant but in the presence of his counsel, who made no objection, the statutes of the state, the judge calling their attention to the sections of the Crimes Act relative to homicide.

In *Com. v. Jenkins*, Thatcher's Crim. Cas. 118, it was held to be insufficient ground for a new trial that the bailiff delivered to the jurors after their retirement, upon their request, and without an application to the court, a volume of the laws of the state containing the act upon which the indictment was found, and which had been commented upon by the counsel and the court.

After Agreeing on Verdict. — It is not a ground for reversal that after agreeing on their verdict the jurors procured a copy of the code, for the purpose of enabling them properly to formulate their verdict. *Graves v. State*, 63 Ga. 740. See also *State v. Wilson*, 40 La. Ann. 751.

1. *Scientific Book.* — Though, by statute, papers in evidence may be allowed to go to the jury, there is no error in refusing to permit the jurors to take with them a scientific work from which passages were read as evidence, but

which were not marked. *State v. Gillick*, 10 Iowa 98.

Map. — Where the evidence was conflicting as to whether or not the *locus in quo* was a public highway, the fact that the jurors in their retirement examined a map of the county was held to be sufficient to vitiate their verdict, there being no proof by the prevailing party that the map contained nothing which might have misled the jury. *State v. Hartmann*, 46 Wis. 248.

Atlas. — In *State v. Lantz*, 23 Kan. 728, after the jury had retired, the bailiff, in response to the request of a juror, passed into the jury room an atlas, which was spread out and examined by the jurors during their deliberations. There being no showing that the rights of the accused had not been prejudiced, it was held that the trial court's refusal to grant a new trial was error.

2. *Dictionary.* — In *Wright v. Clark*, 50 Vt. 130, it was held to be no ground for setting aside the verdict that the officer in charge of the jury brought in a dictionary, which the jurors consulted, and from which they took the word "wanton," which they used in writing their special verdict.

City Directory. — Where, on the trial of a criminal offense, the jurors obtained several directories of New York city, but before rendering their verdict were recalled by the court and instructed to disregard any information they might have obtained from such books, and it did not appear that any prejudice resulted to the prisoner, it was held that a verdict of conviction would not be set aside. *U. S. v. Horn*, 5 Blatchf. (U. S.) 102.

3. *If the Paper Is Not Read*, it is the same thing as though it had not been delivered. *Killen v. Sistrunk*, 7 Ga. 294. See *infra*, X. 8. g. (2) (b) *Where Paper Not Read.*

think that they were not influenced by such paper.¹

(2) *Where No Prejudice Results* — (a) *In General*. — Where papers which should not properly go to the jury are sent to the jury room through inadvertence or accident, and not through the connivance of the prevailing party, the verdict will not ordinarily be set aside on that account, if it does not appear that the unsuccessful party was prejudiced thereby.²

Presumption of Reading. — It will be presumed that a paper improperly in the jury room was read wholly or in part by the jurors. *Elliott v. Luengene*, 17 Misc. Rep. (N. Y. City Ct.) 78. And see *La Bonty v. Lundgren*, 41 Neb. 312. But see *Hix v. Drury*, 5 Pick. (Mass.) 296.

Instruction to Disregard Improper Paper. — Where, without the consent of the parties, the court has sent to the jurors, in their retirement, an improper paper, it is proper to request the judge to instruct them to disregard it. *Schappner v. Second Ave. R. Co.*, 55 Barb. (N. Y.) 497.

1. *Connecticut*. — *Clark v. Whitaker*, 18 Conn. 543.

Georgia. — *Killen v. Sistrunk*, 7 Ga. 294; *Walker v. Hunter*, 17 Ga. 364; *Steadwell v. Morris*, 61 Ga. 97. See also *Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294.

Indiana. — *Toohy v. Sarvis*, 78 Ind. 474.

Iowa. — *McLeod v. Humeston, etc.*, R. Co., 71 Iowa 138.

Kansas. — *State v. Clark*, 34 Kan. 289.

Massachusetts. — *Munde v. Lambie*, 125 Mass. 367; *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. (Mass.) 296; *Alger v. Thompson*, 1 Allen (Mass.) 453; *Com. v. Edgerly*, 10 Allen (Mass.) 184.

Nebraska. — *La Bonty v. Lundgren*, 41 Neb. 312.

New Hampshire. — *Page v. Wheeler*, 5 N. H. 91.

New York. — *Farmers', etc., Bank v. Whinfield*, 24 Wend. (N. Y.) 419; *Elliott v. Luengene*, 17 Misc. Rep. (N. Y. City Ct.) 78; *Durfee v. Eveland*, 8 Barb. (N. Y.) 46; *Neil v. Abel*, 24 Wend. (N. Y.) 185; *Mitchell v. Carter*, 14 Hun (N. Y.) 448.

Counsel's Minutes of Evidence. — Possession by the jury, during its deliberations, of the minutes of the testimony taken by the counsel for the successful party is a sufficient cause for reversing the judgment. *Durfee v. Eveland*, 8 Barb. (N. Y.) 46.

Judge's Minutes. — In *Mitchell v. Carter*, 14 Hun (N. Y.) 448, a verdict was set aside and a new trial granted because after the jury had been instructed and the court had adjourned for the day, leaving the jurors in the court room, they obtained possession of the minutes of the trial judge, read and commented on portions of them, and made an attempt to read other portions. To the same effect see *Neil v. Abel*, 24 Wend. (N. Y.) 185.

Misleading Calculation. — In *Steadwell v. Morris*, 61 Ga. 97, wherein a new trial was granted, it appeared that the verdict was founded upon a misleading calculation sent out by the judge by consent of the parties.

Need Not Show Misconduct in Prevailing Party. — That a bill of exceptions allowed by the judge on the first trial was before the jurors during their deliberation, and was read by them or by any of them, is ground for a new trial, without showing misconduct on the part of the prevailing party. *Munde v. Lambie*, 125 Mass. 367.

2. *Arkansas*. — *Palmore v. State*, 29 Ark. 249.

District of Columbia. — *U. S. v. Wilson*, 69 Fed. Rep. 584.

Indiana. — *Ball v. Carley*, 3 Ind. 577; *Alexander v. Dunn*, 5 Ind. 122.

Iowa. — *Greff v. Blake*, 16 Iowa 222; *State v. Accola*, 11 Iowa 246; *Turner v. Kelley*, 10 Iowa 573.

Kansas. — *State v. Taylor*, 20 Kan. 643.

Louisiana. — *State v. Bradley*, 6 La. Ann. 556; *Flower v. Jones*, 7 Martin N. S. (La.) 148.

Minnesota. — *Denny v. Marrett*, 29 Minn. 361. And see *State v. Nichols*, 29 Minn. 357.

Nebraska. — *Langworthy v. Connelly*, 14 Neb. 340.

New Hampshire. — *Page v. Wheeler*, 5 N. H. 91.

New York. — *Schappner v. Second Ave. R. Co.*, 55 Barb. (N. Y.) 497; *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.) 396; *People v. Wilson*, 8 Abb. Pr. (N. Y. Supreme Ct.) 137; *Merritt v. Brinkerhoff*,

(b) **Where Paper Not Read.** — Where a paper or writing improperly gets into the jury room, even though it be of a kind to prejudice or influence the verdict, a new trial will not be granted if it appears that such paper was not read or considered by the jury.¹

17 Johns. (N. Y.) 323. And see *Durfee v. Eveland*, 8 Barb. (N. Y.) 46.

Ohio. — *Cleveland, etc., R. Co. v. Schneider*, 45 Ohio St. 678; *Tracy v. Card*, 2 Ohio St. 431; *Jaspers v. Mallon*, 11 Cinc. W'kly L. Bul. 166; *Thompson v. Chicago, etc., R. Co.*, 11 Cinc. W'kly L. Bul. 211.

South Carolina. — *State v. Tindall*, 10 Rich. L. (S. Car.) 212.

Texas. — *Beeks v. Odom*, 70 Tex. 183.

Vermont. — *Peacham v. Carter*, 21 Vt. 515; *Winslow v. Campbell*, 46 Vt. 746.

Wisconsin. — *Graves v. Gans*, 25 Wis. 41; *Chapman v. Chicago, etc., R. Co.*, 26 Wis. 295.

United States. — *Simms v. Templeman*, 5 Cranch (C. C.) 163; *Fuller v. Fletcher*, 44 Fed. Rep. 34.

Letters Admitted "Provisionally." — In *U. S. v. Wilson*, 69 Fed. Rep. 584, it appeared that the jury, on its retirement, and for about two hours, had possession of a batch of between fifty and sixty letters which had been admitted "provisionally," but of which only three were claimed to be prejudicial to the defendant, and that different jurors read and discussed the contents of the letters until taken from their possession by the court. It was held that as those jurors who made affidavits in the defendant's behalf failed to show that the three particular letters were read, no inference would arise that they were, and that in view of the instructions as to other letters properly in the case, there was no such irregularity as would entitle the defendant to a new trial.

Paper Withdrawn from Jury. — It is not ground for a new trial that by mistake the jury took an account with it, when, on the attention of the court being called to the mistake, the paper was withdrawn from the jury. *Simms v. Templeman*, 5 Cranch (C. C.) 163. See also *State v. Bradley*, 6 La. Ann. 556.

Paper Must Have Influenced Verdict. — In the absence of statutory direction, it is in a great measure left to the sound discretion of the court as to what papers, books, or other matters of evidence or instruction the jurors will be permitted to carry with them to their room upon retiring to consider their

verdict; and when, by mistake or inadvertence on the part of a jurymen or the court, or even through error of judgment on the part of the court, a paper which ought not to have been taken to the jury room has been so taken, then, before a verdict will be set aside and a new trial granted for that cause, it must appear, either from an examination of the objectionable paper itself or from facts properly presented by the bill of exceptions, that such paper must have been, in the nature of the case, or in point of fact was, considered by the jury in arriving at the conclusion reached by the verdict. *Langworthy v. Connelly*, 14 Neb. 340; *Fuller v. Fletcher*, 44 Fed. Rep. 34; *Peacham v. Carter*, 21 Vt. 515; *Winslow v. Campbell*, 46 Vt. 746. Compare *Durfee v. Eveland*, 8 Barb. (N. Y.) 46.

1. *Georgia.* — *Falvey v. Richmond*, 87 Ga. 99; *Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294; *Schmertz v. Johnson*, 72 Ga. 472; *Wilkins v. Maddrey*, 67 Ga. 766. See also *Killen v. Sistrunk*, 7 Ga. 204.

Indiana. — *Ohio, etc., R. Co. v. Hill*, 7 Ind. App. 255; *Wilds v. Bogan*, 57 Ind. 453.

Kansas. — *State v. Miller*, 35 Kan. 328.

Louisiana. — *State v. Harris*, 34 La. Ann. 119.

Massachusetts. — *Hix v. Drury*, 5 Pick. (Mass.) 206.

New Hampshire. — *Page v. Wheeler*, 5 N. H. 91.

New York. — *New York, etc., Ice Lines v. Howell*, 19 N. Y. App. Div. 341; *Schappner v. Second Ave. R. Co.*, 55 Barb. (N. Y.) 497; *O'Brien v. Merchants' F. Ins. Co.*, 38 N. Y. Super. Ct. 482; *Hackley v. Hastie*, 3 Johns. (N. Y.) 252.

North Carolina. — *State v. Bailey*, 100 N. Car. 528.

Blackboard in Jury Room. — That by mistake a juror took into the jury room a blackboard on which counsel for both sides had figured during their arguments will not necessitate a new trial where the board remained in the room but a few minutes, and none of the jurors looked at it while it was there. *Wilkins v. Maddrey*, 67 Ga. 766.

Not Read Till After Verdict. — While it

(3) *Where Given by Prevailing Party.* — Where a paper has been improperly handed to the jury by the prevailing party or his counsel, without the authority of the court, the verdict will be set aside although the paper was immaterial and was not read by the jury.¹

9. *Communications with Outsiders* — *a. IN GENERAL.* — Courts should be very careful to protect juries from improper influences.² The jurors should not be allowed to communicate with outsiders concerning the case,³ and if remarks relating to the case are made in a juror's presence he should state his relation to the case and request that nothing be said on the subject in his hearing.⁴

is improper that the verdict on a former trial should be given to the jurors on their retirement, yet if it were given to them but the fact was not known, or if it was not read until after the verdict in the case in question had been agreed on and signed, the verdict will not be disturbed. *Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294.

Jurors' Statements Sufficient. — Though jurors are not sworn to testify as to whether or not they read papers taken to their room by accident, their statements are sufficient, being controlled by the general oath touching their verdict. *Hix v. Drury*, 5 Pick. (Mass.) 296.

1. *Co. Litt.* 227 *b.*; *Heylor v. Hall*, *Palm.* 325; *Webb v. Taylor*, 2 *Roll. Abr.* 714, 6 *Style* 383; *Richmond v. Wise*, 1 *Vent.* 125; *Hix v. Drury*, 5 *Pick.* (Mass.) 296; *Page v. Wheeler*, 5 *N. H.* 91; *Ball v. Carley*, 3 *Ind.* 577; *Sheaff v. Gray*, 2 *Yeates* (Pa.) 273; *Offit v. Vick*, *Walk.* (Miss.) 99; *Sanderson v. Bowen*, 2 *Hun* (N. Y.) 153. But see *O'Brien v. Merchants' F. Ins. Co.*, 38 *N. Y. Super. Ct.* 482. See also *infra*, X. 9. *c. Communications By and With Prevailing Party*; and X. 11. *c. Refreshments Furnished by Prevailing Party*.

A verdict will be set aside where a successful party, knowing that a juror has been approached with statements prejudicial to the character of the unsuccessful party, himself gives to the juror a pamphlet containing statements supporting their truth. *Hamilton v. Pease*, 38 *Conn.* 115.

2. *Thompson v. State*, 26 *Ark.* 323.

3. *State v. Cucuel*, 31 *N. J. L.* 249; *Blalock v. Phillips*, 38 *Ga.* 216. See also the cases cited throughout the following sections.

The Reason Why Juries Should Not be Allowed to have intercourse with others

than themselves has been clearly and forcibly stated thus: "The law had, with great pains, endeavored to procure for triers men above all exception, who stood indifferent as they stood unsworn; and with yet more jealous care, provided that they should hear no evidence but what was relevant to the precise matter in controversy, and fit to bring their understanding and consciences to a proper conclusion thereon. If, after all these precautionary measures, it permitted the triers to mix with those around them, to catch the partialities and prejudices of the friends and enemies to the parties, and to open their ears to all that might be said in relation to the matter under trial, the precautions were nugatory, and there was no security for an impartial verdict founded upon the evidence. This part of the rule, as it admitted of no dispensation, so it permitted no exception unless it were such as was produced by imperious necessity, and even this was not allowed without great hesitation, and against the opinion of many sages of the law." *Per* Gaston, J., *dissenting*, in *State v. Miller*, 1 *Dev. & B. L.* (N. Car.) 521.

Complete Nonintercourse Not Required.

— Complete nonintercourse with the rest of the world, under all circumstances, was never exacted of a jury during the progress of a trial in a capital case. *State v. Cucuel*, 31 *N. J. L.* 249.

A Conversation by Separate Jurors in the presence of the affiant is not a conversation with others. *Sanders v. State*, 2 *Iowa* 230.

4. *State v. Andrews*, 29 *Conn.* 100. See also *Blalock v. Phillips*, 38 *Ga.* 216.

The Mere Fact That a Juror Did Not Demand that a person who approached him should cease to talk to him will

Misconduct of Jurors.—It is misconduct, punishable as a contempt, if a juror, sitting in a case, holds unauthorized communications with persons other than the officers in charge.¹

Misconduct of Outsiders.—Outsiders should not approach a juror for any purpose or under any circumstances without first obtaining the permission of the court;² and one who communicates with a juror without leave of court is guilty of a contempt.³

b. PRESUMPTION OF PREJUDICE — When New Trial Granted.—Where it appears that a jury has been exposed to improper influences which may have affected the verdict, the presumption of law is against the purity of the verdict;⁴ and if this presumption is not rebutted the verdict will ordinarily be set aside.⁵

not furnish ground for a presumption that the juror was improperly influenced by what he heard. *McCash v. Burlington*, 72 Iowa 26.

1. *Harrison v. Price*, 22 Ind. 165; *Gulf, etc., R. Co. v. Schroeder*, (Tex. Civ. App. 1894) 25 S. W. Rep. 306; *Foster v. Brooks*, 6 Ga. 237; *State v. Helvenston*, R. M. Charl. (Ga.) 48; *State v. Brazil*, Ga. Dec., pt. II., 107; *Lewis v. State*, 9 Smed. & M. (Miss.) 115. See *supra*, X. 1. c. (6) *Punishment for Misconduct*.

In *Clement v. Spear*, 56 Vt. 401, wherein a juror was guilty of reprehensible conduct in making statements to strangers relative to the case, in disobedience to the admonition of the presiding judge, the court said: "If he alone were to suffer from it, this court would not hesitate to visit upon him the payment of the judgment and costs in the case."

Juror Making Horse Trade.—In *Webb v. State*, 5 Tex. App. 596, wherein the judgment was reversed on another ground, the court condemned the conduct of a juror who was permitted to make, and did make, a horse trade with an outsider, although it was done in the hearing and presence of the officer in charge and possibly no injury resulted to the defendant.

Offer to Hang Jury.—It is misconduct to offer to "hang" the jury for money. *Portis v. State*, 27 Ark. 360.

Veniremen Summoned who talk to litigants and thereby form an opinion upon the merits of the case are guilty of a contempt. *Ruff v. Rader*, 2 Mont. 211.

2. *Martin v. People*, 54 Ill. 225.

3. *State v. Doty*, 32 N. J. L. 403; *Ruff v. Rader*, 2 Mont. 211; *People v. Branigan*, 21 Cal. 338; *Younger v. Louks*, 7 Ill. App. 280.

Arrangement to Indicate Verdict by Sign.—It is a contempt for any person to make arrangements with a juror to convey by sign an indication as to the probable verdict. *State v. Doty*, 32 N. J. L. 403.

In an Action Against a Town, it is misconduct for an inhabitant thereof to hold conversations with a juror sitting in the case, knowing him to be such, and for such misconduct the town will be held responsible. *Bowler v. Washington*, 62 Me. 302. But see *Carlisle v. Sheldon*, 38 Vt. 440.

Reporter Concealed in Jury Room.—In *People v. Barrett*, 56 Hun (N. Y.) 351, 24 Abb. N. Cas. (N. Y.) 430, 18 Civ. Pro. Rep. (N. Y.) 180, 8 N. Y. Crim. Rep. (N. Y.) 1, affirmed 121 N. Y. 678, a newspaper reporter was held to be guilty of contempt in concealing himself in the jury room and taking notes of the deliberations of the jury.

4. *Arkansas*.—*Wood v. State*, 34 Ark. 341.

Kansas.—*Madden v. State*, 1 Kan. 340.

Mississippi.—*Woods v. State*, 43 Miss. 364; *Pope v. State*, 36 Miss. 121; *Riggs v. State*, 26 Miss. 51.

Nebraska.—*Edney v. Baum*, 44 Neb. 294.

North Carolina.—*State v. Crane*, 110 N. Car. 530.

South Carolina.—*State v. Senn*, 32 S. Car. 392.

Tennessee.—*Cartwright v. State*, 12 Lea (Tenn.) 620; *Odle v. State*, 6 Baxt. (Tenn.) 159; *Riley v. State*, 9 Humph. (Tenn.) 646; *Brown v. Pippin*, 12 Heisk. (Tenn.) 657.

But see *People v. Dunne*, 80 Cal. 34.

5. **Burden on Winner to Show No Prejudice.**—Where an opportunity for influencing the jury is afforded, if the verdict is against the accused he is entitled

When New Trial Not Granted. — The presumption of prejudice arising from the exposure of jurors to improper influences may be rebutted by showing that, in fact, no prejudice resulted.¹ And the mere fact that a jury has not been so closely confined and guarded as to make it absolutely impossible that any tampering could have taken place will not warrant a new trial where there is no reason to suppose that the jury was actually tampered with.²

to the presumption that the irregularity has been prejudicial to him, and it is incumbent on the state to show that no such injury could have occurred by reason of the irregularity. *Madden v. State*, 1 Kan. 340.

New Trial in Discretion of Court. — Where it appears only that there was opportunity whereby to influence the jury, but not that the jury was influenced, a new trial was in the discretion of the court below. *State v. Crane*, 110 N. Car. 530 [*citing State v. Brittain*, 89 N. Car. 481]; *State v. Tilghman*, 11 Ired. L. (N. Car.) 513.

An Unexplained Conversation by a juror with an outsider is generally held to be good cause for a new trial. *Riley v. State*, 9 Humph. (Tenn.) 646; *Brown v. Pippin*, 12 Helsk. (Tenn.) 657. But see *People v. Dunne*, 80 Cal. 34.

Cases Where Verdict Set Aside. — In *Wood v. State*, 34 Ark. 341, the judgment of conviction was reversed on a showing that the officer in charge of the jury, though he kept the jurors together, treated them to whisky, took them to a billiard saloon, and took them hack riding five or six miles in the country to church; that the prosecuting attorney loaned one of them a shirt; that at the saloon they sat together, the officer drawing a chalk line between them and the others therein; and that during all the time they did not disperse or intermingle with others. The court said "What improper influences may have had an effect upon the views of the jury cannot be known. That they were exposed to none cannot with certainty be said."

In *Riggs v. State*, 26 Miss. 51, the verdict was set aside because of a showing that the jurors ate at a public table at a hotel with a crowd of guests; that the landlord and servants of the hotel were freely admitted to their room; that a private room was prepared for them in which was put intoxicating liquor, and into which they went separately to drink; that the officer

went to sleep and left them with the door unlocked; that they had cards, liquor, and a fiddle, all of which they used during the night, and that the next morning one of their number, without the consent of the officer, separated from his fellows and paid a visit to his family.

In *Odle v. State*, 6 Baxt. (Tenn.) 159, the fact that the jurors boarded at a small house containing but two rooms, wherein the prosecutor and his two daughters, who were witnesses in the case, also boarded, of itself showed such suspicious circumstances as would require a new trial.

Some cases hold that where a jury has been exposed to outside influences the verdict may be set aside without its being shown that such influence was exercised. *State v. Senn*, 32 S. Car. 392. See also *Edney v. Baum*, 44 Neb. 294.

Capital Case. — That a jury in a capital case, wherein a conviction was had, was exposed to improper influences is alone sufficient to invalidate the verdict. *Woods v. State*, 43 Miss. 364.

1. *Cartwright v. State*, 12 Lea (Tenn.) 620; *Riley v. State*, 9 Humph. (Tenn.) 646; *Pope v. State*, 36 Miss. 121.

2. *Skates v. State*, 64 Miss. 645; *Caleb v. State*, 39 Miss. 721; *Thomas v. Com.*, 2 Va. Cas. 479; *People v. Kelly*, 46 Cal. 355; *Chestnut v. People*, 21 Colo. 512; *State v. Baber*, 74 Mo. 293; *State v. Perry*, Busb. L. (N. Car.) 330; *King v. State*, 91 Tenn. 617.

Jury Eating in Public Dining Room. — The fact that the jurors took their meals in a public dining room where other persons ate is not a ground for disturbing the verdict where they were under the charge of the proper officer and no attempt was made to influence them. *Rowe v. State*, 11 Humph. (Tenn.) 491; *Browning v. State*, 33 Miss. 48; *Doyal v. State*, 70 Ga. 134.

Jury Photographed. — In *State v. Taylor*, 134 Mo. 109, there was held to be no reversible misconduct because the

c. WHERE PREJUDICE RESULTS — (1) Ground for New Trial. — Where it is shown that jurors received unauthorized communications from outsiders regarding the case under their consideration, which had, or probably had, an influence on their verdict, the court will usually set the verdict aside and grant a new trial.¹

jurymen, while passing in the charge of a deputy sheriff from the court room down street to their room, were permitted to stop and be photographed.

Jurors in Hotel Office. — In *State v. Fairlamb*, 121 Mo. 137, the alleged irregularity consisted in not keeping the jury in a private place during the trial, and in the fact that the jurors were, at various times, in the main office of the hotel, where persons were passing in and out. It was held that as it did not appear affirmatively that the jurors were spoken to about the case, nor that it was discussed in their presence, there was no reversible error.

Attending Theatre. — In *Jones v. People*, 6 Colo. 452, it was held that the court properly refused to set aside the verdict on a showing that after the jury was impaneled, the jurors, by permission of the court, attended a theatre in charge of a sworn officer, but did not separate or communicate with any person, nor was any suggestion made that they were in any way incapacitated from performing their duties.

1. *California* — *People v. McCoy*, 71 Cal. 397; *People v. Turner*, 39 Cal. 370; *People v. Mitchell*, 100 Cal. 328.

Connecticut. — *Tomlinson v. Derby*, 41 Conn. 268; *Hamilton v. Pease*, 38 Conn. 115; *Bennett v. Howard*, 3 Day (Conn.) 223; *Dana v. Roberts*, 1 Root (Conn.) 134; *Bow v. Parsons*, 1 Root (Conn.) 430.

Georgia. — *Blalock v. Phillips*, 38 Ga. 216; *Smith v. Willingham*, 44 Ga. 200.

Illinois. — *Martin v. Morelock*, 32 Ill. 487.

Iowa. — *Perry v. Cottingham*, 63 Iowa 41.

Maine. — *Bradbury v. Cony*, 62 Me. 223.

Minnesota. — *Oswald v. Minneapolis, etc., Co.*, 29 Minn. 6; *Hayward v. Knapp*, 22 Minn. 5; *Chalmers v. Whittemore*, 22 Minn. 307.

Nevada. — *Davis v. Cooke*, 9 Nev. 134.

New Hampshire. — *State v. Hascall*, 6 N. H. 352.

New York. — *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. (N. Y. Super. Ct.) 141.

North Carolina. — *State v. Wiseman*,

68 N. Car. 205; *State v. Tilghman*, 11 Ired. L. (N. Car.) 513.

Ohio. — *Farrer v. State*, 2 Ohio St. 54.

Texas. — *Defriend v. State*, 22 Tex. App. 570.

United States. — *Poole v. Chicago, etc., R. Co.*, 2 McCrary (U. S.) 251.

England. — *Coster v. Merest*, 3 Brod. & B. 272, 7 E. C. L. 433.

And see cases cited in the following sections.

In *State v. Tilghman*, 11 Ired. L. (N. Car.) 513, the court said: "If the circumstances are such as merely to put suspicion on the verdict by showing, not that there was, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or of the prisoner, or if they be solicited and advised how their verdict should be, or if they have other evidence than that which was offered on the trial, in all such cases there has, in contemplation of law, been no trial; and this court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner."

Juror Expressing Prejudice Against Losing Party. — In *Poole v. Chicago, etc., R. Co.*, 2 McCrary (U. S.) 251, the verdict was set aside and a new trial granted because one of the jurors, during the progress of the trial, in utter disregard of the instructions of the court, talked freely and fully with an outsider, and expressed himself to the prejudice of the losing party and his counsel.

Action Against Town. — In *Bowler v. Washington*, 62 Me. 302, an action for injuries sustained by reason of a defective highway, a verdict was set aside because during the trial one of the jurymen visited the place of the accident, conversed with the inhabitants of the town as to the condition of the highway at the time of the alleged injury, dined with one of them, and communicated

(2) *Source of Communication.* — If it appears to the court that, during the progress of the trial, a juror was approached by an outsider in such a manner as to have had a probable influence on the verdict, a new trial will be granted, regardless of the source or motive of the interference.¹ Where the communications emanate from the successful party, the verdict will usually be set aside whether prejudice has resulted or not.²

d. HARMLESS CONVERSATIONS OR COMMUNICATIONS —

(1) *Generally.* — While a verdict rendered under such circumstances that its purity is or might have been affected may be set aside, yet if it could not have been so affected it will be sustained. The cases are numerous and the circumstances infinitely varied wherein this last principle is applied.

(2) *Personal Messages Received and Sent by Jurors.* — Thus where personal messages are given by jurors to outsiders to be conveyed to the homes of the jurors,³ or a message of a similar character is received by a juror from the hands of an outsider, it is held that there is no such improper tampering with the

the information received by him to his fellow-jurors. But see *Carlisle v. Sheldon*, 38 Vt. 440.

Communication Allowed by Court — Error. — Where, by statute, no person shall be permitted to converse with a juror impaneled in a felony cause except in the presence and by permission of the court, it is reversible error to allow a juror, against the objection of the defendant, to be brought from the jury room and to permit the district attorney to consult with him privately in relation to another case. *Defriend v. State*, 22 Tex. App. 570.

1. *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. (N. Y. Super. Ct.) 141; *State v. Wiseman*, 68 N. Car. 205; *Bradbury v. Cony*, 62 Me. 223.

In *Coster v. Merest*, 3 Brod. & B. 272, 7 E. C. L. 433, it was proved that handbills reflecting on the plaintiff's character had been distributed in court and shown to the jury on the day of the trial, and the court refused to receive affidavits of the jury in contradiction, and granted a new trial against the defendant, though he denied all knowledge of the handbills.

2. See *infra*, X. 9. *c. Communications By and With Prevailing Party.*

3. **Illustrations.** — That a juror, in the hearing of his son, stated aloud to the attending bailiff a message which he requested the latter to deliver to his son, touching the conduct of some work, will not vitiate the verdict. *Cornwall v. State*, 91 Ga. 277.

After the retirement of a jury in a criminal case (the jurors being kept together, under the care of the sheriff, in a room separate from all others), one of the jurors called to a friend from a window, desiring him to inform his family as to the cause of his absence, and also to procure his watch and deliver it to the sheriff for him. This conversation was held not sufficient to set aside the verdict, although the sheriff happened not to hear it. *Kennedy v. Com.*, 2 Va. Cas. 510.

Where, pending a trial, one of the jury, being at the window of the court room, called to a person in the street and asked him to request his (the juror's) wife to send him supper, to which the person addressed replied that he would, and the supper was sent as requested, and the person who brought it came into the room where the jurors were confined but was not permitted to deliver it, the officer in charge of the jury receiving it and delivering it to the juror, there was held to be no ground for setting aside a verdict. *Ned v. State*, 33 Miss. 364.

Letter Destroyed by Sheriff before Delivery. — In *Eich v. Taylor*, 20 Minn. 378, it was held to be no ground for a new trial that one of the jurors had attempted to send to his wife, by the hands of the prevailing party, a letter, of which letter, however, the prevailing party had no knowledge and which was destroyed by the sheriff.

jury or sinister influence brought to bear on it as will necessitate the setting aside of a verdict.¹

(3) *Casual Conversations or Communications with Outsiders.* — Remarks to or conversations with jurors do not necessarily constitute a ground for granting a new trial, where such remarks are not calculated to produce a more unfavorable impression upon the mind of the juror than that produced by the evidence on the trial, or are not of such a nature as is calculated to result in probable harm to the accused,² and the mere fact that the jurors con-

1. *Surles v. State*, 89 Ga. 167; *Rowe v. State*, 11 Humph. (Tenn.) 49; *Taylor v. Everett*, 2 How. Pr. (N. Y. Supreme Ct.) 23; *State v. Howell*, 117 Mo. 307, wherein it appeared that while the jury, in charge of the sheriff, was passing along the street one of its members thereof called to his sister, who was on the opposite side of the street, as to his mother's condition, and that with the sheriff he walked partly across the street, and, in full view of the other jurors, and in a tone of voice loud enough to be heard by them, talked to his sister about the anticipated death of their mother. It was held that there was nothing shown which required a new trial.

In *Taylor v. Everett*, 2 How. Pr. (N. Y. Supreme Ct.) 23, the court refused to set aside the verdict, although the constable improperly gave a writing to the foreman, a part owner of a mill, that a boy "has got ground up in your mill," and thereafter the constable made signs by drawing his hands across his legs in two different places, and once across his body, in the presence of the jury, leading the juror to believe that the boy had been mangled to pieces. The juror in question and some of his fellows became excited and alarmed, but it appeared that their deliberations were not materially disturbed, nor was their verdict influenced.

Character of Letter. — The reception of a letter by a juror is not reversible error where it is shown that it had no allusion or reference to the case on trial. *Scott v. State*, 7 Lea (Tenn.) 232; *King v. State*, 91 Tenn. 617.

2. *Chalmers v. Whittemore*, 22 Minn. 307; *Shaw v. State*, 32 Tex. Crim. Rep. 155; *Nance v. State*, 21 Tex. App. 457; *Bailey v. State*, 26 Tex. App. 706; *March v. State*, 44 Tex. 64.

That a juror told a stranger who approached him that he was on that jury and could not talk to him is not within

a statutory provision (Code Crim. Pro., art. 672) relative to conversations "in regard to the case." *Johnson v. State*, 27 Tex. 758.

Placards Placed upon Walls of Jury Room. — In *Hall v. Com.*, 6 Leigh (Va.) 615, which was a trial of an indictment for passing counterfeit money, the jurors, on their retirement, found against the wall of the jury room a placard charging one of the jurors with being a counterfeiter, and insinuating that such juror had attended court for the purpose of being selected as a jurymen, which placard was read by all the jurors. It was held that there was no ground for setting aside the verdict, it not appearing that the act had produced any effect on the jurors, or had materially influenced their deliberations and verdict.

Influence of Reports and Rumors. — To authorize reversal of the judgment upon the ground that the jurors were influenced by reports and rumors, it must appear that the report was known to the jury at the time the verdict was agreed on. *Rowland v. State*, 14 Ind. 575.

Rebuttal of Presumption of Prejudice. — Any presumption arising from an attempt by a stranger to communicate with a jury is rebutted by the undisputed evidence of the very witness relied on to establish the communication that nothing prejudicial to the defendant was said. *King v. State*, 91 Tenn. 617.

In *Connecticut* it was held that a verdict would be set aside where it appeared that during a trial a juror had conversed with third parties concerning the case, if the conversation was prejudicial to the unsuccessful party, unless it appeared that there was no benefit to the successful party and no injury to the adverse party. *Hamilton v. Pease*, 38 Conn. 115; *Tomlinson v. Derby*, 41 Conn. 268.

In *Pettibone v. Phelps*, 13 Conn. 445

versed with outsiders will not require a new trial to be granted where the conversations are of an innocent character.¹

one of the jurors said out of court that the trials had been lengthy and the cause on trial protracted. When the person whom he addressed spoke to him of the severity with which a witness for the plaintiff had been examined, the juror replied that a witness seldom had so rigid a cross-examination and bore it so well. The court refused to disturb the verdict, it not sufficiently appearing that the successful party had been benefited or his opponent injured by the misconduct. There was nothing in the conversation about or concerning the matters involved in the cause, or the conduct or characters of the parties to it.

1. *People v. Symonds*, 22 Cal. 348; *People v. Kelly*, 46 Cal. 355; *Stockwell v. Chicago, etc., R. Co.*, 43 Iowa 470; *Stewart v. Small*, 5 Mo. 525; *Stites v. McKibbin*, 2 Ohio St. 588; *Hutchins v. Wick*, 1 Cleve. (Ohio) 89; *State v. Belknap*, 39 W. Va. 429.

Illustrations.—Where the interference of strangers is unattended with corruption in them, and has not been prohibited by one of the parties, and no injustice has been done, the verdict will not be disturbed, notwithstanding the nature of the cause. *People v. Boggs*, 20 Cal. 432.

In *State v. Anderson*, 4 Nev. 265, it was held insufficient misconduct to justify a new trial that one of the jurors, during recess and while with his fellows in the court room, in charge of an officer, requested a newspaper from a spectator, it being handed to him with the answer "Certainly, you are welcome," or words of similar import, the juror handing the paper back after glancing over the Eastern dispatches.

In *Flanagan v. State*, 64 Ga. 52, a new trial was refused although a juror had casual communications with strangers and procured newspapers and cards before the verdict, it not appearing that the case was alluded to or that the losing party was in any wise prejudiced.

In *Pickens v. State*, 31 Tex. Crim. Rep. 554, it appeared that while the jurors were going to supper in charge of an officer, an outsider shook hands with several of the jurors and said to the officer "Take care of the children," and nothing further. It was

held that as this could not have influenced the jury there was no ground for disturbing the conviction.

In *Burtine v. State*, 18 Ga. 534, the court refused to interfere because jurors entered a store and engaged in conversation with persons present, where it appeared that the conversation was in the presence of the bailiff and of the prisoner, and the former testified that nothing was said in relation to the case.

In *U. S. v. Daubner*, 17 Fed. Rep. 793, it appeared by affidavit that the affiant met two persons, who informed him that they were jurors in the case, and that upon his remark that the trial was lasting a long time, one of them took from his pocket a passbook, which he opened, and exhibited the names of some or all of the witnesses that had been sworn in the trial. It was held insufficient ground to disturb the verdict, since it did not appear that the jurors had any conversation with the affiant about the merits of the case, nor that the words or writing in the passbook related thereto.

In *Tiernan v. Trewick*, 2 Utah 396, the appellate court refused to disturb the judgment on a showing that during the trial a juror conversed with a witness for the plaintiff, it appearing that the conversation related solely to the mechanical execution and appearance of a map in possession of the witness, and that nothing was said nor was any suggestion made about its correctness, or in reference to the subject-matter of the controversy.

In *Armleder v. Lieberman*, 33 Ohio St. 77, it appeared that one of the jurors, outside of the jury room, and without an attending officer, inquired of an attorney not connected with the case whether the jurors could obtain books and papers from the court on their retirement, to which inquiry the attorney gave no consideration except to refer him to court. It was held that the conduct of the juror, though irregular, was not sufficient to vitiate the verdict, no bias or prejudice for or against either party being shown.

In *Chase v. State*, 46 Miss. 683, a juror who had been sworn requested a bystander to intercede with the judge for his discharge because of the illness of his wife, to which the bystander said

A Mere Business Conversation by a juror with an outside person, upon a matter entirely foreign to the case on trial, and in the presence and hearing of an officer and the other jurors, is not such conduct as will necessitate the setting aside of a verdict.¹

(4) *Conversations and Communications Concerning the Case on Trial.* — It has also often been held that if the improper conduct on the part of the jury in talking about the case on trial to outsiders does not appear to have been occasioned by the prevailing party, or by any one in his behalf, and if the court cannot see that it had or might have had a prejudicial effect against the

that it was too late. The court refused to disturb the verdict.

It is not misconduct that while on the street one of the jurors, in the presence of the others, and of the bailiff in charge, communicated facts to the sheriff concerning the health of a member of the family of the latter. *Daniel v. Frost*, 62 Ga. 697.

A mere request by a bystander as to whether he should inform a juror's wife that the juror had been drawn, etc., although a "conversation" prohibited by statute, may be disregarded where it is evident that the juror could not have been influenced. *Shaw v. State*, 32 Tex. Crim. Rep. 155.

Conversation by a juror with his wife, apart from his fellows, is not such misconduct as will warrant a new trial where it appears that counsel for the defendant consented to the interview, which had no reference to the case on trial. *Hill v. State*, 64 Ga. 453.

That a juror had conversation with his wife in the presence of the bailiff is not reversible error where it is shown that the subject-matter of the conversation was not in any way related to the case. *Sanitary Dist. v. Cullerton*, 147 Ill. 385.

A casual remark between a juror and another person, in the presence of the court, after the juror has been sworn, is not of itself necessarily suggestive of such an irregularity as will require the verdict to be set aside. *Cohron v. State*, 20 Ga. 752; *Epps v. State*, 19 Ga. 102.

In *People v. McCurdy*, 68 Cal. 576, the appellate court refused to interfere with the conviction where it appeared that a juror approached persons engaged in conversation concerning the case, and on one of such persons calling attention to the juror's presence,

the latter said that they might go ahead, as it would make no difference to him.

Conversation with Sheriff. — In *Green v. State*, 71 Ga. 487, it was charged that the foreman separated from his fellows and conversed with the sheriff, but it was shown that he never was out of the sight of the bailiff, and that the sheriff ordered him back and referred him to the court for an answer. There was held to be no ground for a new trial.

A verdict is not vitiated by the fact that a juror asked a question of and was answered by the sheriff; and such an objection is unavailable where by statute the appellate court is required to give judgment without regard to technical errors or defects, etc. *People v. Riley*, (Supreme Ct.) 3 N. Y. Crim. Rep. 374.

A new trial will not be granted, in a prosecution for murder, because the jurors have been permitted to communicate with other persons, where they were kept together in apartments provided for their use during the adjournment of court, and the few words exchanged with such persons were with sworn officers of the court, brought unavoidably in contact with them, and did not relate to the trial, and were not of a character to produce the slightest effect on their decision. *State v. Kennedy*, 8 Rob. (La.) 590.

Conduct of Bailiff Punishable. — The conduct of the bailiff in permitting conversation between jurors and other persons is reprehensible and should be punished, even though such conversation will not permit the granting of a new trial. *Masterson v. State*, 144 Ind. 240; *Ellis v. Ponton*, 32 Tex. 434.

1. *State v. Harrison*, 36 W. Va. 729; *Martin v. People*, 54 Ill. 225; *Bevelot v. Lestrade*, 153 Ill. 625.

moving party, a verdict should not be set aside.¹

(5) *Remarks and Discussions in Hearing of Jury.* — Remarks made in the presence or hearing of the jury by strangers expressing their opinions or wishes in relation to the case on trial have

1. In *Catterlin v. Frankfort*, 87 Ind. 45, which was a proceeding to annex territory to a city, the reviewing court declined to disturb a refusal to grant a new trial upon the fact that during the progress of the trial one of the jurors, on a view of the premises, jocosely inquired of a person engaged in plowing a near field whether he wanted that field brought into the corporation. See also *Foedisch v. Chicago*, etc., R. Co., 100 Iowa 728; *Brant v. Lyons*, 60 Iowa 172; *McCash v. Burlington*, 72 Iowa 26; *State v. Harper*, 101 N. Car. 761; *March v. State*, 44 Tex. 64; *Nance v. State*, 21 Tex. App. 457.

Illustrations. — Where a party asked a person whom he did not know to be a juror as to what he thought of the case, and on being informed by the person addressed that he was a juror, said no more, there was held to be such an innocent and harmless mistake as would not require disturbance of the verdict. *Wise v. Bosley*, 32 Iowa 34.

In *Cowles v. Merchants*, 140 Mass. 377, it was held that there was no requirement, as a matter of law, that the verdict should be set aside, though during the trial a juror was accosted on the street by a person whose faculties were very much impaired by reason of his advanced age, and who expressed to the juror his opinion in reference to the case.

In *Harrison v. Price*, 22 Ind. 165, one of the jurors, while the jury was temporarily separated, asked a stranger how he thought the case would go, whereupon the latter said that from outside rumor the jury ought to find a verdict for the defendant, but from the appearance of the jury he thought it would find for the plaintiff, to which the juror responded: "Yes, by God, I know it will." It was held that, no other improper conduct being shown, there was not sufficient ground for a new trial.

In *Clement v. Spear*, 56 Vt. 401, it appeared that a juror, who had been duly admonished upon adjournment of the court, on his way home, in answer to an inquiry as to how the case was going, said that "C. [the prevailing party] is going to beat." It appearing

that there was no fault chargeable to the party or his friends, and that the expression, which had been unwittingly called out by persons friendly to the unsuccessful party, did not show that he was injured, it was held that neither the interests of the party nor those of the state required that a new trial should be granted.

Conversations by a juror with an outsider, in which the former states that the examination of the witnesses has, as yet, disclosed nothing against the defendant, while reprehensible, will not furnish good ground for a new trial. *State v. Craig*, 78 Iowa 637.

In *King v. State*, 91 Tenn. 617, a bystander in a store conversed with a juror, who was with his fellows, and in charge of an officer, relative to the juror's family, and in further conversation the juror, in answer to the query "What do you think?" said, "It will be a hung jury." It was held that the conduct of the juror and the person who conversed with him, though very reprehensible, did not tend to influence the juror and was not prejudicial.

Mere information to the jury that a bet as to the verdict had been made by a person named is not a ground for setting aside the verdict. *Westmoreland v. State*, 45 Ga. 225.

Conversation with Attorney. — In *State v. Fruge*, 28 La. Ann. 657, the appellate court refused to interfere with the action of the court below in declining to disturb a verdict because, in open court, without permission of the court, a juror left his seat and whispered to the district attorney, who did not respond except to shake his head, whereupon the juror returned to his seat.

Where an attorney for one of the plaintiffs, seeing a juror leave the court house for a necessary purpose, and supposing that a verdict had been agreed on, inquired of the juror if that was the case and received a negative answer, no further conversation taking place, the appellate court declined to interfere because it was apparent that no prejudice resulted. *Carnaghan v. Ward*, 8 Nev. 30.

In *Lee v. McLeod*, 15 Nev. 158, it

been held insufficient to justify interference with the verdict, where such remarks or expressions are not shown to have influenced the verdict,¹ as where persons in the court room, in the presence of the court and jury, in audible tones express their opinions as to the punishment to which the defendant should be subjected.² And the discussion of a case by strangers in a position near the jury is not a ground for a new trial where nothing was heard by the jurors which could have influenced their verdict.³

was held insufficient to authorize a new trial that during a recess one of the jurors gratuitously participated in a conversation with counsel in reference to the trial, and during the presentation of the case of the defeated party was inattentive and indifferent, and occupied the attention of the other jurors at the closing argument by writing in a book and passing it to them, where such remarks and conduct did not indicate any improper bias against the unsuccessful litigant.

Discussion on Construction of Evidence. — It is manifestly improper for the jury to enter upon a discussion and call for a reading of the minutes of testimony previously given, and to enter upon a discussion and controversy with the counsel in the case as to the construction of written evidence, but an instruction upon such evidence to the effect that the points discussed by counsel and jury were immaterial obviates the objection as a ground for setting aside a verdict. *Truman v. Bishop*, 83 Iowa 702.

Conversation with Clerk. — In *Dennison v. Powers*, 35 Vt. 39, it appeared that the jurors, having agreed as to the rights of the party, but being in doubt as to the proper mode of computation, called on the clerk, who, in compliance with their request, correctly informed them, and there was held to be no such irregularity as would require the verdict to be set aside.

After Agreement. — The fact that after agreement, and before the return of the verdict, one of the jurors states to strangers that an agreement has been arrived at, without stating the result, is not such misconduct as will require a new trial. *McCarthy v. Kitchen*, 59 Ind. 500.

Attempt of Unsuccessful Party to Approach Juror. — In *Owen v. Schmidt*, 37 Leg. Int. (Pa.) 82, 14 Phila. (Pa.) 183, it appeared that one of the unsuccessful parties had attempted to converse

with a juror about the case, but having been instantly repelled by the latter had thereupon desisted. It further appeared that the matter had been brought to the attention of the court, which on investigation decided that there was no reason for a new trial, and further that the unsuccessful party was in no position to complain.

1. *People v. Brannigan*, 21 Cal. 337; *Hilton v. Com.*, (Ky. 1891) 16 S. W. Rep. 826.

The fact that a bystander makes a very opprobrious remark in the hearing of the jury is not ground for setting aside a verdict. *Turner v. State*, 89 Tenn. 548.

Prejudicial Sermon. — Where, by consent of the defendant, the jurors were permitted to attend church in charge of the bailiff, it was held that no prejudice would be presumed, and that if the discourse might have had a tendency to prejudice the defendant, he could not complain, because of the consent given by him. *State v. Kent*, 5 N. Dak. 516.

2. *Brake v. State*, 4 Baxt. (Tenn.) 361.

So the expression of a wish, in the presence of the jury, by a bystander under the influence of liquor, that the defendant might be hanged is not of itself a ground for disturbing the verdict. *State v. Cucuel*, 31 N. J. L. 249.

In *McTyler v. State*, 91 Ga. 254, while the jurors in a body, in charge of a bailiff, were, by leave of the court, passing through a street on their way to dinner, one of them casually overheard a bystander say in a loud tone: "We, the jury, find the prisoner guilty," and it was held to raise no presumption of injury to the accused.

3. *Brown v. State*, 65 Ga. 332; *Ridenour v. Clarinda*, 65 Iowa 465; *Snodgrass v. State*, 36 Tex. Crim. Rep. 207, wherein the court refused to disturb a conviction, although, by the affidavit

After Agreement on Verdict. — The fact that after agreement upon and before the return of the verdict one of the jurors hears third persons express opinions as to the merits of the case is not ground for reversal.¹

e. COMMUNICATIONS BY AND WITH PREVAILING PARTY —

(1) *In General.* — Whenever it comes to the knowledge of the court that a party has made remarks concerning the case in the presence of jurors, or has otherwise tampered with the jury, the presiding judge should set aside the verdict in favor of the party guilty of such misconduct,² and the court will not inquire in such a case whether or not prejudice actually resulted to the unsuc-

of one of the jurors, it appeared that before the verdict, and on the way back from supper, the affiant heard somehow that a witness for the defendant had been arrested for perjury committed on the trial of the case and bound over, and that this matter was mentioned before the jury, without stating what was said. There was no pretense that the statement affected any member of the jury in the least, it further appearing that the juror had agreed with the others on the conviction before he heard of the incident in question, although had it not been for the remark heard by him he would not have agreed to the punishment which was finally assessed.

But see *State v. Dolling*, 37 Wis. 397.

Though, in the presence of persons summoned as jurors, and during the argument of a motion for a continuance, a bystander makes a statement that the defendant's wife said she would not come because she would only help to get her husband in jail, there is no ground of exception. *State v. Jackson*, 112 N. Car. 851.

Statement Concerning Defendant's Past Life. — That a juror might have overheard, outside the jury box, statements relative to the past life of the defendant is not a ground for reversal where it is questionable whether the juror actually heard the remarks, and where, if he did, it was understood that the remarks were not made by any one interested in securing a conviction, and there was little reason to suppose that the slightest impression was made on the mind of the juror. *State v. Yordi*, 30 Kan. 221.

Conversation by Counsel of One of the Parties in the hearing of a juror, there being no proof that anything was said which could have influenced the verdict, is not ground for a new trial.

Rockdale Paper Mills v. Stevens, 65 Ga. 380.

1. *Willing v. Swasey*, 1 Browne (Pa.) 123.

In *State v. Gay*, 18 Mont. 51, the alleged misconduct was that the jurors, in their retirement, discussed the question of the defendant's guilt of another offense, and that during recess of the court they separated and scattered through the court room at times when the evidence and merits of the case were being freely discussed by spectators. It was held that a new trial was properly denied where it was shown that the alleged discussion was after rendition of the verdict, and it appeared by the affidavits of the bailiff in charge of the jury that no conversation took place between the jurors and others during the adjournments.

2. *Georgia.* — *Smith v. Lovejoy*, 62 Ga. 372.

Idaho. — *Palmer v. Utah*, etc., R. Co., 2 Idaho 290.

Illinois. — *Vane v. Evanston*, 150 Ill. 616.

Indiana. — *Huston v. Vail*, 51 Ind. 299.

Iowa. — *Wise v. Bosley*, 32 Iowa 34.

Kansas. — *May v. Ham*, 10 Kan. 598.

Maine. — *Heffron v. Gallupe*, 55 Me. 563; *Hilton v. Southwick*, 17 Me. 303; *Cottle v. Cottle*, 6 Me. 140.

New Hampshire. — *Allen v. Aldrich*, 29 N. H. 63; *Perkins v. Knight*, 2 N. H. 474.

New York. — *People v. Carnal*, 1 Park. Cr. Rep. (N. Y. Oyer & T. Ct.) 256; *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. (N. Y. Supreme Ct.) 7; *Turner v. Beardsley*, 19 Wend. (N. Y.) 348.

Ohio. — *Pittsburgh*, etc., R. Co. v. Porter, 32 Ohio St. 328.

Pennsylvania. — *Com. v. Martin*, 16

cessful party,¹ but will set aside the verdict as a punishment for the improper conduct.²

(2) *Innocent Communications*. — Where irregularities only have occurred which do not necessarily or naturally involve suspicion of improper influence, the approved course is, upon proper presentation of a complaint, for the trial court to examine witnesses and take testimony with a view of ascertaining whether any improper influences have been put in operation to control the mind of any or all of the jurors, and, after ascertainment of the facts, with the further view of sustaining or setting aside the verdict, as the facts disclosed upon such examination may demand.³

Pa. Co. Ct. Rep. 140; *Ritchie v. Holbrooke*, 7 S. & R. (Pa.) 458.

Rhode Island. — *Tucker v. South Kingstown*, 5 R. I. 558.

Tennessee. — *Vaughn v. Dotson*, 2 Swan (Tenn.) 348; *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11; *Davidson v. Manlove*, 2 Coldw. (Tenn.) 346.

Texas. — *Gulf, etc., R. Co. v. Schroeder*, (Tex. Civ. App. 1894) 25 S. W. Rep. 30.

In *Turner v. Beardsley*, 19 Wend. (N. Y.) 348, the judgment was reversed because while counsel for the unsuccessful party was summing up, the prevailing party, without leave of the court, spoke to one of the jurors in a low tone of voice and persisted in so doing when forbidden by the court.

Writing to Jury. — That the prevailing party writes to the jury is such misconduct as will require a new trial. *Humphries v. Blevins*, 1 Overt. (Tenn.) 36.

Drinking and Playing Cards with Jurors. — In *Vollrath v. Crowe*, 9 Wash. 374, the judgment was reversed because, during the progress of the trial, the plaintiff and one of the jurymen played cards, drank together at a saloon, and walked and conversed together, though it was testified that the case on trial was not discussed, but it did not appear who paid for the liquor. *Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291.

Bribery of a Juror by the successful party is good ground for a new trial. *Hawkins v. New Orleans Printing, etc., Co.*, 29 La. Ann. 134.

A judge who has knowledge that a juror was bribed should of his own motion set aside the verdict and order a new trial. *Hawkins v. New Orleans Printing, etc., Co.*, 29 La. Ann. 134.

If the losing party has reason to believe that the jury has been tampered

with, or that some undue influence was brought to bear upon it, the proper course is to bring the matter before the presiding judge, and compel a full disclosure of the conduct and conversation of which complaint is made. *Borland v. Barrett*, 76 Va. 128.

Patronizing Bar of Juror. — In *Palmer v. Utah, etc., R. Co.*, 2 Idaho 290, the judgment in favor of the plaintiff was reversed because of his generous patronage of the bar of one of the jurors, although it did not appear that there was any direct attempt to influence the verdict by denouncing the opposite parties.

1. *Vaughn v. Dotson*, 2 Swan (Tenn.) 348; *Huston v. Vail*, 51 Ind. 299; *Gale v. New York Cent., etc., R. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 385; *Ritchie v. Holbrooke*, 7 S. & R. (Pa.) 458.

In *May v. Ham*, 10 Kan. 598, it was held that the verdict could be set aside under such circumstances, unless it appeared beyond a reasonable doubt that the unsuccessful party was not prejudiced.

2. *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11; *Pittsburg, etc., R. Co. v. Porter*, 32 Ohio St. 328.

Injunction. — It is also held that proceedings on a judgment at law entered on a verdict obtained by improper practices on the part of the prevailing party may be enjoined, and the court may direct an issue to ascertain the amount and the propriety of the plaintiff's demand. *Humphries v. Blevins*, 1 Overt. (Tenn.) 36.

3. *Brookhaven Lumber, etc., Co. v. Illinois Cent. R. Co.*, 68 Miss. 432; *Kelley v. Downing*, 69 Vt. 266.

A Casual Communication by the prevailing party, pending the trial, made without intent to influence the verdict, is not ground for a new trial if it is

(3) *By Counsel for Prevailing Party* — (a) *In General*. — So improper conduct on the part of the counsel for the prevailing party will be sufficient to justify the setting aside of a verdict where such conduct is of a kind calculated to prejudice the rights of an adverse party.¹

(b) *Harmless Communications*. — But the mere temporary association of a juror with the attorney for the prevailing party is held to be insufficient of itself to require the setting aside of a verdict, when

evident that the jurors were in no wise influenced thereby in reaching their verdict. *Oswald v. Minneapolis*, etc. Co., 29 Minn. 5; *Borland v. Barrett*, 76 Va. 128.

In *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97, there was held to be no impropriety in the fact that the court allowed the trial to proceed with a juror who had conversed with the plaintiff, where it appeared that the juror was not aware that the person with whom he conversed was the plaintiff, and that all that he had said was that it was "a long sit to sit here all day," the court having duly investigated the alleged misconduct and ascertained that it was in no wise prejudicial.

That after a case had been commenced, and during an adjournment, one of the parties met a juror and told him he had been obliged to go home and get two deeds, which were subsequently used on the trial, was held insufficient to justify interference with the verdict. *White v. Wood*, 8 Cush. (Mass.) 413.

Customary Offices of Civility, ordinary hospitality, or courtesy extended by the successful litigant, without any design or calculation to influence the jury or jurors in their consideration of the case, and which are devoid of suspicion, will not afford sufficient ground for setting aside the verdict and awarding a new trial. *Vane v. Evanston*, 150 Ill. 616.

Mere association, where nothing was said about the case nor any allusion made to it, while it might be improper in some cases, is not of so grave a character as to require the setting aside of the verdict. This was held where a juror rode to or from the place of trial in a wagon with the successful party, *Bonnet v. Glattfeldt*, 120 Ill. 166; *Gale v. New York Cent.*, etc., R. Co., 53 How. Pr. (N. Y. Supreme Ct.) 385; *Hilton v. Southwick*, 17 Me. 303; or where a juror walked with the party

to a hotel at which they were both stopping, *Beardstown v. Smith*, 150 Ill. 169. So also where during the trial a juror went to and from his court each day with the successful party, it was held to furnish no ground for a new trial, it appearing that they were neighbors, and for convenience and economy had arranged so to travel before the commencement of the term, and that no conversation was had between them relative to the case in question. *Ford v. Holmes*, 61 Ga. 419.

In *Central R., etc., Co. v. Wiggins*, 91 Ga. 208, which was an action for injury to the plaintiff, which, as he contended, disabled him from walking without crutches or other assistance, it was held to be no cause for a new trial that one of the jurors took the plaintiff by the arm and assisted him downstairs in the court house, during a recess of the court after the commencement of the trial.

Statements in Presence of Juror. — In *Shea v. Lawrence*, 1 Allen (Mass.) 167, one of the parties, in answer to an inquiry by a third person, made a statement in reference to the case in the presence of some of the jurors, who had been summoned to attend, but who were unknown to him, and immediately on being informed that some of the persons standing near were members of the jury, he forbore all further conversation and immediately separated from them. It was held that there was no ground for a new trial, it not appearing that he had attempted to obtain any advantage to himself or worked any harm to his adversary, and there appearing no reason for supposing that the impartiality of the jurors was diminished or affected by the occurrence.

1. *Martin v. Morelock*, 32 Ill. 487; *Hutchins v. State*, 140 Ind. 78; *Stafford v. Oskaloosa*, 57 Iowa 748; *Oleson v. Meader*, 40 Iowa 663; *Ensign v. Harney*, 15 Neb. 330.

a satisfactory explanation of such conduct is given,¹ and where it does not appear that there was any intercourse or communication with regard to the case on trial.²

(4) *By Partisans*.—The general principles applicable to interference with a juror by a party to the suit are equally applicable to similar interference by the agent, friends, or relatives of the party.³

1. *Delaney v. Hartwig*, 91 Wis. 412.

2. *Collier v. State*, 20 Ark. 36; *Hoover v. State*, 5 Baxt. (Tenn.) 672.

Illustrations.—When a juror returning to the jury room requested an attorney whom he had met on his way out to send some one for a bottle of liniment which he had procured at a drug store, as he was quite lame and suffering much pain, which request the attorney acceded to, it was held that there was not such extension of favor to the juror by the attorney as would vitiate the verdict rendered in favor of his client. *Carnaghan v. Ward*, 8 Nev. 30, *distinguishing* *Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291, wherein it was held that the treating of the jury by the prevailing party with spirituous liquor would vitiate the verdict. In this case the act was volunteered and entirely uncalled for by any rule of civility or propriety.

That before final argument the attorney for the prevailing party and one of the jurors were seen drinking and "clinking glasses" in a public saloon is not enough to call for reversal where it is shown that the conversation was with reference to a suit which had been compromised, in which the wife of the juror was a party, and in which the attorney had represented the adverse party. *Mobile, etc., R. Co. v. Davis*, 130 Ill. 146.

In *Hoover v. State*, 5 Baxt. (Tenn.) 672, there was held to be no ground for reversal because of the fact that, while the foreman of the jury was temporarily suspended, one of the jurors selected was allowed to confer with the counsel who was assisting the prosecution, and who was also counsel for the juror's son, who was defendant in another case which had been taken up during the suspension, and that the juror was allowed to sit at the bar with his son's counsel during the trial to aid them in the case, it appearing that no reference whatever was had to the case in hand.

In *Thomas v. State*, 61 Miss. 60, after seven jurors had been tendered

and accepted, the district attorney made a suggestion, in their presence, that he would put up ten dollars towards the expense of feeding the jury, if there was no other provision made, whereupon one of the defendant's counsel stated that he would give a hundred dollars for the same purpose, if necessary, and another of his counsel said that he would give as much as any one. It was held that while this conduct was highly reprehensible, it furnished no ground for reversing the conviction.

3. *Hamilton v. Pease*, 38 Conn. 115; *Bradbury v. Cony*, 62 Me. 223; *Knight v. Freeport*, 13 Mass. 218; *Veneman v. McCurtain*, 33 Neb. 643; *Cohen v. Robert*, 2 Strobb. L. (S. Car.) 410, *McDaniels v. McDaniels*, 40 Vt. 364.

In *People v. Mitchell*, 100 Cal. 328, one or more of the jurors on several occasions visited a disreputable resort kept by a woman who was a witness for the defendant. The court said: "It may appear at first blush that the friend and witness of defendant having been largely instrumental in bringing about the condition of which he complains, it cannot be presumed that he was injured thereby, and that to yield to his plaint will result in encouraging other men charged with crime to resort to like practices. This is but a surface view of the case, and when we go deeper we find that the jurors in question had compromised themselves; that their position had been exposed; that the public was watching them with a suspicious eye; and that henceforth they could only allay that suspicion, and vindicate themselves from it, by convicting the defendant. Their freedom of action was foreclosed. Amid all the notoriety given to their conduct, there can be no reasonable doubt but that the jurors understood fully the unfortunate position in which they were placed, and the temptation to escape by the most practicable mode, viz., by convicting the defendant, was too strong a one to be reasonably resisted by such men under such circum-

Casual Conversation with Witnesses. — It is also held that the verdict should not be set aside on account of the mere fact that the witness was seen in conversation with a juror, where it is not made to appear that there was any communication with reference to the case on trial.¹

f. COMMUNICATIONS BY JUDGE. — The judge has no right to communicate privately with the jury after it has retired to consult,² and it is held to be error for the judge, in the absence of

stances. It is plain that all this tended to the injury of the defendant, and a verdict rendered under such circumstances should not be upheld."

Harmless Communications. — But it is also held that such communications will not require the setting aside of a verdict where it appears that justice has been done and that the communications were not for the purpose of prejudicing the unsuccessful party. *Blaine v. Chambers*, 1 S. & R. (Pa.) 169.

It is not sufficient cause to set aside a verdict that a person in the employ of the successful party conversed during the trial on one occasion with two of the jurors, took refreshments in the same box with them at an oyster saloon, and without their knowledge paid for them, if it does not appear that the successful party was implicated in the transaction, or that they talked about the question in the cause, or that the jurors were at all influenced by the occurrence. *Eakin v. Morris Canal, etc., Co.*, 24 N. J. L. 538.

Attempt to Bribe. — It is not ground for a new trial that a bribe was offered to a juror by a person whom it was not shown acted for the prevailing party, and where the juror denies that he was in any wise influenced because of being approached by such person. *Clay v. Montgomery*, 102 Ala. 297.

Remarks in Presence of Jury. — Where the father of one of the parties, a guarantor who had been rejected as a witness, said in the court room and in the hearing of the jury to a witness on the other side, among other things, that if he had been allowed to testify he could have explained the whole matter, which fact did not become known to the moving parties until after verdict, the Supreme Court refused to revise the action of the court below in granting a new trial. *Smith v. Willingham*, 44 Ga. 200.

1. *Omaha Fair, etc., Assoc. v. Missouri Pac. R. Co.*, 42 Neb. 105; *State*

v. Way, 38 S. Car. 333; *Hairgrove v. Curtiss*, 67 Ill. App. 448; *Shomo v. Zeigler*, 10 Phila. (Pa.) 611.

The mere circumstance that a juror rode from the court house in a carriage with a witness for the prosecution, and that they parted at the same place, is not a ground for disturbing a verdict unless it is shown that the circumstance operated prejudicially to the objecting party. *U. S. v. Daubner*, 17 Fed. Rep. 793.

Where a witness and a juror drank together before the jury was called, and during the trial the witness told the juror to get the drink which he had paid for, there was held to be no misconduct, it not appearing, in fact, that the juror accepted the last invitation. *Hawley v. Acker*, 2 Woodw. (Pa.) 237.

Business Conversation. — That a juror engaged in conversation with one of the witnesses, during an adjournment, about a matter of business unconnected with the case on trial, is not ground for a new trial, there being no evidence that the jury was unduly influenced. *Bevelot v. Lestrade*, 153 Ill. 625.

Witness Improperly Approaching Juror. — One party should not be deprived of his verdict because of the misconduct of one of his adversary's witnesses in improperly approaching the jury. *Johnson v. Witt*, 138 Mass. 79.

Conversations Relating to Case. — In *Mench v. Bolbach*, 4 Phila. (Pa.) 68, a new trial was granted because one of the witnesses for the prevailing party conversed with a person who was summoned as a juror, and who thereafter served, and showed him a plan of the premises in question. To the same effect see *Simpson v. Kent*, 9 Phila. (Pa.) 30; *Com. v. Stokes*, 3 York Leg. Rec. (Pa.) 220, wherein a new trial was granted because a witness for the prosecution told one of the jurors that he could have told a good deal more about the character of the defendant but was afraid to do so.

2. *Sargent v. Roberts*, 1 Pick. (Mass.)

the parties or counsel, to go before the jury while it is deliberating.¹ But on the other hand, where no prejudice results, it is held that the mere fact that the judge entered the jury room during the deliberations is not sufficient to vitiate a verdict.²

g. OUTSIDERS IN JURY ROOM.— Outsiders have no right in the jury room or the place occupied by the jury, and such an intrusion as may have the effect of influencing the verdict is ground for a new trial,³ though in many instances the mere tem-

337; *Hoberg v. State*, 3 Minn. 262; *Helmbrecht v. Helmbrecht*, 31 Minn. 504; *State v. Alexander*, 66 Mo. 148; *People v. Linzey*, 79 Hun (N. Y.) 23.

Irregular Communication by Jury with Judge.— Where, by statute, the jury is required to communicate with the judge through the foreman, the fact that a written inquiry was sent to the court signed by a juror other than the foreman, to which neither the latter nor the judge objected, is a mere irregularity which, in the absence of any apparent injury to the accused, is wholly immaterial. *Willis v. State*, 24 Tex. App. 586.

1. *Stager v. Harrington*, 27 Kan. 414. Where Both Parties Consent that a justice may visit the jury room, at the request of the jury, to answer an inquiry, the unsuccessful party cannot urge error. *Smoke v. Jones*, 35 Mich. 409.

Where, during the deliberations of the jurors, and at their request, and with the knowledge and consent of the unsuccessful party, a justice enters the jury room and reads the testimony of a witness to them, consent to the reading will be implied. *Hancock v. Salmon*, 8 Barb. (N. Y.) 564.

2. *Hart v. Lindley*, 50 Mich. 20, holding that when at the request of a jury the commissioner went into the jury room, stating, however, that he would give no instructions, it is not of itself reversible error; *Helmbrecht v. Helmbrecht*, 31 Minn. 504, relaxing the strict rule laid down in *Hoberg v. State*, 3 Minn. 262.

Where No Prejudice Results.— While a justice jury was in consultation, the justice stepped to the door of the jury room and asked the constable for a paper belonging to him, whereupon the foreman asked if the jurors could see the evidence, to which the justice answered "No." Questions were then put to him by jurors, but he refused to answer in the absence of the parties, and withdrew. It did not appear that any harm was done or intended, and it

was held that the irregularity was not enough to justify a disturbance of the verdict. *Kerr v. Hammer*, (Supreme Ct.) 15 N. Y. Supp. 605.

In *Thayer v. Van Vleet*, 5 Johns. (N. Y.) 111, the fact that after a jury, in a justice's court, had retired, the jurors sent for the justice and asked him if they could add anything to the demand, to which he simply answered "No," was held not sufficient irregularity to set aside the verdict.

In *People v. Carnal*, 1 Park. Cr. Rep. (N. Y. Oyer & T. Ct.) 256, when the jury was in retirement one of the jurors sent the bailiff in charge to request that some book containing the law of manslaughter should be sent to them, and was informed by the officer that the judge said they had nothing to do with manslaughter. A new trial was denied after conviction for murder.

In *Priest v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 611, it was held that the fact that the judge went into the jury room during the deliberations of the jury and inquired as to the probabilities of agreement did not constitute reversible error where it appeared that his action was prompted by a desire to find out the necessity of sending for talesmen to make up another jury.

3. *Wright v. State*, 17 Tex. App. 152, wherein a conviction was reversed because, among other things, while the jury was considering the verdict the officer permitted several town officers to go into the jury room, and permitted the foreman of the jury, who was likewise a town officer, to attend to and participate in the transaction of business before such officers, in the presence of the jury.

In *Tarkington v. State*, 72 Miss. 731, the judgment was reversed because, when the jury was deliberating in the court room, there were present in the same room nine other persons, deputy sheriffs and porters, two of whom had testified on behalf of the prosecution,

porary presence of outsiders has been held to have no effect upon the verdict, where no prejudice could have resulted from such intrusion, and it was apparent that the intrusion was not for such a purpose.¹

notwithstanding that it did not appear that any communication took place between the jurors and any of the parties.

Outsiders Sleeping with Jurors.—*Wright v. State*, 17 Tex. App. 152; *McElrath v. State*, 2 Swan (Tenn.) 382.

A verdict should be set aside on the ground that a person, not a member of the jury, slept in the same room with the jurors, and had conversations with some of their number in which he made statements reflecting upon the character of the unsuccessful party. *Welch v. Taverner*, 78 Iowa 207.

State Witnesses.—In *State v. Cartwright*, 20 W. Va. 32, it appeared that after all the evidence was in, and the jury had retired for the night, the officer having the jurors in charge, at the instance of one of them, brought into the jury room one of the principal witnesses for the state, who had been in the affray upon which the indictment was based. He remained therein for about an hour, performing on the fiddle, the officer denying to a brother of the witness, who inquired for him, that he was in the room. The verdict was set aside, although the jurors and the officer testified that no conversation or communication was had with the witness touching the trial, and that his presence or conduct had not influenced the verdict, no affidavit by the witness being offered, nor any excuse given for not introducing it.

Evidence of Intrusion.—A verdict will not be set aside on an affidavit that a person was seen to enter the court house through an open window of the room where the jury was ordered to be kept during deliberation, where it is shown by the testimony of some of the jurors that no one entered the room except the jurymen themselves and the officer having them in charge. *Hair v. State*, 16 Neb. 601.

1. Harmless Intrusion.—In *Luster v. State*, 11 Humph. (Tenn.) 169, the Supreme Court refused to disturb a conviction because, when the officer left the jury in retirement to procure wood and water, an individual went into the room, took his seat by invitation of a juror, and there remained until the arrival of the officer, who removed

him, there appearing no improper motive for the intrusion, and no communication having taken place between the intruder and the jurymen.

In *State v. Gould*, 90 N. Car. 658, the appellate court refused to interfere with the refusal of the court below to grant a new trial, it appearing that one person passed through the room where the jury was kept during the night, and another was found asleep in a stupid, drunken condition on a bench in the rear of the room, and was ejected therefrom as soon as discovered, and that neither of such persons had any communication with any member of the jury, and it also appearing that there was no ground for even a suspicion that any undue influence had been brought to bear.

That the jurors retired for a few moments to their room, wherein witnesses who had given testimony were sitting, is not such an irregularity as will void the verdict where it does not appear that any communication was had between the jurors and the witnesses. *State v. Nance*, 25 S. Car. 168.

In *Doyal v. State*, 70 Ga. 134, during the formation of the jury an outsider came into the room where some of those selected were in charge of an officer, and made some idle remarks, but withdrew upon being informed of the impropriety of his presence, and it was held that sufficient reason for a new trial did not appear, no prejudice having resulted.

That a Servant Who Brought Dinner into the Jury Room removes dishes therefrom will not militate against the verdict, where it is clearly shown that neither did he communicate with the jurors nor they with him. *Green v. State*, 59 Miss. 501.

Attendance of Physician.—See *supra* X. 3. **Illness of Juror.**

Newspaper Reporter Secreted.—The fact that a newspaper reporter secreted himself in the jury room and was there for a portion of the time during which the jury was deliberating, taking notes, was held not to vitiate the verdict, it appearing that the jurors were unaware of his presence, and that the verdict was not in any wise influenced.

h. DELIVERY OF LETTERS TO JURORS. — Letters sent to the jurors while the trial is in progress should be inspected by the court before their delivery.¹

10. Jurors Reading Newspapers — When New Trial Not Allowed. — The fact that the jurors read newspapers during the trial of a cause is not, of itself, a ground for disturbing the verdict if the newspapers contain no comments on the case in hand.² And even where the jurors receive newspapers containing accounts of or comments upon the case, a new trial will not be granted if there was nothing calculated to mislead or improperly affect their minds or to prejudice their verdict.³ Where the alleged miscon-

People v. Flack, 24 Abb. N. Cas. (N. Y. Oyer & T. Ct.) 444, 8 N. Y. Crim. Rep. 31, *affirming* 57 Hun (N. Y.) 83, 8 N. Y. Crim. Rep. 43, *reversed* on another ground in 125 N. Y. 324.

Interpreter. — In *Thomason v. Territory*, 4 N. Mex. 154, which was a trial of an indictment for murder, it appeared that a number of the jurors did not understand the English language, some of them speaking in Spanish. After retirement they requested that an interpreter be sent because of their inability to communicate with each other, and it was held that it was proper for the court to send them an interpreter specially sworn.

1. *State v. Robinson*, 20 W. Va. 713, holding that the reception of a sealed letter by a juror in a capital case will vitiate the verdict, although the juror testifies as to the harmless character of the letter, but fails to produce it.

But in *King v. State*, 91 Tenn. 617, the fact that letters written to a juror by his wife were delivered after examination by the officer in charge of the juror, in accordance with a practice known to the defendant, himself a practicing lawyer, who, after drawing out the evidence of the fact, without endeavoring to show the nature of the communication, dropped the investigation, was held not to afford a presumption that the communications were prejudicial, but rather otherwise, although the officer in charge of a juror is not the proper person to judge of the propriety of allowing written communications from his family to be given to him.

2. *Fogarty v. State*, 80 Ga. 450; *State v. Wilson*, 121 Mo. 434; *State v. Brown*, 7 Oregon 200.

In *U. S. v. Gilbert*, 2 Sumn. (U. S.) 19, where the officers, mistaking their duty, permitted jurors to read news-

papers after first inspecting and excising matter relative to the trial, it appearing that, in fact, the jurors never saw anything concerning the trial, nor were allowed to see papers containing a report of the trial until after the verdict, it was held that while the action of the officers was irregular, yet, under all the circumstances, there was nothing which would justify the court in setting aside the verdict and granting a new trial, or in treating the matter as a mistrial.

3. *People v. Leary*, 105 Cal. 486; *State v. Cucuel*, 31 N. J. L. 249; *People v. Gaffney*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 36; *State v. Jackson*, 9 Mont. 508; *Williams v. State*, 33 Tex. Crim. Rep. 128; *Moore v. State*, 36 Tex. Crim. Rep. 88; *State v. Robinson*, 20 W. Va. 716.

In *U. S. v. Reid*, 12 How. (U. S.) 361, it appeared from the voluntary affidavits of two of the jurors that during the trial they read a newspaper report of the case, but that their verdict was in no wise influenced thereby. It was held that there was not sufficient ground for a new trial.

Incorrect Account of Trial. — In *Com. v. Chauncey*, 2 Ashm. (Pa.) 90, a new trial was refused, the court being satisfied with the verdict, it appearing that the officer in charge of the jurors, on their retirement, permitted them, without consent of the complaining party or his counsel, to have several copies of a newspaper containing an incorrect and imperfect account of the trial.

In Libel Suit. — In *Thrall v. Smiley*, 9 Cal. 529, the alleged misconduct consisted in the perusing of a newspaper slip, which had been handed to the jury by a deputy sheriff, and which contained the alleged libel upon which the action was brought; also publications bearing on the subject-matter of the

duct of a juror in reading a newspaper is not objected to by the defendant's counsel at the time it comes to his notice, the irregularity will be deemed waived.¹

When New Trial Allowed.—Where, during the trial of a cause, jurors obtain and read newspapers containing matters bearing on the case in hand, calculated to influence them in the performance of their duty and to affect their verdict, a new trial should be granted.²

libel, contents of which, it appeared, had either been in evidence or had been mentioned by the witnesses without objection. Upon the attention of the court being called to the fact, the slip was returned and the jury was instructed that it was not in evidence and should be disregarded. It was held that there was no ground shown for a new trial, as the unsuccessful party was in no wise prejudiced.

Rebutting Presumption of Prejudice.—The presumption that the accused was prejudiced by the reading of a newspaper by a juror during the trial is sufficiently rebutted by the fact that when the attention of the presiding judge was called thereto, he immediately animadverted upon it in the presence of the jury, and that thereafter the newspapers and all their comments were excluded from the consideration of the jurymen, who at no time discussed them, and the trial continued for four days, affording counsel ample time to refer to the comments in question. *State v. Jackson*, 9 Mont. 508.

No Showing that Objectionable Matter was Read.—In *McKee's Case* (U. S. Circuit Ct.), 3 Cent. L. J. 258, a new trial was refused, it appearing that copies of a newspaper containing a leading article prejudicial to the defendant and entitled "What the jury will read" were obtained by two of the jurymen, but there was no proof that any of the jurors had violated the instructions of the court to the effect that they might read newspaper reports of the trial, but not editorial notes or articles criticising the trial one way or another.

Account of Former Trial.—In *Sherwood v. Chicago*, etc., R. Co., 88 Mich. 108, the reviewing court refused to interfere with the refusal of the court below to permit an inquiry as to whether, during the progress of the trial, the jurors had read newspaper items relative to a former trial which stated the amount of the former verdict, and to arrest the

progress of the case and grant a new trial if the inquiry showed the reading of such items.

1. See *supra*, X. 4. d. *Objections—When and How Made.*

Waiver of Irregularity.—In *Bulliner v. People*, 95 Ill. 394, while the jury was being impaneled one of the counsel for the defendant handed a newspaper to one of the jurymen who had been accepted and sworn. No objection was made by counsel for the people, nor was anything said by either party against the reading of newspapers by the jurymen. Afterwards one of the attorneys for the defendant stated to the court that there was an article in a specified paper which might be considered by the jury as prejudicial to the defendant, and while he did not wish any motion to be made to that effect, he would like the court to have the paper in question kept from the jury. The court, discovering that one of the jurors had the paper, called the counsel's attention to the fact that the suggestion had come too late. On further conversation it was thought by the court, and so stated to counsel, that as the paper was already in the hands of one of the jurymen, it would give the article too much prominence, and do the defendants more harm than good, to speak about it. Therefore nothing was said or done on the subject, nor was any motion made by counsel for defendant at the time, nor any exception taken, and it was held that the irregularity was waived.

2. **Statement that "Two Men Will Hang the Jury."**—A verdict will be set aside where it is shown that in their retirement the jurors read newspapers commenting on the trial and stating among other things that "two men will hang the jury," and that their identity is known to the public. *People v. Stokes*, 103 Cal. 193. See also *People v. McCoy*, 71 Cal. 397.

Biased Report.—In *Cartwright v. State*, 71 Miss. 82, a new trial was

11. Refreshments for Jury — a. FOOD — (1) Early Doctrine. — In early times it was the practice under the common law to administer to the officer, on his taking charge of the jury, an oath to keep the jury "without meat, drink, fire, or candle."¹

The Effect of taking refreshments, however, was merely to render the offending jurors liable to punishment,² and, unless the refresh-

granted because during the trial the jury obtained and read a newspaper containing the substance of the evidence as the same had impressed itself upon the mind of the reporter, who was a partisan of the state, and which was accompanied with remarks by the reporter unfriendly to the accused and calculated to excite prejudice in the mind of a reader. To the same effect see *Meyer v. Cadwalader*, 49 Fed. Rep. 32.

Where, by statute, the jurors are forbidden to take with them anything but papers in evidence, with certain exceptions and notes made by themselves, it is ground for a new trial that they took into their room and there read newspapers containing criticisms and complaints of the failure to bring criminals to justice, and which purported to contain in full the evidence taken on the trial in question and the arguments of counsel, and also contained fulsome commendation of the arguments of the counsel for the state, etc. *State v. Walton*, 92 Iowa 455.

Paper Giving Charge of Court. — A verdict should be set aside where it appears that the jury, without knowledge of the court or of the defendant, procured a part of a newspaper purporting to contain a part of the charge of the court, which was given, notwithstanding the charge thus published might be correct. *Farrer v. State*, 2 Ohio St. 54.

Giving Verdict in Former Trial. — In *Hasson v. Railroad Co.*, 21 W. N. C. (Pa.) 96, a new trial was granted because the plaintiff's counsel informed a newspaper reporter of a former verdict for eight thousand dollars, which fact appeared in the daily papers, and was read by the jury before it returned a verdict in the second trial, which verdict was for the like amount.

Notices of Matters Not in Evidence. — In *Carter v. State*, 9 Lea (Tenn.) 440, the judgment was reversed and a new trial ordered because the officer in charge of the jurors permitted them to receive and read newspaper notices of the homicide and of incidents of the

trial which were not in evidence. See *supra*, X. 7. *Receiving Evidence Out of Court*.

Imperfect and Incorrect Accounts. — That during a trial the jurors were suffered to have access to newspapers containing imperfect and incorrect accounts of the trial, together with comments upon the persons and characters of those connected with the trial, is a sufficient reason for setting aside the verdict. *Walker v. State*, 37 Tex. 366. Compare *Com. v. Chauncey*, 2 Ashm. (Pa.) 90.

Account of a Similar Case. — On the trial of an indictment for murder the jurors read a newspaper containing an account of the proceedings on the trial of Guiteau for the assassination of President Garfield, which included the testimony of an expert witness as to "moral insanity" and "dipsomania." This was held to be prejudicial to the accused, and sufficient ground upon which to set aside the verdict. *State v. Robinson*, 20 W. Va. 713.

1. 1 Chit. Crim. Law 632; Co. Litt. 227 b. See *Monroe v. State*, 5 Ga. 85; *Murphy v. Wilson*, 46 Ind. 537.

Reason for Rule. — In the "Historical Dissertation Concerning the Antiquity of the British Constitution," by Dr. Gilbert Stuart, it is said that "from the propensity of the older Britons to indulge excessively in eating and drinking has proceeded the restriction upon jurors and jurymen to refrain from meat and drink, and to be even held in custody, until they had agreed upon their verdict."

2. Co. Litt. 227 b; 21 Vin. Abr. 448, tit. Trial (G, g); Anonymous, 2 Dyer 218 a; *Rex v. Burdett*, 12 Mod. 111, 2 Salk. 645; *Harebotle v. Placock*, Cro. Jac. 21. See also *Com. v. Roby*, 12 Pick. (Mass.) 496; *Ragland v. Wills*, 6 Leigh (Va.) 1.

In Anonymous, 1 Dyer 37 b, where the jurors ate and drank after agreeing upon their verdict, but before delivering it in court, they were each fined forty pence.

Figs and Apples in Jurors' Pockets. — In *Mounson v. West*, 1 Leon. 132, cited

ments were furnished by the successful party,¹ the court would not disturb the verdict on that account.²

(2) *Modern Doctrine.*—In modern times, owing to the increased duration of trials, circumstances have rendered it necessary to relax the severity of the rule forbidding refreshments to the jury,³ and it is now the universal practice to allow the jury to take refreshments whenever the occasion demands it.⁴ In some jurisdictions, however, it is held to be improper for the jury to be furnished with refreshments except by the express permission of the court.⁵

in *Bac. Abr.*, tit. Verdict, H, after the jurors had been locked up together for some time, the officer who attended them, being surprised at their delay in rendering a verdict, searched them and found figs in the pockets of three and pippins in the pockets of two others. This being represented to the judge, the three, who confessed to having eaten of the figs, were fined four pounds each, and the other two, notwithstanding they declared upon oath that they had not eaten of the pippins, were fined forty shillings each.

1. See *infra*, X. 11. c. *Refreshments Furnished by Prevailing Party*.

2. *Co. Litt.* 227 b; 21 *Vin. Abr.* 448, tit. Trial (G, g); *Harebotle v. Placock*, *Cro. Jac.* 21; *Rex v. Burdett*, 12 *Mod.* 111, 2 *Salk.* 645; Anonymous, 1 *Dyer* 37 b; Anonymous, 2 *Dyer* 218 a; *Mounson v. West*, 1 *Leon.* 132. See also *Ragland v. Wills*, 6 *Leigh (Va.)* 1; *Com. v. Roby*, 12 *Pick. (Mass.)* 496.

In *Everett v. Youells*, 4 B. & Ad. 681, 24 *E. C. L.* 141, wherein food was secretly delivered to the foreman of the jury after retirement, *Parke, J.*, said: "It would be a fearful thing if verdicts could be set aside on such grounds as this."

3. In *Rex v. Stone*, 6 *T. R.* 527, the jury having sat continuously for thirteen hours, without interruption for refreshments, and the attorney-general stating that his evidence would occupy four hours more, some of the jury declared themselves exhausted and incapable of keeping their attention much longer. The court thereupon took an adjournment, Lord Kenyon observing that "no rule could compel the court to continue longer sitting than their natural powers would enable them to do the business of it," and the jury adjourned to an adjoining tavern, where accommodations were prepared, in charge of bailiffs sworn "well and truly to keep the jury," etc.

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4. *Stone v. State*, 4 *Humph. (Tenn.)* 27; *State v. Town, Wright (Ohio)* 75; *People v. Douglass*, 4 *Cow. (N. Y.)* 26. See also *People v. Olcott*, 2 *Johns. Cas. (N. Y.)* 301.

Without Consent of Accused.—In *U. S. v. Fries*, 3 *Dall. (U. S.)* 515, the jurors were permitted to eat and drink and rest without requiring the formal consent of the prisoner.

Cider Furnished to Jury.—In *Com. v. Roby*, 12 *Pick. (Mass.)* 496, it was held that the court might permit cider to be furnished to the jury.

Basket of Apples to Jury.—There is no error in refusing a new trial because, while deliberating, the bailiff, at the request of one of the jurors, procured and gave to the jurymen a basket of apples. *Seavey v. Shurick*, 110 *Ind.* 494.

Where Not Furnished by Prevailing Party.—It is the universal rule that a new trial will not be granted because the jury partook of refreshments, unless it appears that the refreshments were furnished by the prevailing party. *State v. Sparrow*, 3 *Murph. (N. Car.)* 487; *Johnson v. Hobart*, 45 *Fed. Rep.* 542; *Harrison v. Rowan*, 4 *Wash. (U. S.)* 32; *Com. v. Roby*, 12 *Pick. (Mass.)* 496. And see cases cited in the preceding section. As to the effect of refreshments furnished by the prevailing party, see *infra*, X. 11. c. *Refreshments Furnished by Prevailing Party*.

By Agreement of Both Parties.—Neither party will be heard to complain of the conduct of jurors who "were feasted and wined" at a dinner ordered by the sheriff, by the agreement of both parties, without proof of intoxication to the extent of disqualifying the jury or any members thereof for the proper discharge of their duties. *Arizona Prince Copper Co. v. Copper Queen Min. Co.*, (*Arizona* 1885) 7 *Pac. Rep.* 718.

5. *State v. Bailey*, 32 *Kan.* 83; *Harrison v. Rowan*, 4 *Wash. (U. S.)* 32; *Purinton v. Humphreys*, 6 *Me.* 379.

Volume XII.

Jury Cannot Be Starved into Agreement. — It is improper to starve a jury into an agreement,¹ and a verdict forced in this way should be set aside.²

b. INTOXICATING LIQUORS — (1) *Early Doctrine.* — In some of the older cases the extreme rule was laid down that the mere fact that jurors drank intoxicating liquor while in the discharge of their duty was a sufficient ground for setting aside their verdict, without any showing that they were thereby made intoxicated or rendered incapable of considering the case in a proper manner.³

See also *O'Barr v. Alexander*, 37 Ga. 195.

In *State v. Baldy*, 17 Iowa 39 (decided in 1864), it was said that the common-law rule has been so far modified in this country that the jury may of course, and without any special permission of the judge, have water, fire, and lights, but the permission of the judge is requisite for meat or board.

Under General Order of Court. — That a jury, after retiring for deliberation, was taken to supper by the sheriff without a special order for that purpose was held not to be improper where the court had made a general order to the sheriff to take jurors at meal time in a body to their meals. *Cooper v. Robertson*, 87 Ind. 222.

1. *State v. Kelley*, 45 S. Car. 659; *State v. M'Kee*, 1 Bailey L. (S. Car.) 653.

2. **Refusal of Judge to Furnish Food at County's Expense.** — In *Physioc v. Shea*, 75 Ga. 466, it was held that a new trial was properly granted because after the jurors had been out all night without supper or breakfast, and had stated that they could not agree, the judge refused to furnish them refreshments at the expense of the county, as he was empowered by law to do, although he did inform them that they would be furnished opportunity to procure meals at their own expense, it further appearing that within ten minutes thereafter they agreed.

Refusal of Officer to Communicate with Judge. — In *State v. Kelley*, 45 S. Car. 659, the jury was sent for after having been out for twenty-four hours, during a part of which time the jurors had been deprived of food, and the foreman stated the inability of the jurors to agree. The jury asked no instructions, but was directed again to retire, and after some hours, without returning to the court room a second time before agreement, brought in a sealed verdict. It appeared that the jurors

had made repeated efforts to communicate to the trial judge their inability to agree, but were prevented from accomplishing their purpose by the failure of their custodian to communicate their wishes. Under the *South Carolina Revised Statutes*, § 2409, providing that when jurors, after due deliberation, have stated their inability to agree, the court may instruct them again and send them out for further deliberation, but that if they return a second time without having agreed upon a verdict, they shall not be sent out again without their own consent, unless they ask further explanation of the law, there was held to be error vitiating the verdict.

Where No Prejudice Shown. — In *Templeton v. State*, 5 Tex. App. 398, which was a trial of a capital case, it was shown that when the case was submitted to the jury the sheriff was instructed to furnish the jurors no supper, and that they were not supplied with food until the following morning, but no objection was made to the order of the court, nor any showing that the jurors desired food, nor that there was any prejudice, and there was held to be no available error.

3. **This Doctrine Originated** in the cases of *Brant v. Fowler*, 7 Cow. (N. Y.) 562, and *People v. Douglass*, 4 Cow. (N. Y.) 26, and was adopted in *Gregg v. McDaniel*, 4 Harr. (Del.) 367; *State v. Baldy*, 17 Iowa 39; *Ryan v. Harrow*, 27 Iowa 494; *Pelham v. Page*, 6 Ark. 535; *Davis v. State*, 35 Ind. 496; *Leighton v. Sargent*, 31 N. H. 120; *State v. Bullard*, 16 N. H. 139; *Jones v. State*, 13 Tex. 168; *March v. State*, 44 Tex. 64. And see *Pope v. State*, 36 Miss. 121.

Cases Overruled. — In *Wilson v. Abrahams*, 1 Hill (N. Y.) 207, the New York court refused to sustain the doctrine enunciated in *Brant v. Fowler*, 7 Cow. (N. Y.) 562, and *People v. Douglass*, 4 Cow. (N. Y.) 26, *Bronson*, J. saying:

But this rule has been very generally departed from.¹

(2) *Modern Doctrine* — (a) *In General*. — While it is the safer rule in criminal, and especially in capital, cases to exclude intoxicating liquors entirely from the use of the jury,² the indulgence therein to a limited extent, under the direction of the trial judge,³ is not, in the absence of any evidence of overindulgence in or apparent effect from the use of such liquor, by or upon any member of the jury, a sufficient ground for a new trial.⁴

No Presumption of Drinking. — In the absence of any proof, it will not be presumed that a juror drank intoxicating liquor from the mere fact that he had an opportunity of so doing.⁵

(b) *When Drinking Not Ground for New Trial*. — It is very generally

‘There is no authority, ancient or modern, so far as I have observed, which goes far enough to uphold such a doctrine.’ And in *State v. Harrigan*, 9 *Houst. (Del.)* 369, the *Delaware* court overrules *Gregg v. McDaniel*, 4 *Harr. (Del.)* 367, which was based on the early New York cases.

For the modern doctrine see the following sections.

In California it has been held that a verdict of conviction should not be allowed to stand where it is clearly proved that the members of the jury in a capital case drank intoxicating liquor while deliberating upon their verdict. *People v. Lee Chuck*, 78 *Cal.* 317; *People v. Gray*, 61 *Cal.* 164. But see *People v. Bemmerly*, 98 *Cal.* 299; *People v. Sansome*, 98 *Cal.* 235; *People v. Leary*, 105 *Cal.* 486.

1. See the following sections.

2. *State v. Brunetto*, 13 *La. Ann.* 45; *Tuttle v. State*, 6 *Tex. App.* 556.

3. In *Robinson v. State*, 33 *Ark.* 185, it is said that in cases of necessity it is the better practice to have liquor furnished to jurors under the direction of the presiding judge. See also *State v. Reed*, (Idaho 1894) 35 *Pac. Rep.* 706.

Barkeeper Not Proper Judge of Limit. — In *Palmore v. State*, 29 *Ark.* 254, the drinking of intoxicating drinks, though in limited quantities, was held very improper, and aggravated by the conduct of the officer in permitting a public barkeeper to limit the quantity drunk, though it was thought that some of the jurors needed it. The court said: “Even if a case should occur where stimulants would become absolutely necessary to any person, the administration of them should not be left to the discretion of a barkeeper in a public saloon.”

Procuring or Furnishing Liquor Miscon-

duct. — Although the verdict will not be set aside where no harm has resulted from the drinking of intoxicating liquors, yet an officer or other person who furnishes liquor to the jury without being authorized to do so may be punished for contempt. *State v. West*, 69 *Mo.* 401; *Tuttle v. State*, 6 *Tex. App.* 556; *Webb v. State*, 5 *Tex. App.* 596; *State v. Harrigan*, 9 *Houst. (Del.)* 369. And the jurors themselves are punishable for contempt. *State v. Harrigan*, 9 *Houst. (Del.)* 369; *Jones v. People*, 6 *Colo.* 452; *People v. Hull*, 86 *Mich.* 449. But see *Haupt v. Hendler*, 2 *Kulp. (Pa.)* 400.

4. See the cases cited in the next section.

5. *Liquor in Juror's Possession*. — The verdict will not be disturbed for the reason that before the jury was sworn a juror was found with liquor in his possession, it not being shown that he was intoxicated, or that he partook of the liquor after he was chosen. *Carleton v. State*, 43 *Neb.* 373. See also *Gilmer v. Cameron*, *Ga. Dec.*, pt. I., 142.

Juror Entering Saloon. — The fact that a juror went into a saloon will not furnish a presumption, in the absence of proof, that he drank liquor. *Cortelyou v. McCarthy*, 37 *Neb.* 742.

Jury Making Noise. — Where a jury which was out all night was quite still during the evening, but the last part of the night made considerable noise, there being no proof of drinking, a new trial was refused. The court said: “I find no warrant for setting aside a verdict because jurors are unable to agree, and, spending a wearisome night, may at times have made more noise than comported with strict propriety.” *Oram v. Bishop*, 12 *N. J. L.* 153.

held at the present day that the drinking of intoxicating liquors by jurors is not, of itself, a ground for disturbing their verdict, where the liquor was not furnished by the prevailing party,¹ and there is no showing that any juror was thereby rendered incompetent or less capable of an intelligent discharge of his duties.²

1. Where refreshments are furnished to the jury by the prevailing party it is generally a sufficient ground for a new trial, regardless of the effect such refreshments may have had upon the jury. See *infra*, X. 11. c. *Refreshments Furnished by Prevailing Party*.

2. *Arkansas*. — *Dolan v. State*, 47 Ark. 454. And see *Robinson v. State*, 33 Ark. 185.

California. — *People v. Bemmerly*, 98 Cal. 299; *People v. Sansome*, 98 Cal. 235; *People v. Leary*, 105 Cal. 486.

Colorado. — *Jones v. People*, 6 Colo. 452.

Delaware. — *State v. Harrigan*, 9 Houst. (Del.) 369.

Georgia. — *Westmoreland v. State*, 45 Ga. 225.

Idaho. — *State v. Reed*, (Idaho 1894) 35 Pac. Rep. 706.

Illinois. — *Sanitary Dist. v. Cullerton*, 147 Ill. 385; *Davis v. People*, 19 Ill. 74.

Indiana. — *Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *Pratt v. State*, 56 Ind. 179.

Iowa. — *State v. Livingston*, 64 Iowa 560; *State v. Bruce*, 48 Iowa 530; *O'Neill v. Keokuk, etc., R. Co.*, 45 Iowa 546; *Van Buskirk v. Daugherty*, 44 Iowa 42; *Hemmi v. Chicago, etc., R. Co.*, 102 Iowa 25.

Kansas. — *State v. Tatlow*, 34 Kan. 80; *Larimer v. Kelly*, 13 Kan. 78; *Perry v. Bailey*, 12 Kan. 539.

Kentucky. — *Gordon v. Louisville, etc., R. Co.*, (Ky. 1895) 29 S. W. Rep. 321.

Louisiana. — *State v. Caulfield*, 23 La. Ann. 148; *State v. Bellow*, 42 La. Ann. 586; *State v. Dorsey*, 40 La. Ann. 739.

Maine. — *Purinton v. Humphreys*, 6 Me. 379.

Michigan. — *In re Merriman*, 108 Mich. 454.

Minnesota. — *Young v. Otto*, 57 Minn. 307.

Mississippi. — *Russell v. State*, 53 Miss. 368; *Green v. State*, 59 Miss. 501. And see *Brookhaven Lumber, etc., Co. v. Illinois Cent. R. Co.*, 68 Miss. 432.

Missouri. — *State v. Baber*, 74 Mo. 293; *State v. West*, 69 Mo. 401; *State v. Upton*, 30 Mo. 397; *State v. Taylor*, 134 Mo. 109.

Montana. — *Territory v. Burgess*, 8 Mont. 57; *Territory v. Hart*, 7 Mont. 489.

Nevada. — *State v. Jones*, 7 Nev. 408; *Richardson v. Jones*, 1 Nev. 405.

New Jersey. — *State v. Cucuel*, 31 N. J. L. 249.

New York. — *Wilson v. Abrahams*, 1 Hill (N. Y.) 207 [overruling *People v. Douglass*, 4 Cow. (N. Y.) 26, and *Brant v. Fowler*, 7 Cow. (N. Y.) 562]. See also *Dennison v. Collins*, 1 Cow. (N. Y.) 111.

North Carolina. — *State v. Bailey*, 100 N. Car. 528; *State v. Miller*, 1 Dev. & B. L. (N. Car.) 500.

Ohio. — *Pittsburgh, etc., R. Co. v. Porter*, 32 Ohio St. 328.

Tennessee. — *King v. State*, 91 Tenn. 617; *Rowe v. State*, 11 Humph. (Tenn.) 491.

Texas. — *Jack v. State*, 26 Tex. 1; *Allen v. State*, 17 Tex. App. 637; *Tuttle v. State*, 6 Tex. App. 556; *Rider v. State*, 26 Tex. App. 334.

Wisconsin. — *Roman v. State*, 41 Wis. 312.

United States. — *U. S. v. Gibert*, 2 Sumn. (U. S.) 19.

England. — *Richmond v. Wise*, 1 Vent. 124.

In *Perry v. Bailey*, 12 Kan. 539, *Brewer, J.*, said: "Aware, as all are, of the subtle and potent influence of liquor on the brain, no judge should for a moment permit a trial to proceed where it appeared that any juror was under the influence of intoxicating drink, or permit a verdict to stand which was not the cool, deliberate judgment of sober men. But, with the habit of drinking so common as it unfortunately is, to hold that if a juror should, during a protracted trial, take a single drink of liquor, the verdict thereafter rendered must be set aside therefor, would be giving to verdicts of juries a dangerous and unnecessary instability."

Must Be Showing of Intoxication. — To justify interference with the verdict it is necessary to show that some juror drank so much as to produce intoxicating effects upon him, thereby rendering him incapable of examining the

Thus, where jurors drink during adjournments of court, there will be no reason for granting a new trial if it does not appear that they were under the influence of intoxicating liquors to any degree when engaged in the actual performance of their duties.¹

Use for Medicinal Purposes. — A verdict will not be set aside because of the conduct of a juror in drinking intoxicants for medicinal purposes where it does not appear that such juror was in any way incapacitated thereby for a proper performance of his duties.² But the permission of the court should be obtained before drinking the liquor.³

(e) **When Ground for New Trial.** — Where, during the progress of the trial or the deliberation upon the verdict, members of the jury partake of intoxicating liquors to such an extent as to become intoxicated and unable to bring a clear and unclouded intellect to bear upon the case, the verdict should be set aside.⁴

case with that clearness, impartiality, and calm consideration which is expected of every juror in his deliberation upon a verdict. *State v. Jones*, 7 Nev. 408; *Tuttle v. State*, 6 Tex. App. 556; *Gordon v. Louisville, etc., R. Co.*, (Ky. 1895) 29 S. W. Rep. 321.

However, in *Young v. Otto*, 57 Minn. 307, it was said that the drinking of intoxicants by jurors raises a presumption against the validity of the verdict which may be rebutted by showing that, in fact, the jurors were not intoxicated.

1. *Indiana*. — *Pratt v. State*, 56 Ind. 179.

Iowa. — *State v. Bruce*, 48 Iowa 530; *State v. Livingston*, 64 Iowa 560; *Van Buskirk v. Daugherty*, 44 Iowa 42.

Kansas. — *Larimer v. Kelly*, 13 Kan. 78.

Mississippi. — *Green v. State*, 59 Miss. 501.

New York. — *Wilson v. Abrahams*, 1 Hill (N. Y.) 207; *Dennison v. Collins*, 1 Cow. (N. Y.) 111.

Ohio. — *Pittsburgh, etc., R. Co. v. Porter*, 32 Ohio St. 328.

Virginia. — *Thompson v. Com.*, 8 Gratt. (Va.) 637.

But see *Fairchild v. Snyder*, 43 Iowa 23; *Brown v. State*, 137 Ind. 240.

Adjournment to Allow Juror to Become Sober. — In *State v. Tatlow*, 34 Kan. 80, wherein the conviction was for an assault and was punished by a fine, the court refused to disturb the conviction, although the trial judge adjourned the court for two hours to allow a juror to recover from the effects of intoxicating liquors drunk during recess.

Liquor in Jury Room During Early

Stages. — That a quantity of intoxicating liquor was introduced into the jury room by jurors in an early stage of the trial, including the time before the jury was entirely completed, will not necessitate a new trial where it appears that there is no pretense that any member of the jury became in the least affected by the liquor so as to impair his faculties, and no liquor was drunk during the deliberation of the jury. *People v. Leary*, 105 Cal. 486.

2. *Gilmanton v. Ham*, 38 N. H. 108; *State v. Morphy*, 33 Iowa 270; *Pope v. State*, 36 Miss. 121; *State v. Cucuel*, 31 N. J. L. 249.

As to the power of the court to allow medicines to be furnished to sick jurors, see *supra*, X. 3. *Illness of Juror*.

In *People v. Pscherhofer*, 64 Hun (N. Y.) 483, the court refused to disturb the judgment though it appeared that during an adjournment, and before submission of the case, one of the jurors was taken sick at the hotel where they were being kept together, with symptoms of alcoholism; that a physician was called and prescribed champagne as a stimulant, and small quantities of spirits, from time to time, and that the prescription was administered by the attendant in charge of the jury, there being no evidence that the juror took any stimulant after the submission and retirement of the jury, but on the contrary it appearing that during the deliberation his mind was clear and composed, and that he exhibited none of the effects of intoxicating liquors.

3. *State v. Cucuel*, 31 N. J. L. 249.

4. *Brown v. State*, 137 Ind. 240;

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c. REFRESHMENTS FURNISHED BY PREVAILING PARTY—
 (1) *Furnished by Party Himself.*—It is a well-settled principle that where jurors are entertained by a party in whose favor a verdict is rendered, a new trial should be granted.¹ This rule is

Perry v. Bailey, 12 Kan. 539; *State v. Brunetto*, 13 La. Ann. 45; *Green v. State*, 59 Miss. 501; *State v. Jones*, 7 Nev. 408; *Rose v. Smith*, 4 Cow. (N. Y.) 17; *Hanrahan v. Ayres*, 10 N. Y. Misc. Rep. (Buffalo Super. Ct.) 435; *State v. Jenkins*, 116 N. Car. 972; *Webb v. State*, 5 Tex. App. 596.

Where Three-fourths Verdict Allowed.—In *Davis v. Cook*, 9 Nev. 134, the judgment was reversed because one of the jurors was intoxicated when the verdict was returned, and although by statute a verdict might be rendered by three-fourths of the whole number of jurors.

Jurors Sick from Drinking.—In *State v. Broussard*, 41 La. Ann. 81, the verdict was set aside because between the submission of the case in the evening and the rendition of the verdict the next morning, the jurors were furnished with three and one-half pints of whiskey, the greater part of which was consumed by two of their number, who became too sick to eat breakfast, and were in that condition when the verdict was agreed on.

Jury Boisterous and Noisy.—In *State v. Foster*, 45 La. Ann. 1176, a new trial was granted where it appeared that the jurors "separated while they were deliberating; that they drank a large quantity of whiskey; that one or more of the jurors were under the influence of liquor; and that while they were deliberating they were boisterous and noisy; so much so that on one of the two nights during which they were deliberating their noise prevented the inhabitants of the town from sleeping."

Jury Acting in Unseemly Manner.—In *State v. Demarest*, 41 La. Ann. 413, wherein the defendant was convicted of a capital offense and sentenced to be executed, the judgment and verdict were set aside, it appearing that the jurors were furnished with flasks of whiskey; that while passing through the public streets to a hotel they were so boisterous as to attract the attention of the police; that while at the hotel they were rowdyish, indulged in horse play and in bad language, sang unseemly songs, and so conducted themselves that the proprietor of the hotel

directed the officers in charge to take them from his house.

1. *Georgia.*—*Walker v. Walker*, 11 Ga. 203.

Maine.—*Cottle v. Cottle*, 6 Me. 140; *McIntire v. Hussey*, 57 Me. 493.

Nebraska.—*Vose v. Muller*, 23 Neb. 171.

Nevada.—*Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291.

Ohio.—*Bender v. Buehrer*, 8 Ohio Cir. Ct. Rep. 244.

Pennsylvania.—*Redmond v. Royal Ins. Co.*, 7 Phila. (Pa.) 167; *Keegan v. McCandless*, 7 Phila. (Pa.) 248.

Tennessee.—*Mynatt v. Hubbs*, 6 Heisk. (Tenn.) 320; *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11.

Texas.—*Marshall v. Watson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 352.

Vermont.—*Baker v. Jacobs*, 64 Vt. 197; *Shattuck v. Wrought Iron Range Co.*, 69 Vt. 468.

United States.—*Platt v. Threadgill*, 80 Fed. Rep. 192; *Johnson v. Hobart*, 45 Fed. Rep. 542.

And see *Richmond v. Wise*, 1 Vent. 124.

In *Johnson v. Hobart*, 45 Fed. Rep. 542, where the jury was sent out and it was suggested that no provision was made by law for furnishing meals to the jury, and counsel were asked whether the parties would share the expense if a necessity arose for giving the jury refreshments, the defendant's counsel declining so to do, it was held that the fact that the refreshments were furnished and paid for by the prevailing party necessitated a new trial, although it did not appear that the verdict was determined thereby.

Cigars.—It has been held ground for a new trial that the prevailing party furnished jurors with cigars. *Baker v. Jacobs*, 64 Vt. 197; *Shattuck v. Wrought Iron Range Co.*, 69 Vt. 468; *Platt v. Threadgill*, 80 Fed. Rep. 192; *Bender v. Buehrer*, 8 Ohio Cir. Ct. Rep. 244.

Intoxicating Liquors.—If the prevailing party furnishes intoxicating liquors to the jury a new trial should be granted. *Mynatt v. Hubbs*, 6 Heisk. (Tenn.) 320; *Pelham v. Page*, 6 Ark. 535; *Vose v. Muller*, 23 Neb. 171; *Sac-*

grounded upon the probable prejudice created in the minds of the jurors in favor of the party, and has been held to apply to any entertaining of the jury after being sworn, whether by design or inadvertence.¹ But there are some cases in which a new trial was refused, notwithstanding the jury was furnished refreshments by the successful party, where the circumstances were such as to negative any possible prejudice.² Thus a new trial was refused

ramento, etc., *Min. Co. v. Showers*, 6 Nev. 291; *Bender v. Buehrer*, 8 Ohio Cir. Ct. Rep. 244.

In *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11, it appeared that during the trial the prevailing party invited the jurors to take a drink, and likewise invited the unsuccessful party and witnesses; that the prevailing party called for liquor for the crowd, which was furnished, and all drank, whereupon he made the remark that he had not money enough to pay for the drinks, about half a dollar, without changing ten dollars, and when the unsuccessful party proposed to loan him half a dollar, he replied that his credit was good. While drinking, the prevailing party remarked that he had lost the mule, which was the subject of litigation, but he and the unsuccessful party would be friends, and they shook hands. To this one of the jury replied: "Hold on, you do not know whether you have or not." It was held that the verdict should be set aside.

It Is Improper for a Justice to Permit a Party to treat the jurors with a bottle of whiskey in order "to enable them to listen to the remarks of counsel." *Kellogg v. Wilder*, 15 Johns. (N. Y.) 455.

Entertainment After Verdict.—The fact that a party entertained the jury after the verdict is misconduct on the part of the jury, where there is a suspicion that it has been tampered with. *Montgomery v. Township*, 26 Pa. L. J. 193.

1. *Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291. See also *supra*, X. 8. §. (3) *Where Given by Prevailing Party*; X. 9. *c. Communications by and with Prevailing Party*.

2. **Where Refreshments Paid for by Bailiff.**—In *Johnson v. Greim*, 17 Neb. 447, it was held that it was not ground for a new trial that the jury, in charge of a bailiff, on a view of lands alleged to have been damaged by an overflow, dined at the residence of the successful party, where it appeared that the bailiff paid for the accommodation, and that

there was no improper action on the part of the jury or of the party, it further appearing that there was no other convenient place where the meal could have been obtained.

No Suggestion of Wrongful Intention.—In *Brookhaven Lumber, etc., Co. v. Illinois Cent. R. Co.*, 68 Miss. 432, the court refused to disturb the judgment though one of the jurors, who was habituated to drink, applied to a neighbor and friend for a drink, and was supplied to the extent of a single drink by an employee of the successful party, at the request of the friend, there being no suggestion of wrongful intention. See also *Goodright v. McCausland*, 1 Yeates (Pa.) 372.

Without Knowledge of Party.—In *Tripp v. Bristol County*, 2 Allen (Mass.) 556, it appearing that no injury had resulted, the court refused to set aside a verdict of the sheriff's jury because, during the deliberations of the jurors, upon their request for refreshments, the officer having them in charge furnished to them a pitcher of cider, belonging to the prevailing party, but without his knowledge, the deliberations being had at his residence.

Furnished by Codefendant.—That a juror drank intoxicating liquors at the instance and solicitations of one defendant cannot be urged by his codefendant as ground for a new trial. *Webster County v. Hutchinson*, 60 Iowa 721.

Where Party Refused Request of Jury.—In *Southwestern R. Co. v. Mitchell*, 80 Ga. 438, it was held that the court properly refused to declare a mistrial because after an adjournment and dispersal for the night certain of the jurors approached the successful party and asked him to entertain them for the night, which request was denied by him, it further appearing that on the alleged misconduct of the jurors being brought to the attention of the court, a thorough and sifting investigation disclosed that nothing was said in reference to the trial.

where the jury ate and drank at the expense of one party, but with the consent of the other, no corruption appearing.¹

(2) *By Partisans of Prevailing Party* — *By Counsel*. — Entertainment of jurors by counsel for the prevailing party has been held to be ground for a new trial,² but it seems to be the more general doctrine that this will not require the verdict to be disturbed where it is apparent that there has been no wrongful intention and no prejudice has resulted.³

Court Satisfied with Verdict. — In *McCarty v. McCarty*, 4 Rich. L. (S. Car.) 594, during an adjournment one of the successful parties, with his brother-in-law, met some of the jurors in a dramshop, treated them to liquor, and engaged in conversation with one of the jurors apart from his fellows, but the court, being well satisfied with the verdict, refused a new trial.

Showing of No Prejudice. — In *Vaughn v. Dotson*, 2 Swan (Tenn.) 348, the court refused to disturb the verdict although it appeared that after final arguments to the jury, at the invitation of the defendant, a juror drank a glass of soda with him and dined with him at his expense. The juror stated that nothing was said about the suit; that he was unaware that his conduct was improper; that he was in favor of a verdict for the plaintiff, but by consent of parties, in open court, a verdict of a majority was taken as the verdict of the jury, the jurors not being able otherwise to agree; and that the juror and the defendant were intimate neighbors and were in the habit of doing mutual favors.

1. *Coleman v. Moody*, 4 Hen. & M. (Va.) 1. See also *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188, where the objection was not raised until after verdict.

If the Liquors Are Furnished by Both Parties neither can complain. *Dennison v. Collins*, 1 Cow. (N. Y.) 111.

2. *Walker v. Hunter*, 17 Ga. 364; *Springer v. State*, 34 Ga. 381.

Prosecuting Officer. — There is great impropriety in a prosecuting officer consorting with jurors and offering them entertainment of any sort. *People v. Montague*, 71 Mich. 447; *Springer v. State*, 34 Ga. 381. But see *People v. Lyle*, (Cal. 1884) 4 Pac. Rep. 977.

3. **Jury and Counsel Drinking Together.** — In *Pittsburg, etc., R. Co. v. Porter*, 32 Ohio St. 328, the court refused to interfere with the action of the court

below in refusing a new trial on a showing that casually, and without evil intent, a juror and an attorney for the prevailing party met during an adjournment, and, at the invitation of the latter, drank together, each taking a single glass of ale, and that they remained together for about five minutes, no allusion whatever being made to the case on trial.

By Prior Appointment. — In *Koester v. Ottumwa*, 34 Iowa 41, a verdict was held not vitiated for the reason that during the progress of the trial one of the jurors, in fulfillment of a prior appointment, took dinner and supper with one of the counsel for the prevailing party. It further appeared that counsel had been engaged on some business on behalf of the juror at the time when the latter was called; that these facts were known to one of the defendants' counsel before the case was submitted, and that no objection was made, no communication on the subject-matter of the case or improper influence being claimed, or any prejudice being shown.

Jurors Entertained by District Attorney. — In *People v. Lyle*, (Cal. 1884) 4 Pac. Rep. 977, the appellate court refused to disturb a conviction of murder in the second degree, though during the trial, which lasted over a month, the district attorney, at his own expense, treated some of the jurors to intoxicating liquors, presented one of them with a bottle of intoxicating liquors, entertained him at the attorney's house with a dinner, and after dinner escorted him homeward; and that during the trial he and his associate counsel, at their expense, entertained the same juror and also a witness in the case at an oyster supper at which liquors were drunk — there appearing no proof that any juror was intoxicated while on duty, or that any liquor was drunk during any such time, or that there was anything in the acts charged from which the court could reasonably infer

Other Persons. — Furnishing refreshments to the jury is not generally a ground for a new trial when not brought about by the instrumentality of the prevailing party, and the fact that refreshments were furnished by persons supposed to be friendly to the prevailing party will not require the verdict to be set aside where no prejudice has resulted.¹

12. Jurors Sleeping During Trial. — Although it is an irregularity for a juror to fall asleep while sitting in a case, it seems that such conduct will not, of itself, constitute a sufficient ground for disturbing the verdict,² especially where the party having knowledge of the fact fails to raise the objection in due season.³

13. Illegal Methods of Arriving at Verdict. — (See the article VERDICT.) Where the jury adopts an improper method of

that they in the slightest degree influenced the result.

Both Parties at Fault. — That the members of a jury, after agreement and before the return of the verdict, adjourned, went into a saloon and were there joined by the attorneys for the respective parties, being treated by them and entertained by the telling of anecdotes, etc., will not furnish ground for a new trial, since both parties were equally at fault. *McLaughlin v. Hinds*, 151 Ill. 403.

1. Medical Witness for State. — That a medical witness for the state who was casually present at the hotel wherein the jury was lodged for the night inadvertently, and as an act of courtesy, invited the jurors to join with him in drinking, in the presence of the sheriff in charge, which invitation was accepted by some of them, was held insufficient to set aside a verdict and award a new trial. *Thompson v. Com.*, 8 Gratt. (Va.) 637.

Brother of One Who Contributed for Prosecution. — In *Dumas v. State*, 63 Ga. 601, there was held to be no error in the fact that the brother of one who contributed money in aid of the prosecution entertained the jury by order of the court in accordance with the usual practice, he being jailor, where it further appeared that the jury was in charge of a bailiff, and that the jailor had not communicated with the jury, nor himself taken any part in the prosecution.

Person Appointed to Show Premises. — In *Schissler v. Cheshire*, 7 Nev. 427, it was held that the verdict was not vitiated because, on their return from a view, the jurors were treated to intoxicating liquor by a person who had been appointed by the court at the instance

of the successful party to show the premises to the jury, such person having previously mapped the premises in question, and it appeared that beyond the making of the map the person in question had no relation with the prevailing party, nor interest of any kind in the suit.

In an Action Against a Town the mere fact that some of the jurors were, in the ordinary exercise of friendly hospitality, and without improper motive, entertained with food and drink by some of the inhabitants of the defendant will not bring such action within a statute providing that a verdict obtained by a party who "treats" the jury shall be set aside. To bring such a case within the statute it must appear that the entertainment was at the expense of the town, or was the act of one of its authorized agents. *Carlisle v. Sheldon*, 38 Vt. 440. But see *Bowler v. Washington*, 62 Me. 302.

2. McClary v. State, 75 Ind. 260.

That a Juror Became Drowsy for a brief spell during the argument of counsel does not seem a sufficient reason for disturbing the verdict. *Dolan v. State*, 40 Ark. 454.

The "Appearance" of Being Asleep on the part of a juror is not a ground for a new trial. *Pelham v. Page*, 6 Ark. 535. In this case it is said that if such an appearance would furnish ground for a new trial, motions for that reason would be endless.

An Affidavit which does not aver that a juror actually fell asleep, but only that he had his eyes closed and appeared to be asleep, is insufficient to show misconduct. *McClary v. State*, 75 Ind. 260.

3. Scott v. Waldeck, 12 Neb. 5; *Carey v. Gunnison*, (Iowa 1883) 17 N.

arriving at a verdict, it is ground for a new trial.¹ But there is no presumption that a verdict was reached in an improper manner.²

XI. DISCHARGE OF JURORS AND OF JURY — 1. Power to Discharge — a. IN GENERAL — Early Doctrine. — It was the early rule, as laid down by Lord Coke, that a jury once sworn and charged in a case affecting life or member could not be discharged without giving a verdict.³ If the jurors could not agree before the judges departed, they were carried about in carts from one court to another until they did agree.⁴

Modern Doctrine. — This primitive mode of administering justice has yielded to the improved manners and sentiments of the present day,⁵ and it is now the general doctrine that, where an

W. Rep. 881; *Cogswell v. State*, 49 Ga. 103. See *supra*, X. 4. d. *Objections — When and How Made.*

1. Committee Appointed to Settle Amount. — In *Memphis, etc., R. Co. v. Pillow*, 9 Heisk. (Tenn.) 248, the judgment was reversed and a new trial granted because the jury agreed in effect that three of its members should settle the amount of its verdict, they agreeing in advance to abide by the determination on that question. To the same effect see *Ryerson v. Kitchell*, 3 N. J. L. 551.

2. Verdict for Odd Amount. — It will not be presumed that jurors were guilty of misconduct in compromising their verdict in an action in which there was no proof of damages simply because the verdict was for an odd amount, *i. e.*, \$1,375.03. *Meyer v. Press Pub. Co.*, 46 N. Y. Super. Ct. 127.

Quotient Verdict. — It will not vitiate a verdict that there was found in the jury room a paper containing twelve several amounts added together the total of which, when divided by twelve, resulted in a quotient the exact sum of the verdict. *McMurdock v. Kimberlin*, 23 Mo. App. 523.

Method of Ascertaining Damages. — In an action to recover for an injury to goods, the jury, in computing the damages, added to the costs at the port of shipment the amount of insurance, freight, and commissions for the auctioneer and consignee, and deducted from the aggregate the proceeds of the sale. It was held that there was no impropriety in arriving at a verdict by such methods. *Morgan v. Bell*, 4 Martin (La.) 615.

3. Co. Litt. 227 b; 4 Black. Com. 360; 2 Hale P. C. 297; 2 Hawk. P. C. 568; Morris v. Davies, 3 C. & P. 427.

14 E. C. L. 378. And see *Nelson v. State*, 47 Miss. 621; *Ned v. State*, 7 Port. (Ala.) 187; *Monroe v. State*, 5 Ga. 85; *State v. Garrigues*, 1 Hayw. (N. Car.) 241.

4. Rex v. Ledgingham, 1 Vent. 97. And see *Berry v. Wallin*, 1 Overt. (Tenn.) 241.

5. Jury Cannot Be Carted About. — The judge cannot have the jurors conveyed from circuit to circuit until they agree on a verdict. *People v. Olcott*, 2 Johns. Cas. (N. Y.) 309; *State v. M'Kee*, 1 Bailey L. (S. Car.) 653; *State v. Kelley*, 45 S. Car. 659; *State v. Bullock*, 63 N. Car. 570.

Lord Coke's Rule Denied. — The rule laid down by Lord Coke that a jury once sworn and charged cannot be discharged without giving a verdict has been questioned in many cases and its authority denied. *Com. v. Bowden*, 9 Mass. 494; *Com. v. Sholes*, 13 Allen (Mass.) 554; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *People v. Goodwin*, 18 Johns. (N. Y.) 187; *Hurley v. State*, 6 Ohio 399; *Com. v. Clue*, 3 Rawle (Pa.) 498; *Com. v. Fells*, 9 Leigh (Va.) 613; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364; *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *Winsor v. Reg.*, L. R. 1 Q. B. 289, 390; *Rex v. Stevenson*, 2 Leach C. C. 546; *Rex v. Scalbert*, 2 Leach C. C. 620; *Rex v. Edwards*, 4 Taunt. 309. See also *Hawes v. State*, 88 Ala. 37.

In *Com. v. Cook*, 6 S. & R. (Pa.) 579, Tilghman, C. J., said: "There was an ancient tradition among the English lawyers that a jury charged in a capital case could not be discharged without giving a verdict, even with the consent of the attorney general and the prisoner; this is laid down for law by Sir Edward Coke, in his 1st Inst. 227 b and 3 Inst. 110. It is a doctrine alto-

imperious necessity demands it,¹ the trial court may, even in capital cases,² discharge the jury and hold the prisoner for another trial.³

gether unreasonable; for why should not the jury be discharged when it is desired by all parties interested in the verdict? Accordingly, we find that it could not stand, though supported by so great a name. Lord Coke cited a case in the Year Books, 21 Edw. III., which, being thoroughly examined, was found not to support his opinion; the matter was fully discussed in the case of the Kinlocks, Foster 22, and the law, in cases of consent, settled on a foundation too firm to be shaken. The Kinlocks, having been indicted for treason, pleaded not guilty and were put upon their trial; and after the jury were sworn they asked permission to withdraw their plea, in order to plead another matter of which they were advised they could not have the advantage on the general issue; leave was given, with the consent of the attorney-general, and a juror withdrawn, after which, their second plea being overruled, they were tried by another jury and convicted of high treason; they then moved in arrest of judgment, because the first jury had been discharged; but it was decided by nine judges against Wright (the only dissenter) that the discharge of the jury was legal, and judgment was pronounced against the prisoners."

In *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, Mr. Justice Kent, after reviewing the English authorities, concluded that as he could find no general rule or decision to the contrary in a case of misdemeanor, and as the rule, even in capital cases, abounded with exceptions, and had been even questioned, if not denied, by the most respectable authority—that of nine of the judges of England—it must, from the reason and the necessity of the thing, belong to the court, on trials for misdemeanors, to discharge the jury whenever the circumstances of the case render such interference essential to the furtherance of justice.

1. As to the necessity for a discharge, see *infra*, XI. 2. *Necessity for Discharge*.

2. U. S. v. Perez, 9 Wheat. (U. S.) 579; *State v. Moor*, Walk. (Miss.) 134; *State v. Brooks*, 3 Humph. (Tenn.) 70; *State v. Jefferson*, 66 N. Car. 309; *Winsor v. Reg.*, 6 B. & S. 143, 118 E.

C. L. 143. And see *State v. Honeycutt*, 74 N. Car. 391; *Matter of Spier*, 1 Dev. L. (N. Car.) 491; *State v. Connor*, 5 Coldw. (Tenn.) 311.

3. *Alabama*.—*McCauley v. State*, 26 Ala. 135; *Powell v. State*, 19 Ala. 580; *Ned v. State*, 7 Port. (Ala.) 187.

Arkansas.—*Atkins v. State*, 16 Ark. 579.

Connecticut.—*State v. Woodruff*, 2 Day (Conn.) 504.

District of Columbia.—U. S. v. Watson, 3 Ben. (U. S.) 1.

Florida.—*Tervin v. State*, 37 Fla. 396; *Ellis v. State*, 25 Fla. 702.

Illinois.—*Ochs v. People*, 25 Ill. App. 379; *Miller v. Metzger*, 16 Ill. 390; *Logg v. People*, 8 Ill. App. 99; *Thomas v. Leonard*, 5 Ill. 556.

Indiana.—*Miller v. State*, 8 Ind. 325.

Louisiana.—*State v. Diskin*, 34 La. Ann. 919.

Massachusetts.—*Com. v. McCormick*, 130 Mass. 61, 39 Am. Rep. 423; *Com. v. Roby*, 12 Pick. (Mass.) 496.

Mississippi.—*State v. Moor*, Walk. (Miss.) 134; *Price v. State*, 36 Miss. 531; *Josephine v. State*, 39 Miss. 613. See also *Whitten v. State*, 61 Miss. 717.

Nevada.—*State v. Pritchard*, 16 Nev. 101.

New Jersey.—*State v. Hall*, 9 N. J. L. 256.

New York.—*People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *People v. Goodwin*, 18 Johns. (N. Y.) 187; *People v. Reagle*, 60 Barb. (N. Y.) 527.

Tennessee.—*State v. Brooks*, 3 Humph. (Tenn.) 70.

Virginia.—*Com. v. Fells*, 9 Leigh (Va.) 613.

United States.—U. S. v. Perez, 9 Wheat. (U. S.) 579; U. S. v. Shoemaker, 2 McLean (U. S.) 114; U. S. v. Haskell, 4 Wash. (U. S.) 402; U. S. v. Morris, 1 Curt. (U. S.) 23.

England.—*Winsor v. Reg.*, 6 B. & S. 143, 118 E. C. L. 143.

In U. S. v. Shoemaker, 2 McLean (U. S.) 114, the court said: "That a court may discharge a jury in a criminal case, under peculiar circumstances, after they are sworn and have heard all the evidence, is well settled in the courts of the United States."

Power Should be Cautiously Exercised.—The court may, without the consent

b. CONSENT OF ACCUSED. — As has been stated in the preceding section, it is now quite well settled that the trial court is always empowered to discharge a jury in a criminal case before it has arrived at a verdict, where such action is demanded by an absolute and pressing necessity. Where, however, no such imperative necessity exists, the court has no power to discharge the jury without the consent, or against the objection, of the accused.¹ But if the accused requests or assents to the discharge of the jury, the action of the court will be justified although the necessity for such discharge be not absolute.²

of the prisoner, discharge a jury whenever the needs of public justice require it, but the right should be exercised with great caution, only under urgent circumstances, and for plain and obvious causes. *Price v. State*, 36 Miss. 531.

Misdemeanors. — The power of the court to discharge a jury in misdemeanors is analogous to its power in civil cases, and the jury in such a case may be discharged whenever the circumstances render such interference essential to the furtherance of justice. *State v. Morrison*, 3 Dev. & B. L. (N. Car.) 115; *State v. Weaver*, 13 Ired. L. (N. Car.) 203.

Felonies Less than Capital. — In trials for offenses less than capital, the court has a larger discretion to discharge the jury than in capital cases, and may exercise it whenever necessary for the accomplishment of the ends of justice. *State v. Connor*, 5 Coldw. (Tenn.) 311; *State v. Johnson*, 75 N. Car. 123. And see *State v. Tilletson*, 7 Jones L. (N. Car.) 114.

1. *Ellis v. State*, 25 Fla. 702; *State v. Edwards*, 2 Nott & M. L. (S. Car.) 17; *State v. Connor*, 5 Coldw. (Tenn.) 311. And see *Ward v. State*, 1 Humph. (Tenn.) 253; *State v. Ephraim*, 2 Dev. & B. L. (N. Car.) 162; *Bell v. State*, 44 Ala. 393; *Grogan v. State*, 44 Ala. 9.

In *Kinlock's Case*, Foster 22, the jury was discharged by the court, with the consent of the prisoners, to enable the latter to make a defense which they otherwise could not have done, and it was held that the discharge was proper in such case only on account of the prisoners' consent thereto.

In *State v. Connor*, 5 Coldw. (Tenn.) 311, after the court had charged the jury by permission the prosecuting officer entered a *nolle prosequi*, and the jury was discharged without the prisoner's consent. It was held that the

discharge was wholly unnecessary and without authority.

In *U. S. v. Negro Randall*, 2 Cranch (C. C.) 412, a capital case, one of the jurors, a Quaker, requested to be discharged, after the jury had been sworn, and the opening of the case had considerably advanced, assigning as a reason that he could not consistently serve. The court refused to discharge him unless the prisoner would consent, and the latter refusing to consent the request was denied.

Civil Case. — In *Swink v. Bohn*, 6 Colo. App. 517, it was held reversible error on the part of the court, after the testimony of witnesses had been taken, on continuing the case by consent, to discharge the jury against objection.

2. *Lancton v. State*, 14 Ga. 426; *Spencer v. State*, 15 Ga. 562; *Henning v. State*, 106 Ind. 386; *McCorkle v. State*, 14 Ind. 39; *Arcia v. State*, 28 Tex. App. 198. But see *State v. Ephraim*, 2 Dev. & B. L. (N. Car.) 162.

In *Kinlock's Case*, Foster 22, the power of the court underwent careful examination, and it was decided that the general rule laid down by Lord Coke was without authority to warrant it. It was determined that the court had power to withdraw a juror at the request of the prisoners for the purpose of imparting to them a defense which they could not otherwise have taken.

Consent of Slave. — In *Elijah v. State*, 1 Humph. (Tenn.) 102, a capital case, there was held to be no error in discharging the jury and entering a mistrial with the consent of the defendant, a slave, and of the counsel employed by the master to defend him, although no consent of the master appeared.

The Court Is Not Bound to Discharge the jury because the defendant consents to such discharge, and should not thus discharge it on the consent of the

Sufficiency of Consent. — The consent of the defendant to the discharge of the jury may sometimes be taken by implication,¹ and where it does not appear that he objected, it will generally be presumed that his consent was given.²

c. PRESENCE OF ACCUSED. — A person on trial for a criminal offense has a right to be present when the jury is discharged, and a discharge of the jury in his absence is unauthorized.³

d. IN WHOM POWER VESTED. — It has been held that the power to discharge a jury before a verdict has been reached is

defendant's attorney alone. *State v. Wamire*, 16 Ind. 357.

1. In *Stewart v. State*, 15 Ohio St. 155, after the jurors had been sworn one of their number arose and stated that he had been a member of the grand jury which found the indictment, and, the defendant objecting to proceeding and declining to waive any of his rights, the court discharged the jury, impaneled another jury, and proceeded. It was held that the discharge was a necessary result of sustaining the objection interposed by the defendant, and consequently that it was not without his consent.

Sufficient Showing of Consent. — A minute entry of the discharge of a jury, in a capital case, by consent of the prisoner, made by the clerk, but not signed by the presiding judge, because of his illness and subsequent death, is sufficient evidence of the discharge by consent. *Moore v. State* 3 Heisk. (Tenn.) 493.

2. The legal signification of an entry upon the minutes, in the trial of a capital case, of "Juror withdrawn and mistrial declared" is that the discharge of the jury was with consent of the defendant, by agreement between the respective counsel. *Lancton v. State*, 14 Ga. 426.

Where the Record Fails to Show that the discharge of the jury was without the prisoner's consent, or that he objected to the discharge at the proper time and in the proper form, the cause being continued by consent, he cannot thereafter assign the fact of discharge as a ground for reversing a subsequent conviction. *Morgan v. State*, 3 Sneed (Tenn.) 475.

Where the Bill of Exceptions Does Not Show a discharge of the jury without the consent of the defendant, it will be presumed that the discharge was with his consent. *People v. Curtis*, 76 Cal. 57.

California — Record Must Show Consent.

— Under the Penal Code of *California*, § 1140, the consent of the defendant to the discharge of the jury must appear of record. *People v. Curtis*, 76 Cal. 57.

3. *State v. Wilson*, 50 Ind. 487; *State v. Shuchardt*, 18 Neb. 454; *State v. Alman*, 64 N. Car. 364.

In *State v. Smith*, 44 Kan. 75, during a recess, at which the jurors were allowed to separate and go to their homes, it was reported that one of their number was sick and unable to attend. It was held error on the part of the trial court to investigate and determine the fact of the alleged sickness of the absent juror and discharge the jury for that cause in the absence from the court room of the defendants, who were charged with felony, since the fact of the sickness should have been determined by judicial methods, which include the rights of defendants to be present during the investigation, the right of cross-examination, and the right to produce witnesses.

In *State v. Shuchardt*, 18 Neb. 454, which was the trial of an indictment with intent to kill, the discharge was held unauthorized, it appearing that the jury had deliberated from 7 P. M. on Saturday night to 6 P. M. Sunday morning, when, reporting their inability to agree, they were discharged without notice to or consent of the defendant or his attorney, and in their absence.

Waiver of Right by Defendant's Counsel.

— Where the presence of the defendant has been waived by his counsel, his absence cannot affect the action of the court in discharging the jury if otherwise regular. *People v. Smalling*, 94 Cal. 112.

Discharge After Verdict. — It seems that the accused has a right to be present when the verdict is received and the jury discharged. See the article VERDICT.

vested in the court¹ and cannot be delegated to the clerk or other court officer.² But in some cases the discharge of the jury by the officer, acting under instructions from the judge, seems to have been acquiesced in without question.³

2. Necessity for Discharge — *a. MUST BE ABSOLUTE.* — The power of discharging a jury in a criminal case before it has arrived at a verdict is a delicate and highly important trust, and the right to exercise it exists only in cases of extreme and absolute necessity.⁴ What constitutes a necessity sufficient to justify

1. Absence of Associate Justices. — A justice presiding in a court of Oyer and Terminer cannot discharge a jury in the absence of his associates, who with him constitute the court. *People v. Reagle*, 60 Barb. (N. Y.) 527.

2. Ingersoll v. Lansing, 51 Hun (N. Y.) 101. But see *McCorkle v. State*, 14 Ind. 39.

In *State v. Jefferson*, 66 N. Car. 309, it was held that the discharge of a jury by the clerk, acting under telegraphic instructions of the judge, who was absent from the court, was such error as would entitle the prisoner to his discharge.

In *Hines v. State*, 24 Ohio St. 134, it appeared that at 6 o'clock P. M., the jury having been out a little over two hours, the court adjourned for the day, instructing the officer to discharge the jurors if they failed to agree by 11 P. M. At 11:30 P. M. the officer, being informed that there was no probability of agreement, discharged the jury, the judge having no information as to the condition of the jury or the probability of an agreement at the time the jurors were discharged, and no other instruction having been given for their discharge. Neither the defendant nor his counsel had any knowledge of the instructions given by the court to the officer, nor did either of them consent to the discharge, and the record showed no reason for discharge except that the jurors could not agree. It was held that the discharge was unauthorized, no legal necessity being shown therefor, and that the effect was to discharge the prisoner.

3. In Com. v. Townsend, 5 Allen (Mass.) 216, the court ordered the officer to discharge the jury if no agreement had been reached by a specified hour. The jurors, failing to agree at that time, asked further time, and the officer, after waiting ten or fifteen minutes, refused to allow them five minutes more and discharged them. Shortly

thereafter they stated they had agreed but the officer refused to take the verdict, which they handed to the court next morning. It was held that the verdict was invalid and should have been set aside for the reason that at the time the verdict had been agreed on the jury had been lawfully discharged.

In *State v. Cottrell*, 19 R. I. 724, it appeared that the court instructed the officer in charge of the jurors to discharge them at a stated hour, if there was then no probability of their agreeing, and that when informed by the officer at the hour named that they were discharged, the jurors protested, insisting upon further considering the case, and finally agreed without separation and sealed up their verdict. It was held that the verdict was properly received, and that no reason was shown for a new trial.

Failure of Officer to Obey Instructions. — Where the judge directed the officer to discharge the jurors at a stated hour, if they had not then agreed, but the officer did not obey the direction, it was held that the judge might adopt his action by accepting the verdict. *Hansen v. Ludlow Mfg. Co.*, 167 Mass. 112.

4. Alabama. — *Powell v. State*, 19 Ala. 581.

Arkansas. — *Atkins v. State*, 16 Ark. 579.

Indiana. — *McCorkle v. State*, 14 Ind. 39; *Miller v. State*, 8 Ind. 325.

Mississippi. — *Boles v. State*, 24 Miss. 445.

New York. — *People v. Denton*, 2 Johns. Cas. (N. Y.) 275; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *People v. Goodwin*, 18 Johns. (N. Y.) 187; *People v. Barrett*, 2 Cai. (N. Y.) 305.

North Carolina. — *State v. Davis*, 80 N. Car. 384; *State v. McGimsey*, 80 N. Car. 377; *State v. Wiseman*, 68 N. Car. 203; *State v. Jefferson*, 66 N. Car. 309; *State v. Bailey*, 65 N. Car. 426; *State v. Alman*, 64 N. Car. 364; *Matter of Spier*, 1 Dev. L. (N. Car.) 491; *State*

the trial court in discharging the jury is a question largely dependent upon the circumstances of the particular case.¹

b. NECESSITY APPEARING FROM RECORD. — In some jurisdictions it is held that where a jury in a criminal case is discharged before reaching a verdict, it is the duty of the presiding judge to find the facts constituting the necessity for the discharge.²

v. Ephraim, 2 Dev. & B. L. (N. Car.) 162.

Ohio. — *Dobbins v. State*, 14 Ohio St. 499.

Pennsylvania. — *Hilands v. Com.*, 111 Pa. St. 1; *Com. v. Cook*, 6 S. & R. (Pa.) 577.

South Carolina. — *State v. Edwards*, 2 Nott. & M. L. (S. Car.) 17.

Tennessee. — *Mahala v. State*, 10 Yerg. (Tenn.) 532; *State v. Connor*, 5 Coldw. (Tenn.) 311.

Virginia. — *Williams v. Com.*, 2 Gratt. (Va.) 567.

In *People v. Barrett*, 2 Cai. (N. Y.) 308, Livingston, J. said: "It is evident this power should not be lightly used, but confined as much as may be to cases of very urgent necessity, where, by the act of God or by some sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public or the defendant himself."

Cannot be Discharged Capriciously. — A jury properly selected cannot be discharged capriciously. *Judge v. State*, 8 Ga. 173.

1. *State v. Connor*, 5 Coldw. (Tenn.) 311; *Com. v. Cook*, 6 S. & R. (Pa.) 577.

Grounds for Discharge. — As to what constitutes a necessity sufficient to authorize the discharge of the jury, see *infra*, XI. 7. *Grounds for Discharge*.

If Either of Two Reasons Assigned for the discharge of a jury, taken alone, is good and sufficient, it will remain sufficient notwithstanding the assignment of the other; but if neither of them alone is sufficient, it cannot be pieced out and completed by the other cause or reason, of itself deemed insufficient. *Conklin v. State*, 25 Neb. 784.

Where It Is Not Necessary to Assign Any Reason for the discharge of a jury, the fact that the order for a discharge assigns an insufficient reason is immaterial. Thus, where jurors were not selected to try the defendant's case, nor selected for any fixed term, the court has the undoubted right to discharge them, or any of them, at any time, without assigning a reason therefor. *People v. Murray*, 85 Cal. 350.

Enactments Authorizing the Discharge of jurors will sometimes warrant the discharge of a jury under circumstances which would not justify that action at common law. *Crookham v. State*, 5 W. Va. 510.

Colorado. — Under the provisions of the Colorado Constitution and of the Criminal Practice Act (1 Comp. L. 2020, 2021), the trial courts are invested with power, in the exercise of a sound legal discretion, to discharge a jury after the submission of the cause to it, without the consent of the defendant, in all cases of manifest necessity, whether such necessity arises from some physical cause occurring during the trial or deliberation of the jury or from the inability of the jurors to agree upon a verdict. *Ex p. Maxwell*, 11 Nev. 436.

Louisiana — **Additional Jurors.** — Under the Louisiana Acts of 1877 (No. 44), giving the district judge discretionary power to order the drawing of additional jurors to serve as regular jurors or as talesmen, the judge may discharge them whenever he thinks that their services are no longer necessary. *State v. West*, 35 La. Ann. 28.

Texas — **Statutes Authorizing Continuance.** — In *Pizafio v. State*, 20 Tex. App. 139, it was held that the provisions of a statute (Code Crim. Pro., art. 561) authorizing a continuance after commencement of the trial, where the applicant therefor is taken by surprise, etc., did not contemplate that where a trial had been postponed in a case where a jury had been impaneled, the judge was authorized to discharge the jury, nor that such a right would exist where there was a continuance for the term, unless a necessity for the discharge was clearly shown.

2. *State v. Prince*, 63 N. Car. 529; *State v. Jefferson*, 66 N. Car. 309.

The Mere Ruling or Finding of the Court that the ends of justice require the discharge of a jury will not of itself be sufficient to establish a necessity for the discharge, especially when the facts in the record show that no such necessity exists. *State v. Leunig*, 42 Ind. 541.

and to set them out in the record, so that his conclusion as to the matter of law may be reviewed by the appellate court.¹ However, there is a strong line of cases holding that the discharge of a jury is a matter wholly within the discretion of the trial court and is not reviewable;² and where this doctrine prevails, the failure of the record to show necessity for the discharge is, of course, of no moment.³

3. Discretion of Trial Court — a. IN GENERAL. — Whether or not it is proper to discharge a jury in a criminal case after it has been sworn and before a verdict is reached is a question necessarily dependent to a large extent upon the circumstances of the particular case, and naturally rests in the sound discretion of the trial judge.⁴

1. *Ex p. Maxwell*, 11 Nev. 436; *State v. Jefferson*, 66 N. Car. 309; *State v. Ephraim*, 2 Dev. & B. L. (N. Car.) 162; *Hines v. State*, 24 Ohio St. 134; *Dobbins v. State*, 14 Ohio St. 493; *State v. Pool*, 4 Lea (Tenn.) 363; *State v. Waterhouse*, Mart. & Y. (Tenn.) 278.

In *Ex p. Maxwell*, 11 Nev. 436, it was held that if the record failed to show the existence of facts rendering the discharge necessary, such a discharge was an illegal exercise of power on the part of the court. To the same effect see *Hines v. State*, 24 Ohio St. 139.

Order Taken as True. — An order setting forth the reasons for the discharge of the jury, entered in the mode prescribed by statute, must be taken as stating the true reasons of the discharge. *Conklin v. State*, 25 Neb. 784.

Presumption in Favor of Ruling. — Where it appears by the recitals in the record that the jury was discharged over the objection and exception of the appellant, on account of the continued sickness of one of the jurors, if the grounds upon which the court ordered the discharge are not shown by a bill of exceptions it will be presumed that the ruling was properly made. *Vanderkarr v. State*, 51 Ind. 91.

It will be presumed in favor of the action of a justice of the peace in discharging a jury that there was a valid reason for the discharge. *Fowler v. State*, 85 Ind. 538.

The facts on which the court has exercised its discretion in discharging the juror should be spread upon the record, and if they are not the reviewing court will presume that the discretion was properly exercised. *State v. Waterhouse*, Mart. & Y. (Tenn.) 278.

Conceding that facts stated in the record of the previous trial of the pris-

oner as to the necessity of the discharge of the jury are presumptive only as to the existence of the necessity, an instruction that such record is conclusive is no reason for disturbing the verdict if there has been no evidence adduced which tends to rebut its correctness. *Josephine v. State*, 39 Miss. 613.

The Record of a Cause May be Amended at the next term so as to show the true facts as to the reason for the discharge of the jury. *State v. Davis*, 80 N. Car. 384.

An Entry Made by the Clerk in the ordinary routine of duty is not a compliance with the statute providing that the court on discharging a jury shall order such reason to be entered upon the journal and that such discharge shall be so entered without prejudice. *Conklin v. State*, 25 Neb. 784.

2. See *infra*, XI. 3. *b. Reviewability.*

3. In *People v. Harding*, 53 Mich. 481, it was contended that the record of the discharge of a jury for inability to agree should show that the presiding judge found a necessity for the discharge, and Cooley, C. J., said that while it would be very proper for the court in such a case to cause an entry to be made on the journal that, being satisfied the jurors could not agree, he directed their discharge, yet it was not necessary, and that the fact that the judge directs the discharge of the jurors on receiving their report as to their inability to agree is understood to be an assent on his part to their own conclusion and a determination by him that the necessity for their discharge without a verdict has arisen.

4. *Alabama.* — *Barrett v. State*, 35 Ala. 406.

Arkansas. — *Atkins v. State*, 16 Ark. 570.

b. REVIEWABILITY. — The decisions regarding the revisability of the trial judge's exercise of discretion in discharging a jury are considerably at variance.¹ In the English and federal courts and the courts of some of the states it has been held that the right to discharge a jury rests in the unrevisable discretion of the trial court.² But in other jurisdictions it is held that the exercise of the power to discharge a jury is not a matter of unbridled discre-

Idaho. — *People v. Stock*, 1 Idaho 218.
Indiana. — *Murphy v. Wilson*, 46 Ind. 537.

Massachusetts. — *Com. v. Purchase*, 2 Pick. (Mass.) 521; *Com. v. Roby*, 12 Pick. (Mass.) 503; *Hubbard v. Gale*, 105 Mass. 511.

Michigan. — *People v. Harding*, 53 Mich. 487.

New Hampshire. — *School District No. 1 v. Bragdon*, 23 N. H. 507.

New York. — *People v. Denton*, 2 Johns. Cas. (N. Y.) 275; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *People v. Goodwin*, 18 Johns. (N. Y.) 200; *People v. Green*, 13 Wend. (N. Y.) 57; *Erwin v. Hamilton*, 50 How. Pr. (N. Y. Supreme Ct.) 32; *People v. Reagle*, 60 Barb. (N. Y.) 527; *White v. Calder*, 35 N. Y. 183.

North Carolina. — *State v. Prince*, 63 N. Car. 529; *State v. Bullock*, 63 N. Car. 570; *State v. Alman*, 64 N. Car. 364; *State v. Jefferson*, 66 N. Car. 309; *State v. Bass*, 82 N. Car. 570; *State v. Chase*, 82 N. Car. 575.

Ohio. — *Dobbins v. State*, 14 Ohio St. 493.

Texas. — *Ray v. State*, 4 Tex. App. 450; *Schindler v. State*, 17 Tex. App. 408; *Taylor v. State*, 35 Tex. 97; *Clark v. State*, 28 Tex. App. 189.

Virginia. — *Com. v. Fells*, 9 Leigh (Va.) 613.

United States. — *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *Logan v. U. S.*, 144 U. S. 264; *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; *U. S. v. Haskell*, 4 Wash. (U. S.) 402; *U. S. v. Watson*, 3 Ben. (U. S.) 1; *U. S. v. Morris*, 1 Curt. (U. S.) 24.

England. — *Reg. v. Newton*, 3 Cox C. C. 489; *Reg. v. Davison*, 8 Cox C. C. 360; *Winsor v. Reg.*, 6 B. & S. 143, 118 E. C. L. 143.

In *Com. v. Fells*, 9 Leigh (Va.) 613, it was said that one general rule is deducible from all the cases, which is that the court may discharge the jury whenever a necessity for so doing shall arise; but what facts and circumstances shall be considered as constituting such

a necessity cannot be reduced to any general rule. The power to discharge is a discretionary power, which the court, as in all other cases of judicial discretion, must exercise soundly, according to the circumstances of the case. The object of the law is to obtain a fair and just verdict, and whenever it shall appear to the court that the jury impaneled cannot render such a verdict, it ought to be discharged, and another jury impaneled.

Florida. — *Statute Providing for Discharge.* — Section 1093 of the Florida Revised Statutes, conferring upon juries the right to be discharged under certain prescribed circumstances, does not abridge the judicial discretion of the trial judge to ordering a discharge in a proper case. *Tervin v. State*, 37 Fla. 396.

1. For a general discussion of reviewing the exercise of discretionary power, see the article APPEALS, vol. 2, p. 409 *et seq.*

2. *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *Com. v. Purchase*, 2 Pick. (Mass.) 521; *Hubbard v. Gale*, 105 Mass. 511; *People v. Harding*, 53 Mich. 487; *State v. Reinhart*, 26 Oregon 474; *Winsor v. Reg.*, 6 B. & S. 143, 118 E. C. L. 143. See also *People v. Green*, 13 Wend. (N. Y.) 55.

In *Morrill v. Warner*, 66 N. H. 572, it was held that whether a trial was properly stopped on discovering that one of the jurors was a party to an action triable by jury, and pending in the trial term in the county, wherein the counsel for the plaintiff in the case on trial were his counsel, was a question of fact to be determined at the trial term and presented no question of law to the appellate court.

In *Misdemeanors, and in All Felonies Not Capital*, the presiding judge has the discretion to discharge a jury before verdict in furtherance of justice. He need not find facts constituting the necessity for such discharge, nor is his

tion in the primary court, but its action in that regard is always open to review on appeal or writ of error.¹ In some states the doctrine is that the appellate court will not revise the action of the trial court in discharging a jury unless it is made clearly to appear that the discretion has been abused and that prejudice has resulted therefrom.²

action reviewable. *State v. Bass*, 82 N. Car. 570; *State v. Chase*, 82 N. Car. 575; *State v. Reinhart*, 26 Oregon 466.

1. *Hawes v. State*, 88 Ala. 37; *Ned v. State*, 7 Port. (Ala.) 189; *Mixon v. State*, 55 Ala. 129; *Cook v. State*, 60 Ala. 39; *Lee v. State*, 26 Ark. 260; *State v. Ephraim*, 2 Dev. & B. L. (N. Car.) 162; *State v. Prince*, 63 N. Car. 529; *Com. v. Cook*, 6 S. & R. (Pa.) 577; *Mahala v. State*, 10 Verg. (Tenn.) 533.

Must Be Exercised in Accordance with Established Rules.—The power to discharge a jury without the consent of the prisoner is not an absolute uncontrolled discretionary power, but it must be exercised in accordance with established legal rules and the sound legal discretion in the application of such rules to the facts and circumstances of each particular case. *Ex p. McLaughlin*, 41 Cal. 211; *People v. Cage*, 48 Cal. 323; *Ex p. Maxwell*, 11 Nev. 436; *State v. Pritchard*, 16 Nev. 101; *Dobbins v. State*, 14 Ohio St. 499; *State v. Shuchardt*, 18 Neb. 454; *State v. M'Kee*, 1 Bailey L. (S. Car.) 651.

Must Be Facts upon Which Discretion Exercised.—It is in the sound discretion of the court to judge of the necessity and propriety of a discharge, though there must be facts upon which the discretion may be exercised. *People v. Reagle*, 60 Barb. (N. Y.) 527.

Finding of Fact Conclusive.—The finding of fact below as to the necessity for the discharge is conclusive on appeal, but a decision as to the legal effect thereof is reviewable. *State v. Prince*, 63 N. Car. 529; *State v. Bullock*, 63 N. Car. 570; *State v. Carland*, 90 N. Car. 668.

Remedy by Certiorari.—The remedy for error in ruling that a necessity existed for the discharge of a jury because of inability to arrive at a verdict is by certiorari, in which way only can the revisory jurisdiction of the Supreme Court be exercised. *State v. Twiggs*, 90 N. Car. 685.

2. *Ray v. State*, 4 Tex. App. 450; *Schindler v. State*, 17 Tex. App. 408; *Varnes v. State*, 20 Tex. App. 107; *Brady v. State*, 21 Tex. App. 659; *Clark*

v. State, 28 Tex. App. 189; *O'Connor v. State*, 28 Tex. App. 288; *Rudder v. State*, 29 Tex. App. 262; *Wright v. Com.*, 75 Va. 914; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507.

In *Erwin v. Hamilton*, 50 How. Pr. (N. Y. Supreme Ct.) 32, the decision in *Green v. Telfair*, 11 How. Pr. (N. Y. Supreme Ct.) 260, is criticised and the doctrine is laid down that it must be left to the good sense and wise discretion of the judge who presides at the trial to determine how long the jury shall be detained, and what, if anything, shall be said as to the probable length of the detention; and so long as there is no abuse of discretion in this respect, the verdict should stand. But see *Slater v. Mead*, 53 How. Pr. (N. Y. Supreme Ct.) 57.

Abuse of Discretion Must Appear Affirmatively.—The Supreme Court will not reverse a judgment of the court below for an abuse of discretion in discharging the jury, unless it is affirmatively shown by the record that there has been such abuse of discretion. Without such affirmative showing, the presumption is that the jury was properly and legally discharged. *State v. Jorgenson*, (Idaho 1893) 32 Pac. Rep. 1129; *Atkins v. State*, 16 Ark. 568.

Presumption in Favor of Correctness.—The trial judge alone is competent to determine the necessity for discharging the jury, and where the record alleges that such a necessity existed, his determination will be presumed to be correct. *State v. Brooks*, 3 Humph. (Tenn.) 70; *O'Connor v. State*, 28 Tex. App. 288.

Where a hearing and determination as to whether a juror reported sick was too ill to attend and proceed with the trial were had by the court by judicial methods, and a finding made based upon testimony which was not preserved, the appellate court cannot say that the discharge of the jury was not warranted or that the issue operated as an acquittal. *State v. Reed*, 53 Kan. 767.

Defendant Bound by Record.—A defendant cannot impeach the record by

4. Discharge of Individual Jurors. — a. POWER TO DISCHARGE.

— Originally, at common law, it was the doctrine that the court could not interfere and discharge a juror after he had been sworn in a criminal case.¹ This doctrine, however, has been very generally departed from, and the great weight of modern authority is to the effect that the trial court may, for good cause,² interpose and discharge a juror after he has been sworn, in order that the ends of public justice may not be defeated.³

extrinsic evidence of facts showing erroneous exercise of judicial discretion in discharging a jury, but is bound by the judgment of the court below, as declared by the record. *People v. Smalling*, 94 Cal. 112.

1. *Com. v. Knapp*, 10 Pick. (Mass.) 477. And see *supra*, XI. 1. *Power to Discharge*.

2. See *infra*, XI. 7. *Grounds for Discharge*.

The discharge of a juror for insufficient cause is error. *State v. Allen*, 46 Conn. 531.

The Incompetency that Will Authorize the Court to Interfere after a juror has been sworn must be of such a character as would defeat a fair and impartial trial if the juror were permitted to serve or the verdict were allowed to stand. *State v. Madoil*, 12 Fla. 151.

Juror Returned under Suspicious Circumstances. — A juror may be discharged after he has been accepted and sworn, where it appears that he was returned through outside influences and under suspicious circumstances. *Ochs v. People*, 124 Ill. 399.

Allen on Jury. — In *Illinois* it was held correct in a capital case to strike off an alien after he had been sworn as a juror. *Stone v. People*, 3 Ill. 326.

Person on Jury Without Authority. — In *State v. Sternberg*, 59 Mo. 410, before the trial had actually commenced by the swearing of a witness, it was discovered that a person who had not been examined, selected, nor presented for challenge had unauthorizedly taken his seat in the box in the place of a juror selected and had been sworn with the jury. It was held that the court, on objection made, should have discharged him, substituted the juror originally selected, and had the oath readministered to the jury; and for its failure to take such a course, and for retaining the person sworn and proceeding with the trial, the judgment was reversed.

3. *Alabama*. — *Bell v. State*, 44 Ala. 393; *Yarbrough v. State*, 105 Ala. 43.

Arkansas. — *Meyer v. State*, 19 Ark. 156; *Cornelius v. State*, 12 Ark. 782.

California. — *People v. Brady*, 72 Cal. 490; *Grady v. Early*, 18 Cal. 111.

Georgia. — *Wesley v. State*, 65 Ga. 731; *Jackson v. State*, 51 Ga. 402.

Illinois. — *Ochs v. People*, 124 Ill. 399; *Shawneetown v. Mason*, 82 Ill. 337; *Ochs v. People*, 25 Ill. App. 379; *Thomas v. Leonard*, 5 Ill. 556; *Stone v. People*, 3 Ill. 326.

Indiana. — *Harrington v. State*, 76 Ind. 112; *Henning v. State*, 106 Ind. 386; *May v. State*, 140 Ind. 88.

Louisiana. — *State v. Moncla*, 39 La. Ann. 868; *State v. Diskin*, 34 La. Ann. 919.

Mississippi. — *McGuire v. State*, 37 Miss. 369; *Jefferson v. State*, 52 Miss. 767.

Nevada. — *State v. Pritchard*, 16 Nev. 101.

New York. — *People v. Damon*, 13 Wend. (N. Y.) 351; *People v. Ellis*, 15 Wend. (N. Y.) 371; *People v. Hughes*, 137 N. Y. 29; *People v. Beckwith*, 103 N. Y. 360.

North Carolina. — *State v. Bell*, 81 N. Car. 591.

North Dakota. — *State v. Hazledahl*, 2 N. Dak. 524.

South Carolina. — *State v. Stephens*, 11 S. Car. 322.

Tennessee. — *State v. Curtis*, 5 Humph. (Tenn.) 601; *Snowden v. State*, 7 Baxt. (Tenn.) 484.

Texas. — *Evans v. State*, 6 Tex. App. 513; *Ellison v. State*, 12 Tex. App. 557.

Virginia. — *Dilworth v. Com.*, 12 Gratt. (Va.) 689; *Bristow v. Com.*, 15 Gratt. (Va.) 646; *Tooele v. Com.*, 11 Leigh (Va.) 749.

West Virginia. — *State v. Davis*, 31 W. Va. 390.

United States. — *U. S. v. Morris*, 1 Curt. (U. S.) 24; *Silsby v. Foote*, 14 How. (U. S.) 218.

Consent to Discharge. — In some cases it has been held that if a juror is sworn, he cannot be discharged without the consent of the parties for any cause existing at the time he was sworn.¹

b. EFFECT. — The effect of the discharge of an individual juror for a cause not going to the competency of the whole jury is a matter largely governed by statutes, and no general rules can be laid down in regard thereto.² In many states the court is authorized to substitute another qualified juror for the one discharged.³

Motion in Effect a Peremptory Challenge. — There is no error in discharging a juror on a motion which is in effect a peremptory challenge. *Mingia v. People*, 54 Ill. 274.

Formal Motion Not Necessary. — During the trial it is sufficient to call the attention of the court to the disqualification of a juror without a formal motion to invoke the ruling of the court. *Crockett v. McLendon*, 73 Ga. 86.

Waiver of Objection. — The court cannot discharge a juror of its own motion and against the consent of the defendant, when the objection to him was waived after disclosure of the fact that he was a member of the grand jury which found the indictment, which fact would only authorize a challenge for implied bias. *O'Brian v. Com.*, 6 Bush (Ky.) 568.

Incompetency Discovered After Juror Sworn. — If a cause of challenge be discovered after the juror is sworn, and before any part of the evidence is introduced, he may be discharged in the discretion of the court. *Meyer v. State*, 19 Ark. 156; *Cornelius v. State*, 12 Ark. 782; *Wesley v. State*, 65 Ga. 731.

If the court has discretion to permit a peremptory challenge after the juror has been sworn, it is a proper exercise of that discretion to act upon the assurance of the prosecuting attorney that matters disqualifying the juror came to his knowledge after such juror was sworn. *People v. Hughes*, 137 N. Y. 29.

Occurrences Out of Presence of Court. — On proof of facts occurring beyond its presence, the court has no power to vacate the seat of a juror who has been sworn, and to call another in his place. *State v. Stephens*, 11 S. Car. 319.

In Texas it has been held that where, after a juror has been sworn, it appears that he is incompetent to sit in the case, the court may, in the exercise of a sound discretion, discharge him at any time before evidence is given.

Evans v. State, 6 Tex. App. 513; *Ellison v. State*, 12 Tex. App. 557. But see *Sterling v. State*, 15 Tex. App. 249; *Hill v. State*, 10 Tex. App. 618.

New York. — By the New York Code Crim. Pro., § 371, the discharge of a juror after he is accepted and sworn is discretionary with the trial judge. *People v. Beckwith*, 103 N. Y. 360; *People v. Hughes*, 137 N. Y. 29.

1. *State v. Williams*, 3 Stew. (Ala.) 454; *U. S. v. Watkins*, 3 Cranch. (C. C.) 441. And see *Orr v. Bobb, Sneed* (Ky.) 244; *Kreuchi v. Dehler*, 50 Ill. 176.

Consent of Counsel. — A juror may be discharged where counsel consents thereto. *State v. Baber*, 74 Mo. 293.

2. **Under the English Practice**, when it is discovered during the trial that one of the jurors is incompetent to serve, the whole jury is discharged. Thereupon the names of the eleven others are immediately recalled and another name is taken from the panel to complete the number. The accused is then given all his challenges to the twelve, after which each juror, or the person substituted by the challenge, must be sworn *de novo*. *State v. Hazledahl*, 2 N. Dak. 524; *People v. Damon*, 13 Wend. (N. Y.) 351.

3. **Alabama.** — *Yarbrough v. State*, 105 Ala. 43; *Hawes v. State*, 88 Ala. 37; *Bell v. State*, 44 Ala. 393.

California. — *People v. Brady*, 72 Cal. 490.

Illinois. — *Stone v. People*, 3 Ill. 328; *Shawneetown v. Mason*, 82 Ill. 337.

Louisiana. — *State v. Moncla*, 39 La. Ann. 868; *State v. Nash*, 46 La. Ann. 194.

Mississippi. — *Jefferson v. State*, 52 Miss. 767.

Nevada. — *State v. Pritchard*, 16 Nev. 101.

North Carolina. — *State v. Scruggs*, 115 N. Car. 805.

North Dakota. — *State v. Hazledahl*, 2 N. Dak. 524.

Tennessee. — *Deberry v. State*,

and begin the trial anew.¹ In such case the incompetent juror must be legally discharged before the substitution can be made.² Instead of replacing the discharged juror, how-

(Tenn. 1897) 42 S. W. Rep. 31; *Garner v. State*, 5 Yerg. (Tenn.) 160; *Mahala v. State*, 10 Yerg. (Tenn.) 537; *State v. Curtis*, 5 Humph. (Tenn.) 601; *Lewis v. State*, 3 Head (Tenn.) 143; *Snowden v. State*, 7 Baxt. (Tenn.) 482.

West Virginia. — *State v. Davis*, 31 W. Va. 390.

In *Yarbrough v. State*, 105 Ala. 43, following *Hawes v. State*, 88 Ala. 37, it was held that where, after the organization of the jury, but before the reading of the indictment, one of the jurors, after an examination by the court, is found to be sick and unable to sit, the court may excuse him and complete the jury from the regular panel or on its exhaustion by a talesman.

California. — Under the California Penal Code, § 1123, providing that if during a trial, before the introduction of evidence, a juror becomes so sick as to be unable to perform his duties, the court may order him to be discharged, swear a new juror, and begin the trial anew, or may discharge the jury and proceed with a new one, where a juror has been discharged for sickness, the court, instead of complying with the defendant's request that the rest of the jurors be discharged and their names, in common with all others summoned, placed in the jury box, and the jury impaneled anew, may retain the eleven jurors subject to the right of challenge and complete the jury in the usual manner. *People v. Brady*, 72 Cal. 490.

Right to Examine Remaining Jurors. — In a capital case, if a juror is excused against the objection of the defendant after the panel has been sworn and evidence introduced, jurors not excused should not be retained without affording the defendant an opportunity of again examining them before they are resworn. *State v. Vaughan*, 23 Nev. 103.

Reswearing Jury. — Under the Tennessee statute, where a juror is substituted the other jurors are not subject again to challenge and need not be resworn. *Garner v. State*, 5 Yerg. (Tenn.) 160; *Mahala v. State*, 10 Yerg. (Tenn.) 537; *State v. Curtis*, 5 Humph. (Tenn.) 601.

In *Florida* and *Mississippi* it seems to be the practice to reswear the jury.

Keech v. State, 15 Fla. 591; *Jefferson v. State*, 52 Miss. 767.

New Jersey. — In some cases it has been held to be the proper practice for the court to discharge the entire jury and order a new one. *Norvell v. Deval*, 50 Mo. 272; *O'Brian v. Com.*, 6 Bush (Ky.) 568; *Shelby v. Com.*, 91 Ky. 563; *State v. Cason*, 41 S. Car. 531; *State v. Stephens*, 11 S. Car. 322; *State v. Scarborough*, 2 S. Car. 439.

In *Grable v. State*, 2 Greene (Iowa) 559, after the introduction of evidence an adjournment was taken, during which one of the jurors separated from his fellows, and upon the reassembling of the court the offending juror was dismissed and another substituted in his stead, the defendant having exhausted his peremptory challenges prior to such substitution, and this was held reversible error.

After Hearing Evidence. — After all the evidence for the state has been heard by the traverse jury on a trial for felony, it is not lawful to change the constitution of the jury by discharging one of its members as incompetent because he was on the grand jury that found the bill and substituting in his place a fresh juror, then proceeding with the trial, the prisoner not consenting to such substitution, but insisting that a mistrial should be declared. *Simmons v. State*, 88 Ga. 272.

1. *State v. Hazledahl*, 2 N. Dak. 521; *Snowden v. State*, 7 Baxt. (Tenn.) 482; *Deberry v. State*, (Tenn. 1897) 42 S. W. Rep. 31; *Bell v. State*, 44 Ala. 393; *Follin v. Foucher*, 8 La. 565.

In *State v. Davis*, 31 W. Va. 390, it was held to be within the sound discretion of the court, in the trial of a felony case, if a juror at any time after he is sworn and before verdict becomes unable from any cause to discharge his duties as such juror, to discharge such juror and substitute another qualified juror in his place; and that when such substitution is made, the trial shall proceed just as if it had then commenced before a new jury.

2. In *People v. Dolan*, 51 Mich. 610, it appeared that during the temporary absence of the prosecuting attorney from the court room, the jury was sworn, and the prosecutor, on his returning and insisting upon his right,

ever, it seems that the court may, in its discretion, discharge the entire jury and continue the case.¹ Sometimes it is provided by statute that in case a single juror becomes incompetent during the trial, a valid verdict may be brought in by the remaining jurors.²

5. Discharge on Sunday or Legal Holiday. — It is generally held that a jury may be discharged on Sunday or a legal holiday where a verdict is reached on that day;³ but a jury cannot be discharged on such day for any other reason, unless authority to do so is conferred by statute.⁴

was permitted against the objection of the defendant to challenge a juror peremptorily, whereupon another was called and sworn in against the like objection. It was held that as but one jury could serve, and the first one had been impaneled and sworn but not legally discharged, the conviction by the second jury was a nullity.

In *Powell v. State*, 48 Ala. 154, where a juror summoned and sworn claimed exemption and asked to be excused, which the court refused, and thereupon the juror, stating that he would discharge himself, left the court room, it was held reversible error for the court, without discharging him, and without the consent of the accused, to select another juror in his stead.

1. *State v. Hazledahl*, 2 N. Dak. 524; *Snowden v. State*, 7 Baxt. (Tenn.) 482; *State v. Curtis*, 5 Humph. (Tenn.) 601.

In *Alabama* it is held that where the discharge of a juror occurs before the jury retires, his place should be supplied and the trial begun anew; but where the discharge occurs after retirement, the entire jury must be discharged. *Bell v. State*, 44 Ala. 393.

Failure to Follow Statute Not an Acquittal. — Where the court, having discharged a juror for illness, dismissed the remaining eleven, instead of causing another person to be summoned in the place of the discharged juror and commencing the trial anew, as provided by statute, the refusal to take the course pointed out by statute was held not to have the effect of acquitting the defendant. *Mixon v. State*, 55 Ala. 129.

Civil Case. — Where a juror has been discharged for illness after the plaintiff has commenced to open to the jury, it is in the discretion of the court whether the situation shall be treated simply as creating a vacancy on a still existing

panel or as breaking up the panel altogether. *Silsby v. Foote*, 14 How. (U. S.) 218.

2. Texas. — By the Constitution and laws of Texas as they were in force in 1878, if jurors not exceeding three died or from any cause became disabled to sit during the trial, a verdict might be rendered by the remainder. *Ray v. State*, 4 Tex. App. 450.

Waiver of Jury of Twelve. — Where, after a trial for a felony has begun to a jury of twelve men, one of them becomes sick, the defendant, with the consent of the state and the court, may waive a jury of twelve men and agree that the trial shall proceed with the eleven jurors, and that their verdict shall "be as valid and binding as though rendered by the full jury." *State v. Grossheim*, 79 Iowa 75.

Not Waiver of Objection to Improper Discharge. — That the objecting party consented to proceed with eleven jurors after the improper discharge of a juror against objection was held not to be a waiver of the objection to the improper discharge. *Mahoney v. San Francisco*, etc., R. Co., 110 Cal. 471.

3. *U. S. v. Ball*, 163 U. S. 662; *McCorkle v. State*, 14 Ind. 39; *Joy v. State*, 14 Ind. 139; *Territory v. Nichols*, 3 N. Mex. 76; *People v. Soto*, 65 Cal. 621. For a full discussion of this subject see the article VERDICT.

4. Under *Hill's Anno. Laws Oregon*, § 928, providing that no court can be opened nor any judicial business transacted on Sunday, except to instruct the jury then deliberating, to receive a verdict, or for the exercise by a magistrate of his powers in a criminal action, it was held that there was no authority to discharge a jury on Sunday because of inability to agree on a verdict. *Ex p. Tice*, (Oregon 1897) 49 Pac. Rep. 1038. See also *Jackson v. State*, 102 Ala. 76.

6. Effect of Discharging Jury — a. WHEN OPERATING AS DISCHARGE OF ACCUSED. — It is well settled that an arbitrary discharge of the jury in a criminal case where no circumstances exist which call for the court to exercise its discretion in that behalf will operate as an acquittal of the defendant.¹

b. WHEN NOT OPERATING AS DISCHARGE OF ACCUSED. — Where an imperious necessity requires that the jury be discharged before arriving at a verdict² such discharge will not operate as an acquittal of the defendant, but he may be put on trial again.³ The irregular discharge of a jury before evidence is introduced has been held to be no reason for discharging the prisoner,⁴ and where the defendant consents to the discharge he cannot afterwards invoke the defense of once in jeopardy.⁵

1. *Alabama*. — *Bell v. State*, 44 Ala. 393; *McCauley v. State*, 26 Ala. 135; *Cobia v. State*, 16 Ala. 781; *Ned v. State*, 7 Port. (Ala.) 213.

Arkansas. — *State v. Ward*, 48 Ark. 36; *Whitmore v. State*, 43 Ark. 271.

California. — *People v. Curtis*, 76 Cal. 57; *People v. Webb*, 38 Cal. 467.

Connecticut. — *State v. Allen*, 46 Conn. 531.

Indiana. — *Adams v. State*, 99 Ind. 244.

Mississippi. — *Whitten v. State*, 61 Miss. 717.

Nebraska. — *State v. Shuchardt*, 18 Neb. 454.

New York. — *Grant v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 527.

North Carolina. — *Matter of Spler*, 1 Dev. L. (N. Car.) 491.

Ohio. — *Hines v. State*, 24 Ohio St. 139; *Mitchell v. State*, 42 Ohio St. 383.

Tennessee. — *State v. Connor*, 5 Coldw. (Tenn.) 311; *Hines v. State*, 8 Humph. (Tenn.) 597.

Texas. — *Powell v. State*, 17 Tex. App. 346; *Pizafio v. State*, 20 Tex. App. 139.

See *contra*, *O'Brian v. Com.*, 6 Bush (Ky.) 568.

For a full discussion of this subject, see the article *Jeopardy*, 11 Am. and Eng. Encyc. of Law (1st ed.) 950.

In Civil Case. — An illegal discharge of a jury in a civil case will not work a discontinuance of the cause. *Ashbaugh v. Edgecomb*, 13 Ind. 466. And see *Leas v. Patterson*, 38 Ind. 465; *Maynard v. Black*, 41 Ind. 310.

2. As to what constitutes a sufficient necessity for discharging the jury, see *infra*, XI. 7. *Grounds for Discharge*.

3. *State v. Allen*, 46 Conn. 531; *State*

v. Pierce, 77 Iowa 245; *State v. Blackman*, 35 La. Ann. 483; *Com. v. Burke*, 16 Gray (Mass.) 32; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *McCreary v. Com.*, 29 Pa. St. 323; *Com. v. Cook*, 6 S. & R. (Pa.) 577.

For a full discussion, see the article *Jeopardy*, 11 Am. and Eng. Encyc. of Law (1st ed.) 950.

4. *State v. Williams*, 3 Stew. (Ala.) 454; *State v. Brown*, 47 Ohio St. 102.

In *State v. Burket*, 2 Mill. (S. Car.) 155, the jury could not be completed for the want of talesmen, and it was held that the prisoners had not been put upon their trial and that therefore they were not discharged.

Jury Discharged Before Case Called. — A party to an action cannot complain that jurors were discharged for the term when it appears that they were discharged before his case was called, and that no exception was taken to the action of the court. *Anderson v. Watsch, etc.*, Valley R. Co., 2 Utah 518.

5. *Kinloch's Case*, Foster 22; *Rex v. Stokes*, 6 C. & P. 151, 25 E. C. L. 327; *Com. v. Cook*, 6 S. & R. (Pa.) 577; *State v. Wamire*, 16 Ind. 357; *Fowler v. State*, 85 Ind. 538; *People v. Kerm*, 8 Utah 269.

Discharge at Request of Defendant. — If a defendant discovers that a juror has become disqualified, or has misconducted himself, he may, upon proper request, undoubtedly secure the discharge of the jury, but in securing this right he does not become entitled to a release from the charge preferred against him. *Henning v. State*, 160 Ind. 386.

Defendant Electing to Have Cause Continued. — In *State v. Falconer*, 70 Iowa 416, after both parties had introduced

c. **POWER OF COURT OVER JURY AFTER DISCHARGE.** — It seems to be generally regarded as the correct rule that after a jury has been discharged the power of the court over it is gone and it cannot be recalled for a further consideration of the verdict.¹

7. Grounds for Discharge — *a.* **IN GENERAL.** — As has been hereinbefore stated, the court is authorized to discharge a jury in a criminal case before verdict only where an absolute necessity calls for such action.² There are certain fairly well defined grounds which are considered sufficient to constitute such necessity,³ but naturally the question depends to a large extent upon the circumstances of the particular case.⁴ In the notes are given

evidence, the district attorney filed a motion to examine a witness who had not been before the grand jury and of whose evidence the notice prescribed by statute had not been given. The court having sustained the motion, the defendant elected to have the cause continued, whereupon the jury was discharged and the cause continued to a subsequent term. It was held that a plea of former jeopardy at the subsequent term, on this state of facts, was unavailable. See *State v. Parker*, 66 Iowa 586, wherein, under substantially similar conditions, it was held that the defendant had not previously been placed in jeopardy.

Where the Record Is Silent as to the Consent of the defendant, consent will be presumed. *People v. Kerm*, 8 Utah 268.

1. *Mills v. Com.*, 7 Leigh (Va.) 751; *State v. Dawkins*, 32 S. Car. 17; *West v. West*, etc., R. Co., 61 Miss. 536; *Bond v. Wood*, 69 Ill. 282. For a general discussion of this point, see the article VERDICT.

2. See *supra*, XI. 2. *Necessity for Discharge*.

3. See the following sections.

4. **The Escape of the Prisoner** is a sufficient ground for discharging the jury. *State ex rel. Battle*, 7 Ala. 259.

The Illegal Drawing of a Jury is a sufficient ground for discharging it. *Barney v. State*, 49 Neb. 515.

Ignorance of Juror. — When, in the progress of a trial, it comes to the knowledge of the court that one of the jurors does not understand the English language, the jury may be discharged, a new one impaneled, and the trial begun *de novo*. *People v. Lopez*, 2 Edm. Sel. Cas. (N. Y. Oyer & T. Ct.) 262.

Thirteen Jurors Impaneled. — If there

are more than twelve jurors impaneled — *i. e.*, thirteen — and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial proceed before the legally constituted jury; or if the fact is discovered before verdict, the case may be withdrawn from the jury and a new jury impaneled and sworn to try it. *Bullard v. State*, 38 Tex. 504, *approved* in *Davis v. State*, 9 Tex. App. 634, as to the first proposition.

Misconduct of Prisoner. — The jury may be discharged when the prisoner, by his own conduct, places it out of the power of the jury to investigate his case correctly. *Mahala v. State*, 10 Verg. (Tenn.) 532.

To Bind Prisoner Over to Superior Court. — Under the *Georgia* County Court Act, allowing the judge to bind the prisoner over to the Superior Court if it shall appear on the trial that a felony has been committed, when such a condition exists, and after all the evidence is in, the court may discharge the jury and bind the prisoner over. *Cunningham v. State*, 80 Ga. 4.

Jury Returning Verdict in Violation of Sworn Duty. — Where a verdict is such as to convince the court that the jurors have purposely and wilfully disregarded the evidence and returned a verdict in violation of their sworn duty, it will not only be justified in discharging the jury, but it will be its duty to do so. *People v. Murray*, 85 Cal. 350.

Disqualified Juror. — Where, during the trial of a capital case, the defendant questions the qualification of a juror, and the court finds and declares him disqualified, there is no error in refusing to permit the defendant to waive the disqualification or to proceed with eleven jurors, nor in the action

some instances wherein it was held that a sufficient necessity did not exist to warrant the discharge of the jury.¹

Separation of Jury. — Where, after the submission of a cause, the jurors separate before agreement without permission, such action on their part furnishes good ground for discharging them and ordering a new trial, as it will vitiate any verdict they may thereafter render.²

of the court in discharging the jury. *State v. Allen*, 46 Conn. 531.

Civil Case — No Necessity for Verdict. — The jury may be discharged whenever it is determined by the presiding judge that there is no necessity for its verdict. *Stepp v. National L., etc., Assoc.*, 37 S. Car. 417.

Issues Properly Triable by Court. — The court may discharge a jury impaneled under the supposition that the case in hand was a jury case when, from developments on the trial, it becomes apparent that the case is one for the court, and that it is inexpedient to submit any specific questions to a jury. *Smith v. Barclay*, 54 Minn. 47.

Justice's Court — Failure of Defendant to Appear. — When a defendant in a justice's court who has demanded a jury fails to appear on the return day, the jury may be discharged. *Helmick v. Churchill*, 92 Hun (N. Y.) 524; *Kilpatrick v. Carr*, 3 Abb. Pr. (N. Y. C. Pl.) 117.

1. In *Poage v. State*, 3 Ohio St. 238, it was held error which operated to discharge the prisoner that the jury was discharged after retiring to consider the verdict, where the record showed that the jurors sent a note to the presiding judge, stating: "We cannot agree on our verdict. One of our jurors is not a naturalized citizen. We want your opinion to see if we can't be discharged," and further that "the jury aforesaid being brought into court, court ordered said jurors to be discharged from the further consideration of this cause."

To Allow Appeal of Solicitor for State. — In *State v. Prince*, 63 N. Car. 529, which was a trial of three defendants for a capital case, the court granted the defendants' motion to allow them to be witnesses for each other, and, for the purpose of allowing an appeal of the solicitor for the state, against the objection of the defendants, withdrew a juror and declared a mistrial. This was held to be such an erroneous exercise of discretion as would entitle the defendants to their discharge.

Adjournment — Absence of Judge from District. — That a special judge adjourned the trial and left the district temporarily is no ground for discharging the jury. *Powers v. State*, 23 Tex. App. 42.

To Procure New Indictment. — In *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, it was held that where the jury was discharged in order to allow the prosecutor to procure a new indictment, it operated as an acquittal.

Judge Erroneously Regarding Indictment Invalid. — A discharge of the jury after the introduction of testimony, the judge erroneously regarding the indictment as invalid and the defendant neither consenting nor objecting, is not a discharge from necessity. *Robinson v. Com.*, 88 Ky. 386.

Jury Deprived of Accommodations for Sleep or Rest. — A jury cannot be deprived of accommodations for sleep or rest and that fact made a cause for discharging them before the completion of the duties for which they were impaneled, without thereby entitling the accused to a defense of former acquittal. *Conklin v. State*, 25 Neb. 784.

2. *People v. Reagle*, 60 Barb. (N. Y.) 527; *Wyatt v. State*, 1 Blackf. (Ind.) 256. But see *Standley v. State*, 10 Ga. 82.

Absence of Juror. — Where, after the submission of a criminal cause, one of the jurors absents himself, it will furnish sufficient grounds for discharging the jury. *State v. M'Kee*, 1 Bailey L. (S. Car.) 651; *State v. Scarborough*, 2 S. Car. 439; *State v. Hall*, 9 N. J. L. 256; *Reg. v. Ward*, 10 Cox C. C. 573. And see *State v. La Croix*, 8 S. Dak. 369.

Separation by Consent of Accused. — In *Hilands v. Com.*, 111 Pa. St. 1, the trial of an indictment for murder, the jurors, after being sworn, were allowed to separate over night by consent of the accused. The next morning the court, considering this an irregularity which was not cured by the consent of the prisoner, discharged the jury and ordered a new one to be impaneled.

Alienage of Juror.—Where it appears after the jury has been sworn that one of the jurors is an alien, and therefore incompetent for jury duty, he may be discharged.¹

b. INABILITY TO AGREE—(1) *In General.*—Inability of the jurors to agree upon a verdict may constitute such a necessity as will require the discharge of the jury without prejudice to another trial; but this inability to arrive at a verdict must be sufficiently positive to constitute an absolute necessity.²

It was held that as the separation did not give rise to such an absolute necessity as to justify the discharge of the jury, the discharge operated as an acquittal.

In Civil Cases.—The court may discharge a jury in a civil case without the consent of the parties where it appears that one of the jurors has absconded or is unavoidably taken off from the other jurors. *Orr v. Bobb*, Sneed (Ky.) 244; *Harris v. Doe*, 4 Blackf. (Ind.) 369; *Pennell v. Percival*, 13 Pa. St. 197.

1. *Keech v. State*, 15 Fla. 591; *People v. Barker*, 60 Mich. 277; *Stone v. People*, 3 Ill. 328; *Thomas v. Leonard*, 5 Ill. 556.

2. **The Modern Doctrine Stated.**—“By necessity cannot be intended that which is physical only; the cases cited are not of that sort, for there is no application of force upon the court or the jury which produced the result. It is a moral necessity, arising from the impossibility of proceeding with the cause without producing evils which ought not to be sustained. According to the practice of England in ancient if not in modern times, it may be doubtful whether the mere disagreement of a jury would constitute the necessity in question; for by that law the jury, after the cause is committed to them, are to be kept without meat or drink, fire or candle, until they shall have agreed; and if this shall not be until the term of the court is closed, they may be made to follow the judge in carts to the next shire, and so until they shall have agreed. Under this severe coercion it will be rare that a jury withholds a verdict beyond a reasonable time, though it may well be doubted whether a verdict so obtained would do any honor to the administration of justice. It is well known that this manner of dealing with juries has not been practised in this commonwealth [Massachusetts] of late years, if it ever was. In all cases committed to

them they are made as comfortable as circumstances will admit of; are accommodated with fire and light, and are allowed reasonable refreshments at proper intervals. This change is owing to a general change of circumstances, and among others, to the more proper estimation of the agency of the jury in criminal trials than was formerly had. Practically, as well as theoretically, there is now a trial by jury; the members of it are deemed to be sound and intelligent men; it is supposed that their minds and faculties are to be exercised on the subjects committed to them; and that their verdict is the truth, as found by the evidence submitted to them. In this state of things, to attempt to coerce them by restraints and privations would be absurd. The jury themselves would revolt at any attempts to overpower their minds by famine or other violence, and resolute adherence to opinions already formed would be the sure consequence of any unreasonable effort to coerce them into a formal agreement. This change in the manners of the times of necessity produces a change in the course of trials. If a jury cannot now be starved into a verdict, if they cannot be carried in the train of the judge from county to county, it seems necessarily to follow that when they have applied their minds to the case as long as attention can be useful, and have come to a settled opinion resulting in a disagreement, the cause must be taken from them; and public justice demands that another trial should be had.” *Parker, C. J.*, in *Com. v. Purchase*, 2 Pick. (Mass.) 521.

Inability to Agree Not a Necessity.—Where the jurors cannot agree because their minds cannot come to the same conclusion from the evidence, it is not such a case of necessity as will authorize their discharge. *Mahala v. State*, 10 Verg. (Tenn.) 532.

Unless Some Great and Overruling Necessity requires a different course, the

Mere Disagreement. — The power to discharge a jury should not be exercised in a case of mere disagreement, but only after there has been a long effort to agree, and it appears satisfactorily to the court that there is no reasonable probability of an agreement.¹

Capital Cases — Felony Trials. — Some of the early cases go to the extent of denying to the court the right to discharge the jurors in a capital case, or on a trial for a felony, because of their inability to arrive at a verdict, unless with the consent of the accused.²

Modern Doctrine — Discretion of Judge. — According to the modern doctrine, however, in a case of felony, capital or otherwise, or on trial of a misdemeanor, or in a civil proceeding, the trial judge has a discretionary power to discharge the jury without the consent of either party where, after sufficient or reasonable time for deliberation, an agreement cannot be reached.³

court should continue its session until the end of the term prescribed by law before discharging a jury charged with a criminal case and entering a mistrial. *Barrett v. State*, 35 Ala. 406.

The court may discharge the jury of a prisoner capitally indicted only in a case of absolute necessity, to constitute which there must be some other ingredient than mere inability to agree. *Com. v. Cook*, 6 S. & R. (Pa.) 577.

1. *Ex p. Maxwell*, 11 Nev. 436.

Simple Statement of Inability. — The jury cannot be discharged simply because the members thereof say that they are unable to agree upon a verdict. *Josephine v. State*, 39 Miss. 613.

Detention to End of Term. — Where jurors state that they are unable to agree, the court may discharge them or may detain them to the end of the trial. *Osborne v. Wilkes*, 108 N. Car. 651.

Discharge by Custodian. — Where the court directed the officer in charge of the jury to discharge the jurors at a specified time if there was then no probability of their agreeing, it was held that so long as the probability of agreement was in doubt the officer was not authorized to discharge them, but that he should have kept them until informed by them that there was no probability of agreement. *State v. Cottrell*, 19 R. I. 724.

2. *Ned v. State*, 7 Port. (Ala.) 187; *Com. v. Cook*, 6 S. & R. (Pa.) 577; *Mahala v. State*, 10 Yerg. (Tenn.) 532; *Williams v. Com.*, 2 Gratt. (Va.) 568.

When Both Sides Protest Against the Discharge of the jurors for inability to agree, the court may retain them and give additional instructions. *Hogg v. State*, 7 Ind. 551.

3. *Colorado*. — *In re Allison*, 13 Colo. 525.

Idaho. — *People v. Stock*, 1 Idaho 218.

Maine. — *Richards v. Page*, 81 Me. 563.

Massachusetts. — *Com. v. Bowden*, 9 Mass. 494; *Com. v. Purchase*, 2 Pick. (Mass.) 521.

Michigan. — *People v. Harding*, 53 Mich. 48.

Minnesota. — *Rollins v. Nolting*, 53 Minn. 232.

Missouri. — *State v. Matrassey*, 47 Mo. 295.

New York. — *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301; *People v. Green*, 13 Wend. (N. Y.) 55; *People v. Goodwin*, 18 Johns. (N. Y.) 187.

Pennsylvania. — *McCreary v. Com.*, 29 Pa. St. 323.

Tennessee. — *State v. Pool*, 4 Lea (Tenn.) 363; *State v. Waterhouse*, Mart. & Y. (Tenn.) 278.

Texas. — *Brady v. State*, 21 Tex. App. 659; *Varnes v. State*, 20 Tex. App. 107.

Virginia. — *Jones v. Com.*, 86 Va. 740.

United States. — *U. S. v. Perez*, 9 Wheat. (U. S.) 579.

England. — *Winsor v. Reg.*, 6 B. & S. 143, 118 E. C. L. 143.

If the Other Business of the Court Has Been Disposed Of, and the jurors have considered their verdict so long as to indicate the absence of all probability that they will agree, the court may discharge them and enter a mistrial. *Barrett v. State*, 35 Ala. 406.

Modern Doctrine. — In *Com. v. Roby*, 12 Pick. (Mass.) 496, it was said by C. J. Shaw that "it has been held in modern times, though it was long

Several Defendants. — On the trial of an indictment against several defendants, if the jurors agree as to one or more of the defendants, but are unable to agree as to others, their verdict may be received as to the former and they may be discharged as to the others.¹

Reasonable Time for Deliberation. — What will constitute a reasonable time for deliberation is not capable of exact determination, but regard must be had to the character of the case, the length of the trial, the forum, and other circumstances from which the reasonableness of the deliberation can be determined.²

Reason for Court's Conclusion — Record. — The court should not only be satisfied of the improbability of an agreement, but the reasons for such conclusion should be set out in the order of discharge, that the reviewing court may consider them,³ and for the like reason the record of the discharge should contain all the essential facts upon which the order of discharge was based, as well as the determination of the court thereon.⁴

doubted and these doubts were countenanced by some respectable authorities, that where the jury, after being long kept together, cannot agree, where it is manifest that they have no reasonable prospect of agreeing, and no means remain but famine or exhaustion to compel them to agree, or where the powers of the court are near terminating by the legal termination of their session, the court, as a power necessarily incident to the due and regular administration of justice, may discharge the jury without the consent of the prisoner, and again impanel a jury and put him upon his trial." *Citing Com. v. Bowden*, 9 Mass. 494; *People v. Goodwin*, 18 Johns. (N. Y.) 187; *U. S. v. Perez*, 9 Wheat. (U. S.) 579.

1. *Com. v. Wood*, 12 Mass. 313; *Com. v. Cook*, 6 S. & R. (Pa.) 577.

Discharge for Inability to Agree as to All. — In *Com. v. Cook*, 6 S. & R. (Pa.) 577, a capital case, the court, after fully discussing the power to discharge jurors, held that three of the defendants were entitled to their discharge because the jurors were discharged without and against the consent of the prisoners merely because they had not agreed, and said they never could agree as to the case of one of the prisoners, though as to two of them they had agreed and were ready to give a verdict if the court would receive it.

2. *State v. Reinhart*, 26 Oregon 466. See *infra*, XI. 7. b. (2) *Length of Deliberation*.

Petty Case in Justice's Court. — In *Fowler v. State*, 85 Ind. 538, which was a prosecution in a justice's court for the unlawful sale of intoxicating liquors, the court, in declining to interfere with the action of the justice in discharging the jury after about three hours' deliberation, and until late in the night, said: "The decisions which declare the rule governing in cases of trials in courts of superior jurisdiction in cases of felony cannot be applied in their rigorous strictness to trials before justices of the peace upon a charge of a misdemeanor where no severe penalty can be inflicted, and where an appeal lies which secures a trial *de novo*. It is obvious that the phrase 'a reasonable time' is a relative one, and is to be considered as having relation to the forum, the character of the charge, and the extent of the penalty. It would be unreasonable to require a jury to be kept a great length of time in a justice's court where the charge is not one of very great gravity and the punishment cannot extend beyond a fine of a few dollars."

3. *State v. Pool*, 4 Lea (Tenn.) 363.

4. **Record Must Show Necessity for Discharge.** — In *Dobbins v. State*, 14 Ohio St. 493, it was said that when the court is convinced that the deliberation is for such a time as to preclude the possibility of agreement, and the facts are such as to justify the conviction, the order discharging the jury may be made. But as this order may most materially affect the legal rights of the party, and

Statements of Jurors — Conclusiveness. — While the report of the jury is competent evidence upon which the court may act in determining the possibility of an agreement, yet the court is not bound to accept as final the statements of the jurors as to their inability to agree.¹

as a discharge without sufficient reason is in effect an acquittal, it must appear from the record, to justify holding him to a further trial, that an obstacle which the law will recognize as a necessity did in fact exist; that it engaged the attention of the judge, and that his order was based thereon, and was the result of consideration and decision. If a further statement of the matter is desired the party may require the signing of a bill of exceptions containing all the facts and circumstances upon which the finding and order are based.

Facts as to Inability and Determination by Court. — That the jurors were unable to agree upon a verdict, and that there was no reasonable probability of their doing so on further consultation and deliberation, are essential facts which must be determined by the court and established by the record; and if the record fails to show the existence of such facts and such determination, the discharge of the jury is an illegal exercise of power on the part of the court. *Ex p. Maxwell*, 11 Nev. 436.

That Court Exercised Its Judgment. — The record should show that before the jury was discharged the court exercised its judgment on the question as to whether or not an agreement on a verdict was probable. *Hines v. State*, 24 Ohio St. 134.

That Jurors were Kept Together Sufficiently Long. — By the *Ohio* Crim. Code, § 156, the record must show that the jurors were kept together so long that there was no probability of agreement. *Hines v. State*, 24 Ohio St. 134.

Entry of Finding of Inability. — When the jurors, after having deliberated upon their verdict such a length of time as the trial court may deem reasonable, shall make known in open court, in the presence of the defendant, their inability to agree, and the court, having in view all the circumstances surrounding the case, and being satisfied with such report, causes a finding to that effect to be entered in the journal and thereupon discharges the jury, the apparent jeopardy which the record shows attached when the jury was impaneled is annulled, and the defendant

may again be put on trial for the same offense. *State v. Reinhart*, 26 Oregon 466.

Sufficient Showing of Necessity. — A recital in the record that "the court, after questioning each one of the jurors as to the probability of their agreeing upon a verdict, and being satisfied that there is no reasonable probability of the jury so agreeing, orders the jury discharged," etc., clearly shows a legal necessity contemplated in law, and sufficient to justify the discharge of the jury. *People v. Smalling*, 94 Cal. 112.

1. *State v. Reinhart*, 26 Oregon 466.

Province of Court. — Where such a statement is made, the court below, being familiar with the nature of the evidence and probably with the temperaments of the men who compose the jury, is better qualified than is the appellate court to say whether there is a reasonable probability of agreement. *People v. Greene*, 100 Cal. 140.

Erroneous Acceptance of Statement. — The discharge of a jury on the statement of the jurors, after a deliberation of three hours and a half, that they could not agree was held an abuse of discretion on the part of a trial judge who "explained" that the jury had "been out a reasonable time," where by statute (*Texas* Code Crim. Pro., art. 701) it is provided that the jurors should be "kept together for such time as to render it altogether improbable they can agree." *Powell v. State*, 17 Tex. App. 345.

Statement by Foreman. — A statement in the record that the jurors "by their foreman stated that they were unable to agree upon a verdict" does not show sufficient to justify the discharge of the jury. *Ex p. Maxwell*, 11 Nev. 429.

Sending Out for Further Deliberation. — When jurors report inability to agree the court may send them out for further deliberation. *Watson v. Minneapolis St. R. Co.* 53 Minn. 551.

Though the report of the jurors that they cannot agree is the proper evidence upon which the judge may act in determining upon the impossibility or their agreement, yet he may keep them

Ascertainment of Inability to Agree. — It has been held that the sheriff is not the proper person to ascertain and report the possibility of agreement on a verdict,¹ but that the jurors should be brought before the court and should announce their inability to agree in the presence of the court and the accused.²

Questions of Law and Fact. — Whether it is possible for the jurors to agree is necessarily a question of fact, or of mixed law and fact, to be determined by the trial court from the facts and circumstances of the particular case, and when so determined it is conclusive³ unless the trial court has abused the discretion reposed in it in that behalf.⁴

(2) **Length of Deliberation.** — As hereinbefore stated, the time which will show the improbability of an agreement depends largely upon the nature of the cause and other facts and circumstances, and cannot be precisely stated. Consequently, whether or not there has been sufficient deliberation must rest to a great extent in the discretion of the trial court, which should not discharge the jury until every reasonable hope of agreement has vanished.⁵ Thus, in the cases referred to in the subjoined notes, deliberation for the time indicated was held sufficient to justify

together for further consultation so long as, in his opinion, there is reasonable ground for believing that they may finally agree. *People v. Harding*, 53 Mich. 481.

Repeated Statements of Inability to Agree. — In *Dutton v. Tracy*, 4 Conn. 79, the jurors, after two days' consideration of a cause, having come into court three times and as often returned for further consideration, declared that they never could agree, and it was held that there was no error in the court taking back the papers and causing another jury to be summoned and impaneled.

In *Florida* the statute (Rev. Stat., § 1093) providing for the discharge of a jury by the court when the jurors cannot agree confers upon them the legal right to be discharged from the consideration of a cause when, after due and thorough deliberation, they come into court for the second time after being charged or recharged and avow their inability to agree upon a verdict, without requesting further explanation of the law. *Lambright v. State*, 34 Fla. 564.

1. **Report by Sheriff.** — Where, in pursuance of an order to the sheriff to inquire of the jurors whether they had agreed, he reported that they "could not agree on a verdict," it was held that the report was extraofficial, was

not evidence upon which the court could act, and that an order for the discharge of the jury under such circumstances would be unauthorized. *People v. Cage*, 48 Cal. 323.

2. *People v. Cage*, 48 Cal. 323.

3. *People v. Harding*, 53 Mich. 487; *State v. Reinhart*, 26 Oregon 474.

4. *School Dist. No. 1 v. Bragdon*, 23 N. H. 507.

In *Texas* the court will not interfere with the action of the court below in exercising the discretion conferred upon it by art. 701 of the Code Crim. Pro., which authorizes the discharge of a jury when the jurors have been kept together such a length of time as to render it altogether improbable that they can agree, unless that discretion has been abused to the injury of the defendant's right. *Varnes v. State*, 20 Tex. App. 109; *Brady v. State*, 21 Tex. App. 659.

5. *People v. Stock*, 1 Idaho 218; *Murphy v. Wilson*, 46 Ind. 537; *Gullick v. Van Tilburgh*, 16 N. J. L. 417; *Green v. Telfair*, 11 How. Pr. (N. Y. Supreme Ct.) 260; *Selman v. State*, 33 Tex. Crim. Rep. 631.

Time a Question of Law. — Under a plea of former jeopardy because of the discharge of the jury in the former trial before verdict, and where it is alleged that the discharge was because of the inability of the jurors to agree, the

the court in discharging the jury,¹ while in other cases, wherein the differences in the time consumed in deliberation are not particularly apparent, there was held to be an erroneous exercise of the discretion reposed.²

time consumed by the jury is a question of fact, and a sufficiency of time for due deliberation is a legal question for the court. *Helm v. State*, 67 Miss. 562.

Arbitrary Discharge.—Where, by statute, a jury may be discharged "after they have been kept so long together that there is no possibility of agreeing," the court cannot arbitrarily exercise the right of discharge until a sufficient time has elapsed to preclude all reasonable expectation that the jurors will agree. *State v. Shuchardt*, 18 Neb. 454.

The Length of Time that jurors shall be kept together, and whether or not they shall be discharged without agreeing upon a verdict, must be left to the sound discretion of the court before whom the case is tried. *School Dist. No. 1 v. Bragdon*, 23 N. H. 507.

1. Thirty Minutes.—*People v. Green*, 13 Wend. (N. Y.) 55.

One and One-half Hours.—*Lovett v. State*, 80 Ga. 255.

Four Hours.—*Jones v. Com.*, 86 Va. 740, a trial for robbery.

One Night.—*In re Allison*, 13 Colo. 525.

Fourteen Hours.—*Rollins v. Nolting*, 53 Minn. 232, a trial before a justice.

Eighteen Hours.—*Com. v. Purchase*, 2 Pick. (Mass.) 521, a capital case.

Twenty Hours.—*Varnes v. State*, 20 Tex. App. 107, horse stealing.

Forty-six Hours.—*Brady v. State*, 21 Tex. App. 659, embezzlement.

Two Days.—*Smith v. State*, 22 Tex. App. 196.

Two and One-half Days.—*People v. Stock*, 1 Idaho 218.

Three Days.—*Wright v. Com.*, 75 Va. 914, a capital case, *distinguishing Williams v. Com.*, 2 Gratt. (Va.) 568, decided prior to Code Va. 1873, c. 202, § 12. And see *Dye v. Com.*, 7 Gratt. (Va.) 662.

Six Days.—*State v. Honeycutt*, 74 N. Car. 391, a capital case.

Two Hours—Simple Assault—Defendant Not Present.—In *Selman v. State*, 33 Tex. Crim. Rep. 631, which was a conviction for simple assault, the punishment being assessed at five dollars, there was held to have been no error in discharging the jury, it appearing that

after deliberating for two hours the jurors disagreed on a question of fact, that the counsel for the state assented to the discharge, but the counsel for the defendant stated that the latter not being present he could not consent and that the court would have to do as it saw proper in the premises. *Distinguishing Rudder v. State*, 29 Tex. App. 264.

Six Hours—Discharge on Statement of Jurors.—In *People v. Greene*, 100 Cal. 140, it was held that in view of section 1140 of the Penal Code, authorizing the court to discharge the jury at the expiration of such time as it might deem proper if it satisfactorily appeared that there was no probability of agreement, there was no reason to interfere with the finding against a plea of former jeopardy based on a record showing that the jury in a former trial had been discharged on the statement of the jurors that they could not agree after deliberating six hours, there appearing to have been no abuse of the discretion.

Deliberation Until Last Day of Term.—In *State v. Whitson*, 111 N. Car. 695, a capital case, the jury offered a verdict which the court refused to receive because not responsive to the issues, and the jurors were then kept together until the night of the last day of the term, having deliberated for four days. It was held that the direction of a mistrial and discharge of the jury were justified.

2. Two or Three Hours' consultation is not sufficient to justify a justice of the peace in discharging a jury because the jurors cannot agree. *Gullick v. Van Tilburgh*, 16 N. J. L. 417.

Twelve Hours.—A report of the jurors that they cannot agree after twelve hours' consultation does not constitute such a necessity as will authorize the discharge of the jury. *Miller v. State*, 8 Ind. 325.

Nineteen Hours—Failure to Continue Session.—In *Mahala v. State*, 10 Yerg. (Tenn.) 532, a trial for a capital offense, the case was given to the jury about two P. M. on one day, and in about half an hour thereafter the jurors informed the judge that they could not agree. At his direction, however, they again retired, but in about one hour and

c. ILLNESS OR DEATH — (1) *Of Juror*. — Where, owing to the death or illness of a juror during the progress of the trial, it becomes impossible to proceed with the case, a sufficient necessity exists to justify the court in discharging the jury and holding the prisoner for trial.¹ Not every indisposition of a juror, however, will warrant the discharge of the jury; the illness should be of such a character as to incapacitate the juror from performing his duties in a proper manner.² The question whether or not

a half thereafter stated that they never could agree. Again retiring and remaining out all night, at about half-past nine o'clock the next morning they informed the court that it was impossible for them ever to agree, and they were then discharged. It was held that the facts did not show any necessity authorizing the discharge, it further appearing that the court continued its session until the following day.

Twenty Hours. — The mere fact that in a capital case the jurors were out twenty hours without agreeing on a verdict does not show a sufficient reason for their discharge. *Conklin v. State*, 25 Neb. 784.

Forty-five Hours. — In *State v. Alman*, 64 N. Car. 364, a capital case, it was held that the mere fact that a jury was unable to reach an agreement after a deliberation of forty-five hours — from Saturday evening till Monday evening thereafter of the second week of the term — was not a sufficient reason for discharging the jury, even though the jurors may have stated that probably they could never agree.

Forty-six Hours. — In *Rudder v. State*, 29 Tex. App. 262, it was held error to discharge a jury which had been out forty-six hours, the jurors having announced their inability to agree, but counsel for the defendant refusing to agree to their discharge and the defendant being absent and in confinement.

1. *Alabama*. — *Nugent v. State*, 4 Stew. & P. (Ala.) 79; *Ned v. State*, 7 Port. (Ala.) 213; *Jackson v. State*, 78 Ala. 471; *Hawes v. State*, 88 Ala. 37; *Webb v. State*, 100 Ala. 47.

Illinois. — *Shawneetown v. Mason*, 82 Ill. 337.

Louisiana. — *State v. Moncla*, 39 La. Ann. 868.

Massachusetts. — *Com. v. Roby*, 12 Pick. (Mass.) 496.

Missouri. — *Hector v. State*, 2 Mo. 166.

North Carolina. — *State v. Scruggs*, 115 N. Car. 805.

Tennessee. — *Fletcher v. State*, 6 Humph. (Tenn.) 249; *State v. Curtis*, 5 Humph. (Tenn.) 601.

Texas. — *Bates v. State*, 19 Tex. 122.

England. — *Rex v. Edwards*, 4 Taunt. 309; *Rex v. Scalbert*, 2 Leach C. C. 620.

See also *Com. v. Fells*, 9 Leigh (Va.) 613.

In *Rex v. Edwards*, 4 Taunt. 309, the jury was discharged because one of the members fell in a fit and was pronounced by a physician, on oath, incapable of discharging his duties as a juror on that day. See also *Rex v. Stevenson*, 2 Leach C. C. 546.

2. In *People v. Buchanan*, (Gen. Sess.) 25 N. Y. Supp. 492, the court said: "Illness of a juror is not of itself a sufficient ground to justify the court in discharging the jury; it must be of such a character as to render the juror unable, at least within a reasonable time, to perform his duty, and when that fact is established to the satisfaction of the court by proper evidence, a case of inexpediency of keeping the jury longer together is shown, calling for the exercise of the discretionary power vested in the court to discharge the jury."

Court May Adjourn for Short Time. — In *State v. Garrity*, 98 Iowa 101, it was held that a statute authorizing the court to discharge a juror too sick to perform his duties, to swear in a new juror and begin the trial anew, or to discharge the jury and impanel a new one did not preclude the court from adjourning for a short time until the juror recovered.

Temporary Exhaustion. — In *Com. v. Clue*, 3 Rawle (Pa.) 498, it was held that no necessity for a discharge was shown because of the illness or temporary exhaustion of two of the jurors because they were kept without meat or drink, where the indisposition could have been speedily removed by proper

the condition of the juror's health is such as to prevent him from serving is a matter resting in the sound discretion of the trial court.¹

(2) *In Juror's Family.* — The death or serious illness of a member of a juror's family is held to be a sufficient reason for discharging the jury, since under such circumstances the juror could not be in a state of mind to discharge properly his duties as a member of the jury.²

nourishment, to which course the defendant had consented.

Recovery of Juror. — There is no error in refusing to discharge a jury because of the illness of one of the members thereof where, upon the statement of the court to the jurors that they would be discharged if the sick juror was not in a condition to remain longer on the jury, he stated that he was about well, and that it would not inconvenience him to remain on the jury, and no further complaint was heard of the illness. *Johnson v. State*, 60 Ark. 45.

Sickness Must Be of Serious Nature. — Where, by statute, a jury may be discharged "on account of sickness of a juror, or other accident or calamity requiring their discharge," it has been intimated that the sickness must be of a sudden and calamitous character, and of such a nature as to render the juror's further detention in the jury room manifestly improper. *Conklin v. State*, 25 Neb. 784.

Record Should Show Nature of Sickness. — In *Robinson v. State*, 52 Ala. 587, the record showed that a juror "complained of being suddenly taken sick and unable to sit on the jury," and that without more, and against the objection of the defendant, he was excused, etc., and the court, though deciding the case on another ground, said that "it would have been better if the record showed that the court below ascertained the sickness of the juror to be real, and such as that the trial could not proceed."

1. *Hubbard v. Gale*, 105 Mass. 511; *Atkins v. State*, 16 Ark. 570.

In *State v. Reed*, 53 Kan. 767, it was held that where, after the trial was begun, a juror was reported sick, and where the matter of the sickness and incapacity of the juror to proceed with the trial was heard and determined by the court by judicial methods and a finding was made, based upon testimony which was not preserved, that a discharge was absolutely necessary,

the appellate court could not say that there was not good cause for the discharge, nor that the discharge should operate as an acquittal.

2. *Hawes v. State*, 88 Ala. 37; *Stocks v. State*, 91 Ga. 831; *Bates v. State*, 19 Tex. 122; *Com. v. Fells*, 9 Leigh (Va.) 613; *State v. Davis*, 31 W. Va. 390. And see *Parsons v. State*, 22 Ala. 53.

The Serious Illness of the Wife of a Juror will present the necessity for his discharge without prejudice to further prosecution. *Hawes v. State*, 88 Ala. 37.

In *Com. v. Fells*, 9 Leigh (Va.) 613, a juror whose wife was momentarily expecting her accouchement was withdrawn and the rest of the jury was discharged.

Death of Juror's Son. — Where, after the greater part of the evidence had been heard in a felony case, the information was imparted to one of the jurors that his son had just died, and the court certified that it appeared to the satisfaction of the court that the juror, by reason of his affliction, was unable to discharge his duties as a juror, and discharged him at his request, it was held that a necessity for the discharge of the juror existed, and that he was properly discharged. *State v. Davis*, 31 W. Va. 390.

Death of Juror's Mother. — When, during the trial of a capital case, the mother of a juror died, it was held not to be improper for the court to inform the juror and to discharge him from further service, and also that it was immaterial whether the accused did or did not consent to the juror's being informed of his mother's death or to the mistrial, the emergency authorizing the discharge of the juror, and thus ending the trial, being of a nature similar to one which would arise upon the serious sickness of a juror or of the presiding judge, or sickness in the family of either requiring his personal care and attention, or from other cause which should be recognized as afford-

(3) *Of Accused.* — The illness of the accused, necessitating his removal from the court and the stopping of the trial, is a sufficient ground for discharging the jury.¹

(4) *Of Court or Counsel.* — The illness of the presiding judge furnishes a sufficient ground for discharging the jury,² and it has been intimated that the sudden illness of counsel might be a sufficient reason for a discharge of the jury where there are no associate counsel who can proceed with the case.³

d. END OF TERM. — In the absence of any statute to the contrary, whenever the time fixed by law for the expiration of a term arrives, the powers of the court for that term are at an end by operation of law, and the powers of the jury must terminate with those of the court to which it is attached.⁴ Thus, where

ing in law a sufficient necessity to warrant such action by the trial court. *Stocks v. State*, 91 Ga. 831.

Juror Excused by Consent of Counsel. — After a jury had been selected and sworn, but before the trial had begun, one of the jurors, in open court, asked to be excused from serving because of sickness in his family. In the presence of the accused, and without objection from him, his counsel consented that the juror's request might be granted, and accordingly he was excused and another person served in his stead. It was held that these circumstances presented no sufficient grounds for the reversal of judgment upon conviction of the accused. *Catron v. State*, (Neb. 1897) 72 N. W. Rep. 354. But see *Sterling v. State*, 15 Tex. App. 249.

1. *Ned v. State*, 7 Port. (Ala.) 187; *Lee v. State*, 26 Ark. 260; *Com. v. Roby*, 12 Pick. (Mass.) 496; *State v. Wiseman*, 68 N. Car. 203; *Brown v. State*, 38 Tex. 482; *Meadow's Case*, Foster 76; *Rex v. Streek*, 2 C. & P. 413, 12 E. C. L. 195; *Rex v. Stevenson*, 2 Leach C. C. 546. And see *Mahala v. State*, 10 Verg. (Tenn.) 532.

2. *Nugent v. State*, 4 Stew. & P. (Ala.) 72.

In *State v. Ulrich*, 110 Mo. 350, the trial of an indictment for bigamy, it appeared that after the trial had proceeded for a day, with the consent of the defendant the jury was dismissed with due admonition until the conclusion of another case which had then been taken up by another judge, and that when that case was ended the judge, being ill, discharged the jury, set the case for trial thereafter, and

adjourned the court. It was held that the defendant had not been placed in jeopardy.

3. *U. S. v. Watson*, 3 Ben. (U. S.) 1.
4. *Lore v. State*, 4 Ala. 173; *Ned v. State*, 7 Port. (Ala.) 213; *People v. Cage*, 48 Cal. 323; *Johnson v. Pacific Cement Co.*, 50 Cal. 648; *Ashbaugh v. Edgecomb*, 13 Ind. 466; *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; *Shearer v. Clay*, 1 Litt. (Ky.) 261; *Ex p. Maxwell*, 11 Nev. 436; *State v. Moor*, Walk. (Miss.) 134; *Norvell v. Duval*, 50 Mo. 272; *Berry v. Wallin*, 1 Overt. (Tenn.) 241; *Com. v. Thompson*, 1 Va. Cas. 319.

In *Com. v. Thompson*, 1 Va. Cas. 319, the application of the accused to be discharged because the jury separated on adjournment at the end of the term, without having rendered a verdict, was refused because it did not appear that the trial court had made any order discharging the jury, it appearing on the contrary that upon the adjournment of the court "at the end of the term the members of the said jury were necessarily separated, and its capacities and legal existence destroyed by operation of law."

Adjournment Operates as Discharge. — Where, by statute, a final adjournment of the court for a term discharges the jury (Cal. Code Civ. Pro., § 617), if a cause on trial is continued to a day in a succeeding term, an adjournment without concluding the case operates to discharge the jury, notwithstanding that section 188 provides that the trial of an action shall not be discontinued by the arrival of the period fixed by law for another term of the court. *Johnson v. Pacific Cement Co.*, 50 Cal. 648.

the jurors are unable to agree before the end of the term, they may be discharged and the defendant remanded.¹ But where it is provided by statute that the court may continue the term until the pending case is disposed of, a discharge of the jury because of the expiration of the term is improper.²

c. **BIAS APPEARING DURING TRIAL.** — Where it is made to appear that, either by reason of facts existing at the time the juror was sworn, but not then known or disclosed to the court, or by outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the parties, the necessity for the exercise of the power to discharge the jury in order to prevent the defeat of the ends of public justice becomes manifest.³ Thus it is a sufficient ground for discharging the jury that

1. *State v. Moor*, Walk. (Miss.) 134; *Ex p. Maxwell*, 11 Nev. 436; *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; *Shearer v. Clay*, 1 Litt. (Ky.) 261.

In *Josephine v. State*, 39 Miss. 613, it was held that where the jurors reported their inability to agree within five minutes of the expiration of the term of the court, it presented such a legal necessity as authorized the discharge of the jury without the consent of the accused.

In *State v. Carland*, 90 N. Car. 668, the trial of an indictment for murder, there was held to be no error in discharging a jury, it appearing that the jurors stood six to six at four o'clock P. M. on the last day of the term, after being out eight days, and that, the term being prolonged until the following Monday, they came in on the afternoon of that day standing substantially the same way, and stating that it was improbable that they could agree.

In *People v. Goodwin*, 18 Johns. (N. Y.) 187, after a trial for five days, the jury having been out for seventeen hours and declaring that there was no probability of agreement, and it being but one half-hour to the end of the term, it was held that the discharge of the jury would not preclude another trial.

Another Jury May be Sworn. — If a jury cannot reach an agreement during the term, another jury may be sworn in at the succeeding term. *Berry v. Wallin*, 1 Overt. (Tenn.) 241.

Jury Not Sworn or Charged. — There is no error in discharging a jury which is not completed until eleven o'clock on the last day of the term, where such jury has not been sworn or charged

with the cause. *State v. Lawry*, 4 Nev. 161.

2. *State v. McGimsey*, 80 N. Car. 377; *Wright v. State*, 5 Ind. 290.

In *Mississippi*. — By section 2292 of the Mississippi Code of 1880, where a trial is under progress at the time fixed by law for the expiration of the term the court "may" proceed to the conclusion of the cause as if the stated term had not expired. Under this statute it was held error on the part of the trial judge in a murder case to discharge the jury after a deliberation of three and a half hours on receiving a statement that the jurors could not agree, although the stated term was about to expire, no necessity for the discharge appearing. *Whitten v. State*, 61 Miss. 717.

Prior to the Code of 1880, however, the end of the term was a sufficient ground for discharging the jury. *Josephine v. State*, 39 Miss. 613; *Teat v. State*, 53 Miss. 439.

Operates as Acquittal. — Where a jury was charged with the trial of a prisoner for murder, and before the return of a verdict the term of the court expired and the jurors separated, it was held that the prisoner could not be tried again. *Matter of Spier*, 1 Dev. L. (N. Car.) 491.

3. *Simmons v. U. S.*, 142 U. S. 148.

Wager on Result of Trial. — The mere fact that a wager on the result of the case has been made by a juror will cause his discharge. *Cluverius v. Com.*, 81 Va. 787.

Juror Surety for Defendant. — In *Com. v. McCormick*, 130 Mass. 61, it was held that the trial judge did not err where, without consent of the defend-

jurors have been tampered with.¹ But there must be sufficient reason to suppose that the juror or jurors may be biased before the discharge of the jury is justified.²

f. TO OBTAIN EVIDENCE. — It has generally been held that it is not a sufficient necessity to warrant the discharge of the jury that the public prosecutor finds himself unable to proceed for

ants in the indictment, he stopped the trial and took the case from the jury on ascertaining that one of the jurors was a surety upon a recognizance entered into by one of the defendants in the case.

Acquaintance with Prisoner. — Where, pending a trial, evidence on oath was introduced tending to show that a juror had sworn falsely on his *voir dire* that he had no acquaintance with the defendant, and it was undisputed that a letter written and published in the newspapers by the defendant's counsel commenting upon that evidence had been read by the juror in question and by others of the jury, it was held that it was clearly within the authority of the trial judge to order the discharge of the jury. *Simmons v. U. S.*, 142 U. S. 148.

Juror Fraudulently on Jury to Acquit Prisoner. — A mistrial may be ordered and the jury discharged where it is shown that one of the members fraudulently procured himself to be selected, for the purpose of acquitting the prisoner. *State v. Bell*, 81 N. Car. 591; *State v. Washington*, 90 N. Car. 664. And see *Ochs v. People*, 124 Ill. 399.

Expression of Opinion. — Where, after a jury is sworn, it is ascertained for the first time that a juror has affirmed and expressed an opinion as to the guilt of the prisoner, the trial judge may discharge the jury and order a new trial. *Evans v. State*, 6 Tex. App. 513; *State v. Cason*, 41 S. Car. 531. And see *State v. Shirer*, 20 S. Car. 406.

Objection to Capital Punishment. — Where, in a capital case, after a jury is sworn and evidence is introduced, the prosecution ascertains that a juror is opposed to capital punishment, it has a right to have him excused, though the defendant objects. *State v. Vaughan*, 23 Nev. 103; *State v. Dis-kin*, 34 La. Ann. 919.

1. *Love v. Moody*, 68 N. Car. 200.

Presumption from Unauthorized Separation. — It is clearly proper to discharge jurors who by an unauthorized separation have raised a presumption that

they were tampered with. *Griffie v. State*, 1 Lea (Tenn.) 41.

To Guard Against Fraudulent Practices.

— The jury may be discharged when a necessity arises "from the duty of the court to guard the administration of justice against fraudulent practices." *State v. Washington*, 89 N. Car. 535; *State v. Bailey*, 65 N. Car. 426; *State v. Wiseman*, 68 N. Car. 203.

2. Juror Member of Grand Jury. — The discharge of a juror, after he has been sworn together with the other members of the jury, because he was of the grand jury which found the indictment is a discharge without sufficient cause where the fact that he had been a grand juror would be a mere cause of challenge and not a disqualification. *Whitmore v. State*, 43 Ark. 271; *O'Brian v. Com.*, 9 Bush (Ky.) 333.

Heard Evidence on Motion for Change of Venue. — That they heard the evidence on an application for a change of venue is no reason for discharging regular jurors and issuing a special venire. *State v. Wisdom*, 84 Mo. 177.

Expression of Opinion. — In *Mahoney v. San Francisco, etc.*, R. Co., 110 Cal. 471, it was held error to discharge a juror who, during the progress of the cause, stated to the judge, in the presence of the counsel, that he was familiar with the country in which the accident occurred, and did not believe the statements of three of the plaintiff's witnesses in regard to their description of the country, though the improper expression of opinion might be such misconduct as would necessitate a new trial.

Juror Cross-examining Witness. — The refusal of a motion to exclude a juror from the box after the beginning of a trial because he assumed to cross-examine a witness, where there was nothing in the nature of the juror's questions which disclosed the fact that he was prejudiced and incompetent to discharge the duties imposed on him, is not error. *Chicago, etc., R. Co. v. Harper*, 128 Ill. 384.

want of sufficient evidence to convict.¹ But in some cases the discharge of the jury because of the absence of material evidence has been sanctioned.²

XII. EMBRACERY.—The offense of embracery is indictable and punishable as a crime. It may be punished as a contempt of court, and the wrongdoer is also liable to a party sustaining injury by the wrongful act in a civil action. The latter remedy, however, has evidently been but seldom resorted to, since the books do not appear to contain any adjudications on the subject.³

The indictment charging the offense in the language or substantially in the language of the statute denouncing it is sufficient.⁴

1. *Klock v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 676; *People v. Barrett*, 2 Cai. (N. Y.) 304. And see *State v. Nelson*, 7 Ala. 610; *Reg. v. Charlesworth*, 1 B. & S. 460, 101 E. C. L. 460; *Rex v. Jeffs*, 2 Stra. 984.

The Prisoner Is Entitled to His Discharge where the public prosecutor, after the introduction of evidence, withdraws a juror because he finds himself unprepared with the proper evidence to convict, and that condition does not exist because of improper practices on the part of the defendant or some one acting in his behalf, or some overruling or unavoidable necessity. *Klock v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 676; *People v. Barrett*, 2 Cai. (N. Y.) 304.

2. Failure of Witness to Appear.—In *Jones v. Reg.*, (Can.) 1 Crim. L. Mag. 766, it was held that in a trial for felony the court had a discretion to discharge the jury after it had been sworn, and to remand the prisoner, because of the failure of a crown witness to appear.

Transcript Not Transmitted.—Where the place of trial has been changed, and after the jury has been sworn to try the case on the plea of not guilty it is discovered that the transcript of the record and proceedings in the original court have not been transmitted, as required by law, the jury may be discharged without the consent of the defendant. *Ball v. State*, 48 Ark. 94.

Refusal of Witness to Take Oath.—In *U. S. v. Coolidge*, 2 Gall. (U. S.) 364, a criminal case, it was held that the court had power to discharge the jury because a witness for the government refused to take the oath usually administered to witnesses.

Absence of Evidence Occasioned by Defendant.—In *Reg. v. Charlesworth*, 1 B. & S. 460, 101 E. C. L. 460, the court

thought it questionable whether the judge might not be justified in discharging the jury where the absence of the evidence was occasioned by collusion between the witness and the accused.

To Try Three Defendants Together.—In *People v. Ellis*, 15 Wend. (N. Y.) 371, which was a trial for a misdemeanor, on motion of the district attorney, and against the objection of the defendants, the court withdrew a juror for the purpose of enabling the district attorney to bring on the trial against three defendants at the same time.

3. See *supra*, X. 9. *Communications with Outsiders.*

Embracery is Defined to be "an attempt by either party, or a stranger, to corrupt or influence a jury, or to incline them to favor one side by gifts or promises, threats or persuasions, or by instructing them in the cause, or any other way except by opening and enforcing the evidence by counsel at the trial, whether the jurors give a verdict or not, and whether the verdict be true or false." *Gibbs v. Dewey*, 5 Cow. (N. Y.) 503; *Bac. Abr.*, tit. *Juries*, M, 3; 1 *Hawk. P. C.*, c. 85; *Co. Litt.* 369.

What Included in Term "Petit Jurors."—An act denouncing the offense of bribing petit jurors, among others, is not confined to the bribery of or the attempt to bribe jurors actually impaneled and sworn, but will apply to all jurors who have been lawfully selected and summoned to act as such. *State v. McCrystol*, 43 La. Ann. 907.

The Bribery of a Tales Juror is within an act making it an offense to give any sum or sums of money, or any other bribe, present, reward, or any other thing, to grand or petit jurors, etc. *State v. McCrystol*, 43 La. Ann. 907.

4. **Following Statutory Language.**—An indictment for embracery is good

The proper organization of the term at which the offense is charged to have been committed must be shown.¹

An Allegation as to the "Attempt" to corrupt and influence the jury is very important and necessary, and the attempt must be shown by proper averments to have been made in fact by the person charged with the crime.²

if it plainly and with sufficient fulness follows the language of the statute under which it is drawn. *State v. Williams*, 136 Mo. 293; *State v. McCrystol*, 43 La. Ann. 907; *State v. Glaudi*, 43 La. Ann. 914.

Sufficiency of Information as to Accusation.—An information which sets forth the offense of bribing a juror in the substantial words of the statute, which specifies the nature of the offer to bribe a named juror by promising to give him a specified sum, and the object, viz., to induce him to favor the defendant in the particular cause in which he was summoned by performing his functions as a juror with favor and partiality towards him, is certain, and apprises the defendant fully of the nature and scope of the accusation he has to meet. *State v. McCrystol*, 43 La. Ann. 907; *State v. Glaudi*, 43 La. Ann. 914.

1. Insufficient Designation of Court or Term at Which Alleged Offense Committed.—In *State v. Freeman*, 15 Vt. 723, which was a proceeding against a deputy sheriff for attempting to influence the verdict of a jury in his custody, the indictment alleged that at a County Court holden by and before the chief judge there came on for trial, etc., designating the action in which the alleged offense was committed. The indictment was held insufficient because it omitted the names of the assistant judges, the court being required to be held by a chief judge and assistant judges, or an assistant judge, and therefore the indictment failed to show that a quorum of the court held the term. It was further held that to validate the indictment it should appear that one or both of the assistant judges sat in the case or were disqualified to sit.

Amendment.—In *State v. Freeman*, 15 Vt. 723, cited in the preceding note, the court replied to a suggestion that the name of the chief judge might be stricken from the indictment as surplusage, that the name of the judge alleged to have held the court was descriptive of the court and the holding

of the term, and thus became material and could not be rejected.

2. Failure to Show Attempt to Influence the Jury.—An information stating that the defendant "did wilfully attempt to obstruct the proceedings and hinder the due administration of justice in said suit * * * by attempting to procure" certain persons named "to unlawfully seek, strive, and attempt to corrupt and influence" certain jurors named, "composing the jury aforesaid in said suit aforesaid," fails to state an offense because it contains no facts showing an attempt on the part of the defendant improperly to influence the jurors. *Gandy v. State*, 13 Neb. 445.

"Attempt" to Commit Crime of Embracery.—An indictment charging "the crime of an attempt to commit the crime of embracery" is defective and invalid, because the crime of embracery is itself an attempt to commit a wrongful act. *State v. Sales*, 2 Nev. 268.

Noncommunication with Jury.—In *State v. Brown*, 95 N. Car. 685, the first count, after imputing the corrupt purpose, alleged that the defendant approached the officer in charge of the jurors, who had retired to their room to make up their verdict, and inquired as to their opinion, saying that he "had come to give them instructions," and asked the officer if any such were needed to let him know and he would give them. The second count imputed the same criminal attempt, through "promises, persuasions, entreaties, and the like," setting out the same general act as in that preceding. The third count contained similar averments as to what transpired with the officer at or near the jury room, alleged that the persons on trial were clients for whom the defendant had appeared in the prosecution, and reiterated the conversation had with the officer. It was held that the indictment did not charge the crime of embracery for the reason that no communication with the jurors was alleged, nor any attempt to have it.

Embracery.

JURY.

Embracery.

Summoning and Impaneling of Juror. — If it is sufficiently alleged that the person approached was actually a juror in a cause at the time of the alleged offense, it is unnecessary that the indictment should contain an allegation that he had been summoned and impaneled,¹ or that the panel of which he was a member was summoned by the direction of the court.²

1. **Summoning, Swearing, and Impaneling of Juror.** — An indictment for embracery need not allege that the juror, at the time of the offer to bribe him, had been summoned, sworn, and impaneled, but it is sufficient to allege that he was a petit juror engaged at the time of the offer with eleven other petit jurors in the trial of the defend-

ant on an indictment for a specified offense. *Caruthers v. State*, 74 Ala. 408.

2. **Summoning of Panel of Which Juror Was Member.** — It is unnecessary that the indictment should allege that the panel which included the juror to bribe whom an attempt was made was summoned by order of the court. *State v. Williams*, 136 Mo. 307.

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- Jurisdiction of Justices in Particular Cases*, see the specific titles in this work, such as *BASTARDY*, vol. 3, p. 273; *CHATTEL MORTGAGES*, vol. 4, p. 508; *CREDITORS' BILLS*, vol. 5, p. 435; *DISORDERLY CONDUCT*, vol. 7, p. 1; *FORCIBLE ENTRY AND DETAINER*, vol. 9, p. 46; *PRELIMINARY EXAMINATIONS*; *SEARCHES AND SEIZURES*.
- Jurisdiction of Justices as Dependent on the Amount Involved*, see article *AMOUNT IN CONTROVERSY*, vol. 1, p. 702.
- Power of Justices to Take Affidavits*, see article *AFFIDAVITS*, vol. 1, p. 329.
- Power of Justices to Issue Attachments*, see article *ATTACHMENT*, vol. 3, p. 47.
- Power of Justices to Take Bail in Criminal Cases*, see article *BAIL AND RECOGNIZANCE*, vol. 3, p. 197.
- Power of Justices to Hold Coroner's Inquest*, see article *CORONERS' INQUESTS*, vol. 5, p. 41.
- Appearances in Justices' Courts*, see article *APPEARANCES*, vol. 2, p. 588.
- Process from Justices' Courts*, see article *SUMMONS AND PROCESS*.
- Adjournments and Continuances in Justices' Courts*, see article *CONTINUANCES*, vol. 4, p. 892.
- Change of Venue in Justices' Courts*, see article *CHANGE OF VENUE*, vol. 4, p. 373.
- Pleading Former Adjudication in Justices' Courts*, see article *FORMER ADJUDICATION*, vol. 9, p. 619.
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article *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 368.

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Proceedings Against Railroads, see article *RAILROADS*.

For the *Substantive Law relating to Justices of the Peace*, see *AM. AND ENG. ENCYC. OF LAW* (2d ed.), title *JUSTICES OF THE PEACE*.

I. JURISDICTION — 1. Statutory. — At common law justices of the peace were merely conservators of the peace and examining magistrates; they exercised no civil jurisdiction whatever.¹ Therefore the jurisdiction of a justice's court is purely statutory,² and must be exercised in the manner and within the limits prescribed by the statutes granting it.³ In other words, the statutes

1. *Horton v. Elliott*, 90 Ala. 480; *Ellis v. White*, 25 Ala. 540; *Dunnagan v. Shaffer*, 48 Ark. 476; *Willey v. Strickland*, 8 Ind. 453; *Matter of Way*, 41 Mich. 299.

2. *Alabama*. — *Horton v. Elliott*, 90 Ala. 480; *Ellis v. White*, 25 Ala. 540.

Arkansas. — *Dunnagan v. Shaffer*, 48 Ark. 476.

Georgia. — *White v. Mandeville*, 72 Ga. 705.

Illinois. — *Evans v. Pierce*, 3 Ill. 468; *Stafford v. Scroggin*, 43 Ill. App. 48.

Indiana. — *Matlock v. Strange*, 8 Ind. 57; *Willey v. Strickland*, 8 Ind. 453; *Ohio, etc., R. Co. v. Hanna*, 16 Ind. 391; *Goodwine v. Barnett*, 2 Ind. App. 16.

Maine. — *Martin v. Fales*, 18 Me. 23; *State v. Hartwell*, 35 Me. 129; *Matter of Hersom*, 39 Me. 476; *State v. Hall*, 49 Me. 412; *Inman v. Whiting*, 70 Me. 445.

Massachusetts. — *Bridge v. Ford*, 4 Mass. 641.

Michigan. — *Wright v. Warner*, 1 Dougl. (Mich.) 384; *Matter of Way*, 41 Mich. 299.

Missouri. — *Williams v. Bower*, 26 Mo. 601; *Dillard v. St. Louis, etc., R. Co.*, 58 Mo. 69; *Loomis v. Wabash, etc., R. Co.*, 17 Mo. App. 341.

Tennessee. — *Vanbibber v. Vanbibber*, 10 Humph. (Tenn.) 55.

Texas. — *Cowan v. Nixon*, 28 Tex. 230.

Wisconsin. — *Cox v. Groshong*, 1 Pin. (Wis.) 307.

No Jurisdiction by Estoppel or Consent. — Jurisdiction cannot be obtained by a justice by estoppel. *Stewart v. Shaffer*, 6 Pa. Dist. Rep. 226.

As to jurisdiction by consent, see *infra*, I. 5. *By Consent*.

3. *Evans v. Pierce*, 3 Ill. 468; *Stafford v. Scroggin*, 43 Ill. App. 48; *Matlock v. Strange*, 8 Ind. 57; *Louisville, etc., R. Co. v. Parish*, 6 Ind. App. 89; *Matter of Way*, 41 Mich. 299; *Victor Mill, etc., Co. v. Justice Ct.*, 18 Nev. 21; *Cowan v. Nixon*, 28 Tex. 230. See also *Fitzgerald v. Beebe*, 7 Ark. 305; *Hargrove v. Harris*, 116 N. Car. 418.

Statutes Granting Jurisdiction to Superior Courts are not applicable to justices' courts unless expressly made so. *Cowan v. Nixon*, 28 Tex. 230.

Jurisdiction of Interlocutory Acts. — Where it appears from the face of the process and proceedings that the justice has jurisdiction of the cause, he has, of course, jurisdiction over all interlocutory acts necessary to a final judgment. *Fox v. Hoyt*, 12 Conn. 491.

Cannot Strike Out Pleading. — A justice's court is a court of limited statutory jurisdiction, and a justice has no inherent right to strike out an entire pleading because of refusal to comply with an order calling for a bill of particulars. In such case he is limited to the imposition of the penalty prescribed by the *New York Code Civ. Pro.*, § 531, which provides that a party refusing to give such bill of particulars is precluded from giving evidence as to the

set certain defined limits to a justice's jurisdiction, and having reached those limits, his powers are at an end.¹

2. Special and Limited. — In most of the states justices' courts are inferior courts of special and limited jurisdiction;² but in some states such courts are courts of record, and their decisions stand upon the same ground and are subject to the same rules as those of the higher courts.³

subject on which it was demanded. *Bloom v. Huyck*, 71 Hun (N. Y.) 252; *New York v. Mason*, 1 Abb. Pr. (N. Y. C. Pl.) 344.

1. Order Beyond Justice's Jurisdiction. — An order made by a justice upon a matter not within his jurisdiction is merely void. *Greene v. Briggs*, 1 Curt. (U. S.) 311.

A Writ of Prohibition will lie to prevent a justice exceeding the jurisdiction conferred upon him by law. *James v. Stokes*, 77 Va. 225; *Burroughs v. Taylor*, 90 Va. 55; *Miller v. Marshall*, 1 Va. Cas. 158.

Duration of Jurisdiction. — Where a justice once obtains jurisdiction over the subject-matter of a suit, it continues until the action abates or is legally disposed of. *Knapp v. King*, 6 Oregon 243.

Termination of Jurisdiction. — Justices' courts are courts of limited jurisdiction, having no stated terms; and when a case has been tried, and the record thereof entered upon the justice's docket, his control over it has ended, except to issue execution. *King v. Bates*, 80 Mich. 367.

Loss of Jurisdiction by Failure to Attend. — A justice loses jurisdiction where, after setting aside a judgment, he is absent on the day set by him for a new trial. *Olson v. Nunnally*, 47 Kan. 391.

Where a justice before whom a writ is made returnable does not attend at the time and place of trial, or within a reasonable time after the designated hour, jurisdiction of the suit is lost, unless continued by some other justice. *Martin v. Fales*, 18 Me. 23.

Loss of Jurisdiction by Dismissing Jury. — In *New Jersey* a justice of the peace loses jurisdiction of the cause when he dismisses the jury for not being able to agree upon a verdict. *Waddell v. Physick*, 17 N. J. L. 331.

3. Arkansas. — *Reeves v. Clarke*, 5 Ark. 27; *Pendleton v. Fowler*, 6 Ark. 41; *Levy v. Shurman*, 6 Ark. 182; *Latham v. Jones*, 6 Ark. 371.

California. — *Jolley v. Foltz*, 34 Cal. 321.

Colorado. — *Hamill v. Ferrier*, 8 Colo. App. 266.

Georgia. — *Gray v. McNeal*, 12 Ga. 424; *White v. Mandeville*, 72 Ga. 705.

Illinois. — *Bliss v. Harris*, 70 Ill. 343.

Indiana. — *Ohio, etc., R. Co. v. Hanna*, 16 Ind. 391; *Jolly v. Ghering*, 40 Ind. 139; *Hopper v. Lucas*, 86 Ind. 43.

Maryland. — *Fahey v. Mottu*, 67 Md. 250.

Massachusetts. — *Bridge v. Ford*, 4 Mass. 641.

Michigan. — *King v. Bates*, 80 Mich. 367.

Missouri. — *Haggard v. Atlantic, etc., R. Co.*, 63 Mo. 302; *Olin v. Zeigler*, 46 Mo. App. 193.

Nevada. — *Paul v. Armstrong*, 1 Nev. 82; *McDonald v. Prescott*, 2 Nev. 109.

New Jersey. — *Hopper v. Chamberlain*, 34 N. J. L. 220.

New York. — *Hunt v. Dutcher*, 13 How. Pr. (N. Y. Supreme Ct.) 538; *New York v. Mason*, 1 Abb. Pr. (N. Y. C. Pl.) 344; *Bloom v. Huyck*, 71 Hun (N. Y.) 252.

North Carolina. — *Williams v. Bowling*, 111 N. Car. 295.

Wisconsin. — *Cox v. Groshong*, 1 Pin. (Wis.) 307.

In a discussion of the general principles governing the jurisdiction of inferior courts, see the article JURISDICTION, *ante*, p. 114. And see *infra*, II. 7. *Record and Docket*.

3. Holcomb v. Cornish, 8 Conn. 375; *Brian v. Davidson*, 25 Miss. 213; *Adair v. Rogers*, *Wright* (Ohio) 428; *Wright v. Hazen*, 24 Vt. 143; *Stone v. Proctor*, 2 D. Chip. (Vt.) 108; *Spaulding v. Chamberlin*, 12 Vt. 538; *Underwood v. Hart*, 23 Vt. 120; *Eastman v. Waterman*, 26 Vt. 494.

As to collateral attack upon the judgments of inferior courts, see the article JURISDICTION, *ante*, p. 114.

In *Pennsylvania* a justice's docket, as to things adjudicated by him, has the

3. Must Appear Affirmatively. — Since a justice's court possesses only limited and special jurisdiction, its proceedings must show affirmatively that it had jurisdiction of the case.¹

conclusiveness of a record. *Hazelett v. Ford*, 10 Watts (Pa.) 101; *Clark v. M'Comman*, 7 W. & S. (Pa.) 469.

1. *Arkansas*. — *Reeves v. Clarke*, 5 Ark. 27; *Ex p. Anthony*, 5 Ark. 358; *Pendleton v. Fowler*, 6 Ark. 41; *Levy v. Shurman*, 6 Ark. 182; *Latham v. Jones*, 6 Ark. 371.

California. — *Jolley v. Foltz*, 34 Cal. 321.

Georgia. — *Gray v. McNeal*, 12 Ga. 424.

Illinois. — *Bliss v. Harris*, 70 Ill. 343; *Trader v. McKee*, 2 Ill. 558.

Indiana. — *Hopper v. Lucas*, 86 Ind. 43; *Wilkinson v. Moore*, 79 Ind. 397; *Straughan v. Inge*, 5 Ind. 157; *Davenport Mills Co. v. Chambers*, 146 Ind. 156.

Maine. — *State v. Hartwell*, 35 Me. 129; *Inman v. Whiting*, 70 Me. 445.

Maryland. — *Fahey v. Mottu*, 67 Md. 250; *Kane v. State*, 70 Md. 552.

Michigan. — *Spear v. Carter*, 1 Mich. 19; *Wight v. Warner*, 1 Dougl. (Mich.) 384.

Missouri. — *Iba v. Hannibal, etc.*, R. Co., 45 Mo. 469; *Haggard v. Atlantic, etc.*, R. Co., 63 Mo. 302; *Hessey v. Heitkamp*, 9 Mo. App. 36; *McQuoid v. Lamb*, 19 Mo. App. 153; *Olin v. Zeigler*, 46 Mo. App. 193.

Nevada. — *Little v. Currie*, 5 Nev. 90.

New Jersey. — *Hopper v. Chamberlain*, 34 N. J. L. 220.

New York. — *Stone v. Miller*, 62 Barb. (N. Y.) 430.

Ohio. — *Vandement v. Trisler*, 4 Ohio N. P. 37.

Wisconsin. — *Cox v. Groshong*, 1 Pin. (Wis.) 307.

See also *infra*, II. 7. *Record and Docket*; IV. 9. *e. Sufficiency of Transcript*.

Sufficient Showing of Jurisdiction. — Where a cause of action filed with a justice sets forth that he is the justice of a certain district, and the transcript certificate shows the same fact, and the constable's return shows that the defendant resides in the same district, the jurisdictional facts sufficiently appear. *Klein v. Wielandy*, 15 Mo. App. 581.

Jurisdiction Appearing from Whole Record. — A justice's jurisdiction is sufficiently shown where it appears from the

whole record in the proceeding. *Sappington v. Lenz*, 53 Mo. App. 44.

Formalities Not Required. — Although a justice's court is one of limited jurisdiction, and in order to render its judgments valid jurisdiction of both the subject-matter and the person must appear, yet the judgments of such courts should not be defeated by technicalities; therefore, formalities in the summons or rendition of the judgment are not required. *Bliss v. Harris*, 70 Ill. 343.

Substantial Compliance with Statute. — It is a general rule that the pleading before an inferior tribunal must show jurisdiction. But this rule is greatly relaxed in its application to justices of the peace. Nothing more should be required of them than substantial compliance with the statute conferring and regulating their powers. *Wright v. Phillips*, 2 Greene (Iowa) 191.

Showing Residence of Defendant. — Under the *California* statute providing that "no person shall be held to answer to any summons issued against him from a justice's court, in a civil action, in any township or city other than the one in which he shall reside, except," etc., it must affirmatively appear from the docket or other papers in the case that the defendant was a resident of the township in which the suit was brought, or that he was within one of the exceptions. *Jolley v. Foltz*, 34 Cal. 321.

Omission to State Residence of Parties.

— A process from a justice's court runs to every part of his county, and where a written complaint and a copy of the summons were served within the county, it was held that an omission to state the place of residence of the parties in the complaint did not deprive the justice of jurisdiction. *Hoffman v. Barton*, 47 Hun (N. Y.) 409.

Must Show Filing of Paper. — The lodging of the paper which is the foundation of the action in the justice's court is a requisite to jurisdiction, and it must by some means be made to appear by the record; if not by a docket entry, then by the paper itself being among the original papers in the cause. *Olin v. Zeigler*, 46 Mo. App. 193.

Lack of Jurisdiction Appearing on Rec-

Rule Otherwise in Texas. — In Texas it is held that a justice's court, being created by the constitution, exercises within its defined limitations general exclusive jurisdiction; and in such courts it is not necessary that every prerequisite to the attaching of jurisdiction in a particular case should appear affirmatively.¹

4. No Presumptions Indulged. — Under the general rule that a justice's jurisdiction must appear affirmatively, it follows that such jurisdiction cannot be enlarged by implication, and that no presumption will be indulged in favor thereof.²

ord. — Although it may be conceded that a decision of a justice that he has jurisdiction is presumed to be right till the contrary is shown, yet where it appears on the face of the record that he had not jurisdiction, the presumption is rebutted. *Brown v. Davis*, 59 Iowa 641.

Need Not Negative Loss of Jurisdiction. — A justice need not negative the grounds by which his jurisdiction might be taken away, in order to make his jurisdiction appear affirmatively. *Nelson v. Zink*, 3 Blackf. (Ind.) 103.

Proof of Jurisdictional Facts. — Those jurisdictional facts in 'support of justices' judgments which are not in writing or required to be in writing, or in fact entered in the docket, may be proved by parol. However, where the statute requires such facts to be entered in the docket, and they are so entered, or where they actually appear in the written files of the action, parol evidence is not admissible to contradict such entries and writings. *Jolley v. Foltz*, 34 Cal. 321.

1. *Williams v. Ball*, 52 Tex. 603; *Hance v. Galveston Wharf Co.*, 70 Tex. 115; *Wilkerson v. Schoonmaker*, 77 Tex. 615.

2. *Arkansas.* — *Webster v. Daniel*, 47 Ark. 131; *Dunnagan v. Shaffer*, 48 Ark. 476; *Reeves v. Clarke*, 5 Ark. 27.

Illinois. — *Evans v. Bouton*, 85 Ill. 579.

Indiana. — *Straughan v. Inge*, 5 Ind. 157; *Willey v. Strickland*, 8 Ind. 453; *Jolly v. Ghering*, 40 Ind. 139; *Wilkinson v. Moore*, 79 Ind. 397; *Hopper v. Lucas*, 86 Ind. 43; *Louisville, etc., R. Co. v. Parish*, 6 Ind. App. 89; *Goodwine v. Barnett*, 2 Ind. App. 16.

Maine. — *State v. Hartwell*, 35 Me. 129; *Matter of Hersom*, 39 Me. 476; *Lane v. Crosby*, 42 Me. 327; *State v. Hall*, 49 Me. 412; *Inman v. Whiting*, 70 Me. 445.

Maryland. — *Fahey v. Mottu*, 67 Md. 250.

Massachusetts. — *Bridge v. Ford*, 4 Mass. 641; *Com. v. Fay*, 126 Mass. 236.

Michigan. — *Spear v. Carter*, 1 Mich. 19; *Wight v. Warner*, 1 Dougl. (Mich.) 384.

Missouri. — *McQuoid v. Lamb*, 19 Mo. App. 153.

Nevada. — *Paul v. Armstrong*, 1 Nev. 82; *McDonald v. Prescott*, 2 Nev. 109; *Little v. Currie*, 5 Nev. 90; *Victor Mill, etc., Co. v. Justice Ct.*, 18 Nev. 21.

New York. — *Stone v. Miller*, 62 Barb. (N. Y.) 430.

Tennessee. — *Gibbs v. Bourland*, 6 Yerg. (Tenn.) 481.

See also the article JURISDICTION, *ante*, p. 114.

In *Dunnagan v. Shaffer*, 48 Ark. 476, it was held that a justice's jurisdiction being entirely statutory, he can take nothing by implication except what is necessary to make effective his express powers.

In *Vermont*, however, the same rule of construction is extended in favor of the jurisdiction of a justice as applies in favor of courts of general jurisdiction. *Wright v. Hazen*, 24 Vt. 143; *Vaughn v. Condon*, 56 Vt. 111.

Justice of Foreign State — No Presumption of Jurisdiction. — There is no presumption in law that a justice in a foreign state can render a judgment in a civil action. *Willey v. Strickland*, 8 Ind. 453.

Summons — No Presumption of Proper Service. — The record of a cause in a justice's court must show affirmatively that the court obtained jurisdiction. Therefore, the return of a summons from a justice's court, "Served," without anything further, does not carry the presumption that it was served in the manner required by law. *Vandement v. Trisler*, 4 Ohio N. P. 37.

Rule Not Applicable to Preliminary Examinations. — The rule that no presumption will be indulged in favor of a justice's jurisdiction does not apply

Presumptions Indulged After Attaching of Jurisdiction. — Where, however, it appears affirmatively that the justice acquired jurisdiction both of the subject-matter of the action and the person of the defendant, then the same presumptions are indulged in favor of the regularity and validity of the proceedings of such justice's court as are extended to courts of general jurisdiction.¹

5. By Consent. — It is a well-settled rule that, while a justice of the peace can by consent obtain jurisdiction of the person,² consent of parties cannot confer upon him jurisdiction over the subject-matter of an action where it is not conferred upon him by statute.³

when he sits as an examining court on the preliminary investigation of a criminal charge. *Boynton v. State*, 77 Ala. 29; *People v. Mack*, 1 Park. Cr. Rep. (Dutchess Cir. Ct.) 567.

1. *Webster v. Daniel*, 47 Ark. 131; *Goodwine v. Barnett*, 2 Ind. App. 16; *Kane v. State*, 70 Md. 552; *Wight v. Warner*, 1 Dougl. (Mich.) 384; *Clague v. Hodgson*, 16 Minn. 329; *Vaule v. Miller*, 64 Minn. 485; *Jewett v. Sundback*, 5 S. Dak. 111; *Baizer v. Lasch*, 28 Wis. 268.

In *Thatcher v. Maack*, 7 Ill. App. 635, it was held that where the docket of a justice showed that he had jurisdiction of the person and subject-matter, nothing would be intended to be out of his jurisdiction which did not affirmatively appear to be so.

Error Not Presumed. — When a justice, by compliance with the provisions of the statute, has acquired jurisdiction, his subsequent proceedings are to be construed liberally in respect to irregularity and form, and error is not to be presumed unless made to appear affirmatively. *Wight v. Warner*, 1 Dougl. (Mich.) 384.

Judgment Presumed Rendered on Sufficient Evidence. — Where it appears that the justice acquired jurisdiction of the subject-matter and of the person, it will be presumed that his judgment was rendered on sufficient evidence. *Cantrell v. Fowler*, 24 S. Car. 424.

Not Open to Collateral Attack. — When it appears upon the face of the proceedings that the justice's court had jurisdiction, the proceedings cannot be attacked collaterally for mere error or irregularity therein. *Webster v. Daniel*, 47 Ark. 131; *Vaule v. Miller*, 64 Minn. 485; *Jewett v. Sundback*, 5 S. Dak. 111.

As to collateral attack, see article JURISDICTION, *ante*, p. 114.

2. *Rahn v. Greer*, 37 Iowa 627; *Hogan v. Baker*, 2 E. D. Smith (N. Y.) 22.

By voluntarily appearing and going into the merits of the case a defendant gives jurisdiction over his person. See article APPEARANCES, vol. 2, p. 639 *et seq.* See also *infra*, I. II. *Objections to Jurisdiction.*

3. *Alabama.* — *Walker v. Ivey*, 74 Ala. 475; *Wyatt v. Judge*, 7 Port. (Ala.) 37.

California. — *Feillett v. Engler*, 8 Cal. 76.

Georgia. — *Block v. Henderson*, 82 Ga. 23.

Iowa. — *Rogers v. Loop*, 51 Iowa 41; *McMeans v. Cameron*, 51 Iowa 691; *Miller v. Haley*, 66 Iowa 260.

Maine. — *State v. Hall*, 49 Me. 412; *Call v. Mitchell*, 39 Me. 465.

Michigan. — *Spear v. Carter*, 1 Mich. 19.

Nevada. — *Paul v. Armstrong*, 1 Nev. 82.

New York. — *Striker v. Mott*, 6 Wend. (N. Y.) 465; *Hogan v. Baker*, 2 E. D. Smith (N. Y.) 22; *Low v. Rice*, 8 Johns. (N. Y.) 409.

Ohio. — *Place v. Welch*, 2 Ohio Dec. 542.

Pennsylvania. — *Montgomery v. Heilman*, 96 Pa. St. 44; *Collins v. Collins*, 37 Pa. St. 387.

Texas. — *Crawford v. Saunders*, 9 Tex. Civ. App. 225; *Foster v. McAdams*, 9 Tex. 542.

For a full discussion of this subject, see the article JURISDICTION, *ante*, p. 114.

If the Appointment of a Justice Is Void he has no jurisdiction, and jurisdiction cannot be conferred upon him by consent of parties. *Crawford v. Saunders*, 9 Tex. Civ. App. 225.

One Justice Cannot Be Substituted for Another by consent of parties in the trial of a case in a precinct to which the

6. As Dependent on Locality. — The jurisdiction of a justice of the peace as regards territorial extent and as dependent upon the residence of the parties is a matter regulated entirely by statutes, which vary greatly in the different states. The practitioner is referred to the statutes of his own state and to the cases cited in the notes.¹

former does not belong. *Foster v. McAdams*, 9 Tex. 542.

Jurisdiction to Grant New Trial. — Consent of parties can give a justice jurisdiction of the person only, and not of the subject-matter; and therefore where a justice has no statutory authority to grant a new trial, jurisdiction to do so could not be conferred upon him by consent. *Miller v. Haley*, 66 Iowa 260.

Title to Land in Question. — Where a justice of the peace is ousted of jurisdiction by title to land coming in question, the consent of the parties that the suit shall proceed notwithstanding such plea does not restore the jurisdiction. *Striker v. Mott*, 6 Wend. (N. Y.) 465.

Court Held in Wrong Place. — Under a statute forbidding a justice to hold court in a house in which a tavern is kept, if a justice does hold court in such place the plaintiff's appearance and going to trial will give him no jurisdiction. *Low v. Rice*, 8 Johns. (N. Y.) 409.

Statute Authorizing Consent. — Under the Iowa Code, § 3508, a justice can take jurisdiction of a case involving more than one hundred dollars and less than three hundred dollars by consent of parties. *Schlisman v. Webber*, 65 Iowa 115; *Brown v. Davis*, 59 Iowa 641.

1. *Alabama.* — *Horton v. Elliott*, 90 Ala. 480; *Atkinson v. Wiggins*, 69 Ala. 190; *Read v. Coker*, 1 Stew. (Ala.) 22.

Arkansas. — *Leadbetter v. Kendall*, Hempst. (U. S.) 302.

California. — *Cole v. Fisher*, 66 Cal. 441; *Fagg v. Clements*, 16 Cal. 389.

Colorado. — *Melvin v. Latshaw*, 2 Colo. 81.

Connecticut. — *Lyme v. East Had-dam*, 14 Conn. 394.

Georgia. — *Block v. Henderson*, 82 Ga. 23; *Jones v. Wylie*, 82 Ga. 745; *Thomas v. Lawton*, 71 Ga. 244.

Illinois. — *Durfee v. Grinnell*, 69 Ill. 371; *Pilgrim v. Mellor*, 1 Ill. App. 448.

Indiana. — *Wilkinson v. Moore*, 79 Ind. 397; *Hampton v. Warren*, 51 Ind.

288; *Jolly v. Ghering*, 40 Ind. 139; *Spencer v. Cline*, 28 Ind. 51; *Michael v. Thomas*, 24 Ind. 72; *Maxwell v. Collins*, 8 Ind. 38; *Brickley v. Heil-bruner*, 7 Ind. 488; *Poyser v. Murray*, 6 Ind. 35; *State v. Carter*, 6 Ind. 37; *Nelson v. Zink*, 3 Blackf. (Ind.) 101.

Iowa. — *Thompson v. Jackson*, 93 Iowa 376; *Coffman v. Trimble*, 90 Iowa 737; *Hunt v. Farmers' Ins. Co.*, 67 Iowa 742; *Rogers v. Loop*, 51 Iowa 41; *Knowles v. Picket*, 46 Iowa 503; *Gates v. Wagner*, 46 Iowa 355; *Hamilton v. Millhouse*, 46 Iowa 74; *Klingel v. Palmer*, 42 Iowa 166; *Wright v. Phillips*, 2 Greene (Iowa) 191; *Biddle v. Allender*, 14 Iowa 410.

Kansas. — *State v. Brayman*, 35 Kan. 714.

Maine. — *Blake v. Peck*, 77 Me. 588; *Morton v. Chase*, 15 Me. 188.

Massachusetts. — *Sumner v. Finegan*, 15 Mass. 280; *Pitman v. Flint*, 10 Pick. (Mass.) 504.

Michigan. — *Weaver v. Rix*, (Mich. 1896) 67 N. W. Rep. 970; *Burlingame v. Marble*, 95 Mich. 5; *Jebb v. Chi-cago, etc., R. Co.*, 67 Mich. 160; *Hall v. Shank*, 57 Mich. 36.

Mississippi. — *Cain v. Simpson*, 53 Miss. 521.

Missouri. — *Rohland v. St. Louis, etc., R. Co.*, 89 Mo. 180; *Fare v. Gun-ter*, 82 Mo. 522; *Grayson v. Weddle*, 80 Mo. 39; *Lutes v. Perkins*, 6 Mo. 57; *Johnson v. Fischer*, 56 Mo. App. 552; *U. S. Mutual Acc. Ins. Co. v. Reising-er*, 43 Mo. App. 571; *Clarkson v. Guernsey Furniture Co.*, 22 Mo App. 109.

Nebraska. — *State v. Shropshire*, 4 Neb. 411.

New Hampshire. — *Young v. Bride*, 25 N. H. 482.

New York. — *Geraty v. Reid*, 78 N. Y. 64; *Lapham v. Rice*, 55 N. Y. 472; *Holmes v. Carley*, 31 N. Y. 289; *Head's Iron Foundry v. Sanders*, 77 Hun (N. Y.) 432; *Slavin v. Mansfield*, 77 Hun (N. Y.) 535; *Pollock v. Aldrich*, 17 How. Pr. (N. Y. Supreme Ct.) 109; *Gurnsey v. Lovell*, 9 Wend. (N. Y.) 319; *Hardy v. Rowe*, 7 Wend. (N. Y.)

7. As Dependent on Amount. — The jurisdiction of justices of the peace as dependent upon the amount in controversy has already been fully treated in a former volume of this work.¹

8. Of Actions Involving Title to Land — *a.* IN GENERAL. — It is very generally provided by statute in the different states that a justice of the peace shall not have jurisdiction of actions involving title to real estate.² While the practice regarding the manner

452; *Graves v. McKeon*, 2 Den. (N. Y.) 639; *Fairbanks v. Corlies*, 3 E. D. Smith (N. Y.) 582.

Oregon. — *Taylor v. Jenkins*, 11 Oregon 274.

Tennessee. — *Strain v. Hefley*, 94 Tenn. 668.

Texas. — *Claiborne v. Pickens*, (Tex. App. 1890) 16 S. W. Rep. 867; *Cowan v. Nixon*, 28 Tex. 230; *Perry v. Lovett*, 24 Tex. 359; *Hart v. State*, 15 Tex. App. 202; *Hudson v. Henderson*, 1 Tex. App. Civ. Cas., § 353.

Utah. — *Saunders v. Sioux City Nursery, etc., Co.*, 6 Utah 431.

Wisconsin. — *Starkweather v. Sawyer*, 63 Wis. 297.

See also the article VENUE.

Refusal of Justice to Entertain Suit. — Where the statute provides that a suit in a justice's court must be brought in the township wherein the defendant resides, the refusal of the only justice in the proper township to entertain the suit, although he was legally competent and disinterested, will not authorize the plaintiff to bring suit in another township. His remedy is by suit against the justice. *Poyser v. Murray*, 6 Ind. 35.

Justice Presumed to Know Territorial Limits. — A justice of the peace must be presumed to know the territorial extent of his own jurisdiction, and lands therein, as designated by the public surveys. *Wright v. Phillips*, 2 Greene (Iowa) 191.

1. See article AMOUNT IN CONTROVERSY, vol. I, p. 702.

2. *Alabama*. — *McDaniel v. Moody*, 3 Stew. (Ala.) 314; *Webb v. Carlisle*, 65 Ala. 313.

Arkansas. — *Fitzgerald v. Beebe*, 7 Ark. 305; *Thruston v. Hinds*, 8 Ark. 118; *Cunningham v. Holland*, 40 Ark. 556; *Cotton v. Penzel*, 44 Ark. 484; *Halpern v. Burgess*, (Ark. 1890) 13 S. W. Rep. 763.

California. — *Pollock v. Cummings*, 38 Cal. 683; *Schroeder v. Wittram*, 66 Cal. 636; *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160.

Colorado. — *Klopfer v. Keller*, 1 Colo. 410.

Connecticut. — *Bundy v. Sabin*, 2 Root (Conn.) 54; *French v. Potter*, 2 Root (Conn.) 359.

Delaware. — *Legates v. Lingo*, 8 Houst. (Del.) 154.

Georgia. — *Dougherty v. Marsh*, 11 Ga. 277.

Indiana. — *Smith v. Harris*, 3 Blackf. (Ind.) 416; *Parker v. Bussell*, 3 Blackf. (Ind.) 411; *Love v. Bohan*, 4 Ind. 235; *Wall v. Albertson*, 18 Ind. 145; *Bridges v. Branam*, 133 Ind. 488.

Iowa. — *Cox v. Graham*, 3 Iowa 347; *Delzell v. Burlington, etc., R. Co.*, 89 Iowa 208.

Kansas. — *Burt v. Reyburn*, McCahon (Kan.) 97; *Douglass v. Easter*, 32 Kan. 496.

Maine. — *Low v. Ross*, 3 Me. 256.

Maryland. — *Randle v. Sutton*, 43 Md. 64.

Massachusetts. — *Blood v. Kemp*, 4 Pick. (Mass.) 169; *Kelley v. Taylor*, 17 Pick. (Mass.) 218; *Magoun v. Lapham*, 19 Pick. (Mass.) 419.

Michigan. — *Stout v. Keyes*, 2 Dougl. (Mich.) 184; *Brooks v. Delrymple*, 1 Mich. 145; *Rawson v. Finlay*, 27 Mich. 268; *Fowler v. Hyland*, 48 Mich. 179; *Ostrom v. Potter*, 71 Mich. 44; *Dolanahanty v. Lucey*, 101 Mich. 113; *Orris v. Kempton*, 105 Mich. 229.

Minnesota. — *Tordson v. Gummer*, 37 Minn. 211.

Missouri. — *Bredwell v. Loan, etc., Co.*, 76 Mo. 321; *Bennett v. McCaffery*, 28 Mo. App. 220; *Polhans v. Atchison, etc., R. Co.*, 45 Mo. App. 153; *State v. Ganzhorn*, 52 Mo. App. 220, 56 Mo. App. 519; *Sesser v. Southwick*, 2 Mo. App. Rep. 1384; *Hillhouse v. Houts*, (Mo. 1886) 1 S. W. Rep. 752.

Nebraska. — *Galligher v. Connell*, 23 Neb. 391.

New Hampshire. — *Flagg v. Gotham*, 7 N. H. 266; *Davis v. Morse*, 21 N. H. 345; *Morse v. Davis*, 24 N. H. 159; *Bartlett v. Prescott*, 41 N. H. 493.

New Jersey. — *Smith v. Layton*, 1 N. J. L. 205; *Bispham v. Inskeep*, 1 N. J.

in which this question must be raised and the procedure thereafter is not entirely uniform in the various states, it may be laid down as a general rule that when the question is properly presented to the justice ¹ his jurisdiction is at an end, ² and he must

- L. 268; *Harvey v. Drummond*, 1 N. J. L. 251; *Ming v. Compton*, 2 N. J. L. 324; *Vanmater v. Real*, 3 N. J. L. 64; *Vantyl v. Marsh*, 5 N. J. L. 584; *Gregory v. Kanouse*, 11 N. J. L. 62; *Randolph v. Montfort*, 16 N. J. L. 226; *Hill v. Carter*, 16 N. J. L. 87; *Dixon v. Scott*, 18 N. J. L. 430; *Osborne v. Butcher*, 26 N. J. L. 310; *Messler v. Fleming*, 41 N. J. L. 108; *Jeffrey v. Owen*, 41 N. J. L. 260; *Edgar v. Anness*, 47 N. J. L. 465; *Hillman v. Stanger*, 49 N. J. L. 191; *Bloom v. Stenner*, 50 N. J. L. 59; *Ely v. Schanck*, 52 N. J. L. 119.
- New York*. — *Striker v. Mott*, 6 Wend. (N. Y.) 465; *Whiting v. Dudley*, 19 Wend. (N. Y.) 373; *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96; *Randall v. Crandall*, 6 Hill (N. Y.) 342; *Hall v. Hodskins*, 30 How. Pr. (N. Y. Supreme Ct.) 15; *Hinds v. Page*, 6 Abb. Pr. N. S. (Chenango County Ct.) 58; *Adams v. Rivers*, 11 Barb. (N. Y.) 390; *Fredonia*, etc., *Plank Road Co. v. Wait*, 27 Barb. (N. Y.) 214; *Alleman v. Dey*, 49 Barb. (N. Y.) 641; *Van Etten v. Van Etten*, 69 Hun (N. Y.) 499; *Main v. Cooper*, 25 N. Y. 180; *Little v. Denn*, 34 N. Y. 452; ; *Harding v. Ellston*, 19 Civ. Pro. Rep. (Orange County Ct.) 252; *Lane v. Young*, 66 Hun (N. Y.) 563; *Manfredi v. Wiederman*, 14 Misc. Rep. (N. Y. C. Pl.) 342.
- North Carolina*. — *Credle v. Gibbs*, 65 N. Car. 192; *Peck v. Culberson*, 104 N. Car. 425; *Wright v. Harris*, 116 N. Car. 460.
- North Dakota*. — *Hegar v. De Groat*, 3 N. Dak. 354.
- Ohio*. — *Bridgmans v. Wells*, 13 Ohio 43; *Bowers v. Pomeroy*, 21 Ohio St. 184; *Van Dyke v. Rule*, 49 Ohio St. 530; *Crafts v. Prior*, 51 Ohio St. 21.
- Oregon*. — *Sweek v. Galbreath*, 11 Oregon 516; *Aiken v. Aiken*, 12 Oregon 203.
- Pennsylvania*. — *Sechrist v. Connellee*, 3 P. & W. (Pa.) 388; *Helfenstein v. Hurst*, 15 Pa. St. 358; *Jacobs v. Haney*, 18 Pa. St. 240; *Heritage v. Wilfong*, 58 Pa. St. 137; *Hunsicker v. Miller*, 14 Pa. Co. Ct. Rep. 261; *Shober v. Henry*, 4 Pa. Dist. Rep. 505.
- Rhode Island*. — *Carroll v. Rigney*, 15 R. I. 81.
- Utah*. — *People v. House*, 4 Utah 369.
- Vermont*. — *Thayer v. Montgomery*, 26 Vt. 491; *Foster v. Bennett*, 33 Vt. 66; *Jakeway v. Barrett*, 38 Vt. 316; *Flannery v. Hinkson*, 40 Vt. 485; *French v. Holt*, 51 Vt. 544, 57 Vt. 187; *Burlington*, etc., *R. Co. v. Brush*, 57 Vt. 472.
- Virginia*. — *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Miller v. Marshall*, 1 Va. Cas. 158.
- West Virginia*. — *Belcher v. Gaston*, 4 W. Va. 639.
- Wisconsin*. — *Lybrand v. Carson*, 2 Pin. (Wis.) 33; *Manny v. Smith*, 10 Wis. 509; *State v. Doane*, 14 Wis. 483; *Stoppenbach v. Zohrlaut*, 21 Wis. 385; *Barteau v. Appleton*, 23 Wis. 414; *Murray v. Van Derlyn*, 24 Wis. 67; *Ashbough v. Walter*, 24 Wis. 466; *Winterfield v. Stauss*, 24 Wis. 394; *Strasson v. Montgomery*, 32 Wis. 52; *Ohse v. Bruss*, 45 Wis. 442; *Lowitz v. Leverentz*, 57 Wis. 596; *Huddleston v. Johnson*, 71 Wis. 336.

As is the case with most matters of practice in justices' courts, this question is entirely dependent upon statutory regulation, and the practitioner is therefore advised in all cases to refer to the statutes of his own state.

Demurrer to Plea of Title. — A justice has no more authority to judge of a plea of title on a demurrer than on the merits. *French v. Potter*, 2 Root (Conn.) 359.

1. As to the proper method for raising the question, see *infra*, I. 8. c. *How Question Raised*.

2. **Jurisdiction Not Restored by Pleading Over.** — Where a defendant in an action of trespass before a justice pleads title to real estate, the justice loses jurisdiction; and it cannot be restored by pleading over and joining in issue not involved in the question of title. *Kelley v. Taylor*, 17 Pick. (Mass.) 218.

Judgment Set Aside on Audita Querela. — Where a justice renders judgment in an action in which title to land is involved, it may be set aside on *audita querela*. *Burlington*, etc., *R. Co. v. Brush*, 57 Vt. 472.

Prohibition. — In *Miller v. Marshall*, 1 Va. Cas. 158, a writ of prohibition was awarded to prevent a justice of the

either dismiss the case or certify it to a higher court, according to the directions of the statute.¹

b. WHEN TITLE IN ISSUE — (1) In General. — The question as to when the title to real estate is so drawn in question as to oust a justice of jurisdiction depends largely upon the circumstances of the particular case. If the title to land will necessarily be drawn directly in issue in the case the justice loses jurisdiction.² But these statutes should have a reasonable construction, and where the title is not necessarily in question, a justice may have jurisdiction notwithstanding the action is one relating to real estate.³

peace from trying an action involving the title to land.

Plaintiff Cannot Treat Proceedings as Nullities. — If, in proceedings before a justice, the title to land comes in issue, although the defendant may treat such proceedings as absolute nullities, the plaintiff, who initiated and took the benefit of them, cannot do so. *Dulin v. Howard*, 66 N. Car. 433.

Pleading Title to Part of Lands Only. — Where, in a justice's court, the plaintiff's complaint specified several trespasses on certain lands of the plaintiff, and the defendant pleaded title as to a parcel of the lands only, it was held that the plaintiff might avoid the plea by amending his complaint, and that the justice might dismiss as to that parcel covered by the plea and try the action as to the alleged trespasses upon the rest. *Shull v. Green*, 49 Barb. (N. Y.) 311. Compare *French v. Holt*, 57 Vt. 187.

Jurisdiction Not Divested in all Respects. — In *Massachusetts* the filing of a plea of title does not in all respects divest the justice of his jurisdiction. He still retains the power to act on a motion to waive or amend a plea, or to amend his declaration, or to new assign; and if the pleadings, as definitively fixed by the parties, do not present a question of title to real estate, he should proceed to try the cause. *Magoun v. Lapham*, 19 Pick. (Mass.) 419.

1. As to what action the justice must take when the title to real estate comes in issue, see *infra*, I. 8. *d. What Action Justice Must Take.*

2. *Jakeway v. Barrett*, 38 Vt. 316; *French v. Holt*, 51 Vt. 544. And see cases cited throughout this section.

False Representations as to Title. — The title to land is necessarily in question in an action in a justice's court against

the defendant for falsely representing himself to have title to a piece of land which the plaintiff was induced to purchase of him. *Brooks v. Delrymple*, 1 Mich. 145.

Overflowing Lands. — In an action for damages by overflowing the plaintiff's land, the plaintiff must necessarily show title to the land, and therefore a justice has not jurisdiction. *Dixon v. Scott*, 18 N. J. L. 430; *Vantyl v. Marsh*, 5 N. J. L. 584.

A Mechanic's or Materialman's Lien involves a lien on real estate, and a justice therefore is excluded from jurisdiction over such lien. *Cotton v. Penzel*, 44 Ark. 484.

Action for Permitting Sale of Intoxicating Liquor. — The title to real estate is involved in an action against an owner or lessee for permitting the sale of intoxicating liquors on the premises in violation of 67 Ohio Laws 102. *Bowers v. Pomeroy*, 21 Ohio St. 184.

3. In *Vermont* a justice is not ousted of jurisdiction merely because the title to land may be drawn into controversy under the general issue, or a plea in bar, but only where such an inquiry is necessarily involved, or when the title to land is actually contested in the pleadings. *Whitman v. Pownal*, 19 Vt. 223; *Jakeway v. Barrett*, 38 Vt. 316.

In *Ohio*, although a justice has no jurisdiction of actions involving the title to land, still, where it is not necessary in the first instance for the plaintiff to introduce proof of title in order to make out his cause of action, the justice may have jurisdiction. *Bridgmans v. Wells*, 13 Ohio 43.

A Claim of License does not necessarily involve an assertion of title or raise an issue of title to land to which it relates. *Mechl v. Schwieckart*, 67 Barb. (N. Y.) 599.

Where Stream Ought to Run. — The

Right of Way. — The term "land," as used in the statutes denying to justices jurisdiction over actions involving title to land,

title to land is not necessarily involved in a question as to where a stream ought to run. *Bowyer v. Schofield*, 1 Abb. App. Dec. (N. Y.) 177.

Action by Guardian for Entry on Lands of Ward. — In an action brought by a guardian to recover damages for entering upon the lands of the minor wards and cutting and carrying away timber, it was held that as the action chiefly turned on the question whether the plaintiff had been appointed guardian as alleged, it did not necessarily involve title to real property. *Deacon v. Powers*, 57 Ind. 489.

Contract to Locate Plaintiff on Vacant Government Land. — In an action for the recovery of money on a contract by the defendant to locate the plaintiff on vacant government land, the defendant admitted the contract, alleging that it did locate the plaintiff on vacant government land, and that "defendant is informed and believes that plaintiff claims that said lands were not vacant government lands, but that they were in the possession of some other person; and defendant alleges that they were vacant government lands, and not in the possession of any other person at the time of the location of plaintiff thereon." It was held that the title to land was not necessarily put in issue. *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132.

An Action on an Agreement to Purchase a Judgment which is a lien on real estate does not involve the title to land. *Helfenstein v. Hurst*, 15 Pa. St. 358.

Assessment of Damages for Construction of Road. — A proceeding before a justice for an assessment of damages under an act authorizing the construction of plank, macadamized, and gravel roads, does not involve the title to land. *Norristown, etc., Turnpike Co. v. Burket*, 26 Ind. 53.

Deceit in Sale of Lands. — Title to land is not so involved as to oust a justice of jurisdiction in an action for deceit in the sale of lands, where the plaintiffs allege a false representation by the defendant that the acreage was greater than it was, and ask damages for the fraud. *Dano v. Sessions*, 63 Vt. 405.

To Recover Possession of Mining Claim. — An action by one to recover possession of a mining claim based on a partial performance of the conditions

entitling him to a patent does not involve title to land, since the rights are merely possessory so long as the conditions are not wholly performed. *Duffy v. Mix*, 24 Oregon 265.

Balance of Purchase Money for Land. — Where an action brought before a justice is for a balance of the purchase money for land, in order to oust the justice of jurisdiction on account of the title to land coming in issue it must appear affirmatively on the face of the proceedings that the defendant has not accepted a deed of the property, or that the contract is still executory. *Cole v. Hynes*, 46 Md. 181.

Note in Consideration of Conveyance of Land. — Where, in an action on a promissory note before a justice, the defendant pleaded that the note was given in consideration that the payee would convey certain land to the defendant, that the payee had no title to the land, and that he had failed to make the deed, it was held that this plea did not bring the title to land in issue so as to oust the jurisdiction of the justice. *Rogers v. Perdue*, 7 Blackf. (Ind.) 302.

Whether Land Exempt from Levy and Sale. — Title to land is not brought in question by an issue as to whether the land is exempt from levy and sale under an execution as a homestead. *Moore v. O'Barr*, 87 Ga. 205.

To Recover Frame Building. — Where a replevin suit was brought to recover a "frame building," it was held that the title to real estate was not necessarily involved, since it did not appear from the pleadings whether the building was attached to the realty or not. *Elliott v. Black*, 45 Mo. 372.

To Recover Manure Removed from Farm. — Title to land is not so involved as to oust a justice of jurisdiction in an action of trover in favor of the grantee of a farm and against the purchaser of certain manure for the removal thereof. *French v. Freeman*, 43 Vt. 93.

Note for Stone Quarried on Plaintiff's Land. — Title to land is not involved in an action on a note for the price of stone quarried on land occupied by the plaintiff under a will. *Rhoades v. Patrick*, 27 Pa. St. 323.

Entry on Plaintiff's Land to Remove Personal Property. — The question of

includes a right of way over the real estate of another, whether held by an individual or by the public.¹

Breach of Covenant of Warranty. — In an action for breach of a covenant in a warranty deed the title is involved so as to bring the case within a statute denying to justices jurisdiction of actions involving the title to land.²

(2) **Dispute as to Title.** — When, in an action before a justice relating to land, the defendant disputes the plaintiff's title, the justice ordinarily loses jurisdiction of the case.³ But where the

the defendant's right to enter upon the plaintiff's land for the purpose of removing personal property therefrom is not a question of title to the land. *Corcoran v. Webster*, 50 Wis. 126.

1. *Fowler v. Hyland*, 48 Mich. 179; *Bartlett v. Prescott*, 41 N. H. 493; *Randolph v. Montfort*, 16 N. J. L. 226; *Striker v. Mott*, 6 Wend. (N. Y.) 465; *Alleman v. Dey*, 49 Barb. (N. Y.) 641; *Whitman v. Pownal*, 19 Vt. 223; *Lowitz v. Leverentz*, 57 Wis. 596; *Stoppenbach v. Zohrlaut*, 21 Wis. 385.

Obstructing Highway. — Where, in an action before a justice to recover a penalty for a wilful obstruction of a highway, the defendant answered that the *locus in quo* was at the time when, etc., the defendant's own freehold, and in his actual possession, and that there was no highway open or running over or across any part thereof, it was held that sufficient facts were stated to show that the title to land would come in question. *State v. Doane*, 14 Wis. 483. See also *Little v. Denn*, 34 N. Y. 452. Compare *Butler v. State*, 113 Ind. 5; *Fleet v. Youngs*, 7 Wend. (N. Y.) 292; *Chapman v. Swan*, 65 Barb. (N. Y.) 210; *Bell v. Prouty*, 43 Vt. 279.

Jurisdiction to Try Whether Claim Bona Fide Made. — In a proceeding before a justice to impose a penalty for obstructing a street, if the claim of freehold is set up by the defendant the justice has jurisdiction to try the fact whether the claim is *bona fide* made. *Warwick v. Mayo*, 15 Gratt. (Va.) 528.

Removing Gate from Across Pent Road. — Title to land is involved so as to oust a justice of jurisdiction in an action to recover a statutory penalty for the removal of a gate from across a pent road, whereby lands and crops are exposed to damage. *French v. Holt*, 51 Vt. 544.

Whether Highway Laid Out and Opened. — In an action to recover a penalty for encroachment on a highway, if the

existence of the highway is admitted the question whether the highway was "laid out and opened" does not necessarily involve the question of title to land, and upon this ground the allegation and proof by the plaintiff of such laying out and opening would not oust the justice of jurisdiction. *State v. Huck*, 29 Wis. 202.

2. *Hillhouse v. Houts*, (Mo. 1886) 1 S. W. Rep. 752; *Bredwell v. Loan*, etc., Co., 76 Mo. 321; *Van Dyke v. Rule*, 49 Ohio St. 530. Compare *Flannery v. Hinkson*, 40 Vt. 485.

Quitclaim Deed Does Not Import Title. — Title to land is not involved in an action of covenant where the declaration alleges that the giving of a quitclaim deed was the consideration of the covenant. The giving of such a deed does not import title to land in either party to it. *Judevine v. Holton*, 41 Vt. 351.

3. **Defendant Alleging Title in Himself.** — Where, in an action for conversion of timber, the plaintiff alleges that the title to the land on which the timber was cut was in another, under whose license the plaintiff cut the timber, and where the defendant denies the allegations and asserts title in himself, the title to land is in issue, and a justice has no jurisdiction of the case. *Hudleston v. Johnson*, 71 Wis. 336.

Division Fences. — An action between adjoining landowners arising out of a dispute over a division fence involves title to land so as to oust a justice of jurisdiction. *Hinds v. Page*, 6 Abb. Pr. N. S. (Chenango County Ct.) 58; *Foster v. Bennett*, 33 Vt. 66; *Murray v. Van Derlyn*, 24 Wis. 67.

Statutory Penalty for Cutting Trees. — The plaintiff brought an action of debt against the defendant to recover a penalty under the statute for cutting trees on the land of the plaintiff. The defendant pleaded that he was in possession of the land by virtue of a lease

title is not disputed, a justice may have jurisdiction notwithstanding the action concerns real estate.¹

(3) *Incidentally in Issue.* — In some cases it is held that where the principal question in issue is one within a justice's jurisdiction, he will not be ousted of jurisdiction merely because title to land comes incidentally in question.² Thus, where the case turns

from the plaintiff, and that he lawfully cut the trees; to which the plaintiff replied that the lease was canceled before the trees were cut. The justice rendered judgment for the plaintiff, from which the defendant appealed. Upon a complaint for not entering the appeal, it was held that the plea brought the title to real estate in question, that the justice had no jurisdiction to render a judgment, and that it was unnecessary to enter the appeal; and the complaint was dismissed. *Morse v. Davis*, 24 N. H. 159.

Tenants in Common. — Where, in an action of account between tenants in common of land, the defendant pleads in bar that he was never bailiff and receiver of the plaintiff, the plaintiff is thus put upon the proof of his whole declaration, and the question of title is brought in issue. *Thayer v. Montgomery*, 26 Vt. 491.

1. *Stout v. Keyes*, 2 Dougl. (Mich.) 184; *Ostrom v. Potter*, 71 Mich. 44; *Polhans v. Atchison*, etc., R. Co., 45 Mo. App. 153; *Driscoll v. Dunwoody*, 7 Mont. 394; *Hastings v. Glenn*, 1 E. D. Smith (N. Y.) 402; *Adams v. Beach*, 6 Hill (N. Y.) 271; *Koon v. Mazuzan*, 6 Hill (N. Y.) 44; *Nixon v. Jenkins*, 1 Hilt. (N. Y.) 318; *Browne v. Scofield*, 8 Barb. (N. Y.) 239; *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Craven v. Price*, 53 Barb. (N. Y.) 442; *Bowyer v. Schofield*, 1 Abb. App. Dec. (N. Y.) 177.

Title Admitted by Defendant. — Where a suit was brought for wrongfully withholding the plaintiffs' land and cutting grass therefrom, and the defendant admitted the plaintiffs' title, but pleaded that he was in rightful possession of the premises under a license or permission of the plaintiffs, by virtue of an executory contract by a third person to purchase the land, it was held that the title to land did not arise. *Craven v. Price*, 53 Barb. (N. Y.) 442.

Admission of Title by Demurrer. — Although a justice has no jurisdiction to try an action involving title to land where the title is disputed, still if the title is admitted, as by demurrer to a

declaration alleging it, the justice has jurisdiction. *Delzell v. Burlington*, etc., R. Co., 89 Iowa 208; *Stout v. Keyes*, 2 Dougl. (Mich.) 184. See also *Stoppenbach v. Zohrlaut*, 21 Wis. 385.

Plaintiff's Title Proved by Defendant.

— In an action for obstructing a right of way, where the defendant answers by a general denial, the title to real estate cannot be said to come in question so as to oust a justice's court from jurisdiction, if the defendant, being called as a witness, in the course of his testimony proves on his own behalf the plaintiff's title. The defendant himself having shown the title, it cannot be regarded as disputed, within the meaning of the statute, so as to oust the justice of jurisdiction. *Hastings v. Glenn*, 1 E. D. Smith (N. Y.) 402.

Obstructing River. — Where, in an action on the case in a justice's court for obstructing a river, the plaintiff claimed that such river was a public highway at common law, and had been declared such by statute, without making any other proof of his right; and no fact was shown by the defendant to controvert the right thus declared by law, but he pleaded the general issue, and introduced in evidence a grant from the legislature authorizing him to erect and maintain a dam across the river, of such construction as not to interfere with the public right of passage; the title to land did not come in question so as to oust the justice of his jurisdiction to try the cause. *Browne v. Scofield*, 8 Barb. (N. Y.) 239.

2. *In North Carolina* it was held that, where a justice had jurisdiction of the principal question, it necessarily involved his jurisdiction of determining every incidental question, notwithstanding it might involve the title to land. *Garret v. Shaw*, 3 Ired. L. (N. Car.) 395.

California. — The jurisdiction of a justice over an action to recover a deposit made by a vendor under an executory contract for the sale of land is not ousted by the fact that the title to land comes incidentally in issue. In

principally upon a contract or agreement, the justice does not necessarily lose jurisdiction notwithstanding such contract relates to real estate.¹

Evidence of Title Admissible. — And so while a justice cannot determine questions of title, yet he may receive in evidence deeds, contracts, and other evidences of title when introduced for collateral purposes.²

(4) *Trespass on Lands.* — A justice of the peace has jurisdiction of an action for trespass on lands in a case in which the plaintiff, in order to maintain his action, is obliged to prove only the trespass and the actual possession of the premises; and although in one sense it is title, yet, being a mere fact, an object of the senses, it may be shown in that court.³ But if the plaintiff is

order for the justice to lose jurisdiction the title must come directly in question. *Schroeder v. Wittram*, 66 Cal. 636.

New York. — Where in an action before a justice the issue is fraud, and title to land is only collateral, evidence of title in another instead of the defendant may be received. *Taylor v. Scoville*, 54 Barb. (N. Y.) 34.

Vermont. — Wherever the declaration in a justice's court is of such a character that, under the general issue, or any other plea merely putting the plaintiff to the necessity of proving his declaration, he is bound either to prove or to disprove a title to land, then a justice has no jurisdiction. But where the declaration is such as not to require the proof of title to land to sustain it, and such question only comes into the case by reason of some special line of defense, then the justice is not ousted of jurisdiction. *Jakeway v. Barrett*, 38 Vt. 316.

In a Criminal Case a justice is not ousted of jurisdiction by the fact that the title to real estate may incidentally come in issue. *Miller v. State*, 72 Ind. 421.

1. **Contract of Lease.** — In an action before a justice by a landlord to recover the crop to secure rent alleged to be due upon a contract of lease, the title to land is not in controversy, as the action depends exclusively upon the contract. *Durant v. Taylor*, 89 N. Car. 351.

Contract to Cut and Remove Timber. — Title to land is not in issue in an action for the breach of a contract to pay a certain sum for the right to enter upon the plaintiff's land and cut and remove timber therefrom, which contract has

been partly performed by the defendant. *Woodson v. Hubbard*, 45 Mo. App. 359.

Agreement to Move Fence. — Where A agreed with B to remove his fence, so as to open a certain road to its original width, and B promised to pay to A therefor ten dollars and fifty cents, and an action was brought before a justice by A to recover the money, it was held that this agreement did not concern the title to land, nor was it within the statute of frauds, and that the plaintiff was entitled to recover. *Storms v. Snyder*, 10 Johns. (N. Y.) 109.

Agreement for Sale of Growing Timber. — The defendant made an oral, and therefore invalid, agreement for the sale of growing timber, and after receiving the purchase price refused to allow the purchaser to cut and remove it. In an action to recover such purchase price it was held that the title to real estate was not in issue, since the real question in dispute was as to the time agreed upon for the removal of the timber. *Herrick v. Newell*, 49 Minn. 198.

Status of Parties in Issue. — Where the question in issue was whether a certain contract affecting lands was one of sale or of lease, it was held that the status of the parties, and not the title, was involved. *Quertermous v. Hatfield*, 54 Ark. 16.

2. *Clow v. Van Loan*, 4 Hun (N. Y.) 184; *Nichols v. Bain*, 42 Barb. (N. Y.) 353; *Galligher v. Connell*, 23 Neb. 391; *Lorius v. Abbott*, 49 Neb. 214.

3. *Dolahanty v. Lucey*, 101 Mich. 113; *Schergens v. Wetzell*, 12 Mo. App. 596; *Osborne v. Butcher*, 26 N. J. L. 310; *Jeffrey v. Owen*, 41 N. J. L. 260; *Campfield v. Johnson*, 21 N. J. L. 83;

obliged to go beyond the mere fact of possession, to resort to such evidence as involves the execution, validity, or construction of deeds or other muniments of title, in order to prove a grant, or such enjoyment of the right claimed as implies a grant, then the title in its broader sense comes in question, and a justice has no jurisdiction.¹

Gregory v. Kanouse, 11 N. J. L. 62; *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537.

Evidence of Actual Possession. — The question of actual possession of lands is not one of title, and a justice may therefore try and determine it. Thus where a plaintiff in an action for trespass *quare clausum* gave evidence tending to show that he was in actual possession of the *locus in quo* at the time when the alleged trespass was committed, it was held that the defendant had a right to give counter evidence to prove possession in himself. *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537.

Setting Out Title in Alleging Possession. — In an action in a justice's court to recover damages for breaking and entering the close of the plaintiff, it is sufficient for the plaintiff to aver that he was in possession, and to show, under that averment, that he was rightfully in possession as against the defendant; and if in alleging his possession he unnecessarily sets out the character or extent of his title, a general denial of the allegations of the complaint does not put the title to real estate in question so as to oust the jurisdiction of the justice. *Watry v. Hiltgen*, 16 Wis. 516.

Motion for Nonsuit—Plaintiff Not in Possession. — Where, in an action for trespass in a justice's court, the defendant moved for a nonsuit on the ground that the plaintiff was not in possession and occupancy of the premises, it was held that this motion did not bring in question the plaintiff's title to the premises, and that the justice was not thereby deprived of jurisdiction over the cause. *Ryan v. Harrigan*, 9 Hun (N. Y.) 520.

Defendant in Possession of Part of Land. — Where suit is brought for trespasses on the lands of the plaintiff, if the defendant is in actual possession of a parcel of the land described in the complaint he need not plead title thereto in the justice's court, as his possession is sufficient protection against any claim of the plaintiff for unlawful entry or trespass on that parcel. *Shull v. Green*, 49 Barb. (N. Y.) 311.

License to Enter. — In an action of trespass *quare clausum* before a justice, it is not necessary for the defendant to plead license to enter; for the license is not matter bringing title to the land in question, and it may be given in evidence under the general issue. *Wheeler v. Rowell*, 7 N. H. 515.

1. *Osborne v. Butcher*, 26 N. J. L. 310; *Jeffrey v. Owen*, 41 N. J. L. 260; *Campfield v. Johnson*, 21 N. J. L. 83; *Gregory v. Kanouse*, 11 N. J. L. 62.

Title Disputed. — Where, in an action for trespass on real estate, the defendant disputes the plaintiff's title to the land, the justice loses jurisdiction. *Halpern v. Burgess*, (Ark. 1890) 13 S. W. Rep. 763; *Orris v. Kempton*, 105 Mich. 229; *Bloom v. Stenner*, 50 N. J. L. 59; *Manfredi v. Wiederman*, 14 Misc. Rep. (N. Y. C. Pl.) 342; *Manny v. Smith*, 10 Wis. 509.

The question of title is raised in an action of trespass before a justice if the plaintiff offers deeds in evidence of his right of possession, or claims such right under a third person, whose ownership he proposes to show. *Gay v. Hults*, 55 Mich. 327.

Locus in Quo a Public Highway. — In an action of trespass *quare clausum*, the defense that the *locus in quo* is a public highway raises the question of title to land. *Bundy v. Sabin*, 2 Root (Conn.) 54; *Spear v. Bicknell*, 5 Mass. 125; *Ostrom v. Potter*, 71 Mich. 44; *Randall v. Crandall*, 6 Hill (N. Y.) 342; *Whiting v. Dudley*, 19 Wend. (N. Y.) 373; *Ashbough v. Walter*, 24 Wis. 466. But see *Yawger v. Manning*, 30 N. J. L. 182, wherein it was held that in an action of trespass in a justice's court, a plea that there was a road across the *locus in quo*, to which the defendants had a title in common with all other citizens of the state, and that they entered within the limits of this road, was not a plea of title to any real estate. Such plea was said to mean nothing more than that the defendants had a right, in common with all citizens, to a road across the *locus in quo*, which is merely a right of highway. *Yawger v. Manning*, 30 N. J. L. 182.

(5) *Possession*. — The statutes forbidding justices of the peace to take jurisdiction of actions involving the title to land are held not to apply to cases where the fact of possession only, and not the title, is in issue. A justice has jurisdiction to try the fact of possession.¹ And so where a right or liability arises on account of actual possession, regardless of the question of ownership, such statutes do not apply.²

To Recover Possession. — Actions for the recovery of possession of land do not necessarily bring the title in question, and a justice may take jurisdiction of such actions where it is not necessary to pass upon the title.³

Cutting and Removing Timber. — Where a defendant is sued in a justice's court for a trespass to the plaintiff's close by cutting growing timber and removing it therefrom, if he claims the timber under a debt he is entitled to have the cause removed to the Circuit Court upon giving the required bond. *Strasson v. Montgomery*, 32 Wis. 52.

Removing Earth from Street. — Title to land is involved in an action by the owner of a lot abutting on a street, against another for digging the street opposite to his lot and removing the earth therefrom. *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96.

1. *Pollock v. Cummings*, 38 Cal. 683; *Hamill v. Clear Creek County Bank*, 22 Colo. 384; *Gregory v. Kanouse*, 11 N. J. L. 62; *Hill v. Carter*, 16 N. J. L. 87; *Campfield v. Johnson*, 21 N. J. L. 83; *Osborne v. Butcher*, 26 N. J. L. 310; *Jeffrey v. Owen*, 41 N. J. L. 260; *Ely v. Schanck*, 52 N. J. L. 119; *Cannavan v. Conklin*, 1 Daly (N. Y.) 509; *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537; *Hardrop v. Gallagher*, 2 E. D. Smith (N. Y.) 523; *Fredonia, etc., Plank Road Co. v. Wait*, 27 Barb. (N. Y.) 214; *Carroll v. Rigney*, 15 R. I. 81; *Watry v. Hiltgen*, 16 Wis. 516.

Title Does Not Include Fact of Possession. — Under the *Rhode Island* statute providing that where, in an action of trespass before a justice, the defendant pleads the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate into question, it was held that the word "title" meant the right of possession, and not the fact of possession, and that evidence might be given to disprove the fact of the plaintiff's possession if it could be given without bringing the right of possession into question. *Carroll v. Rigney*, 15 R. I. 81.

2. *An Occupant of a House Damaged by*

Blasting may maintain an action for the injury to his possession, whether he be the owner or merely a tenant. Therefore, in such an action, the title to real estate does not necessarily come into question so as to oust the justice's court of jurisdiction. *Hardrop v. Gallagher*, 2 E. D. Smith (N. Y.) 523.

Injuries from Defects in Pier. — In an action for damages for an injury caused by defects in a pier, it was held that, since a person in actual possession of a pier was liable for such injuries regardless of the question of ownership, the justice could not be ousted of his jurisdiction by the introduction of evidence concerning the title to the pier. *Cannavan v. Conklin*, 1 Abb. Pr. N. S. (N. Y. C. Pl.) 271, 1 Daly (N. Y.) 509.

3. *In Indiana* a justice of the peace has jurisdiction over actions for the recovery of real estate only where the relation of landlord and tenant exists between the parties, or where possession has been unlawfully and forcibly taken, or the real estate unlawfully or forcibly detained. *Burgett v. Bothwell*, 86 Ind. 149; *Kiphart v. Brennenmen*, 25 Ind. 152; *O'Connell v. Gillespie*, 17 Ind. 459; *Short v. Bridwell*, 15 Ind. 211.

Forcible Entry and Detainer. — The statutes prohibiting justices from trying actions involving the title to real estate are generally held not to apply to forcible entry and detainer, as such action usually relates only to possession, and not to the title. *Cobb v. Garner*, 105 Ala. 467; *Hamill v. Clear Creek County Bank*, 22 Colo. 384; *Phelps v. Randolph*, 147 Ill. 335; *Bridges v. Branam*, 133 Ind. 488; *Melloh v. Demott*, 79 Ind. 502; *Ragan v. Harrell*, 52 Miss. 818; *Smith v. Kaiser*, 17 Neb. 184; *Browne v. Haseltine*, (S. Dak. 1897) 70 N. W. Rep. 649; *Smith v. Ryan*, 20 Tex.

(6) *Landlord and Tenant* — (a) *Proceedings to Dispossess Tenant*. — In proceedings by a landlord to dispossess a tenant who holds over after his term, or fails to pay rent, the question in issue is the relationship of landlord and tenant, and a justice's jurisdiction is not ousted by raising a question of title.¹

(b) *Actions for Rent*. — Where, in an action for rent, the relation of landlord and tenant exists between the parties, the fact that the defendant disputes the plaintiff's title to the land will not defeat the justice's jurisdiction, as the ownership of the land is in such case immaterial.² But where the defendant shows that the

661; *Jenkins v. Jeffrey*, 3 Wyoming 669. See article *FORCIBLE ENTRY AND DETAINER*, vol. 9, p. 46.

But where in such action it clearly appears that the title to the land will have to be tried, the justice must dismiss the case or certify it to a higher court, as the statute may direct. *Henderson v. Allen*, 23 Cal. 519; *Dickinson v. Maguire*, 9 Cal. 47; *Lick v. O'Donnell*, 3 Cal. 59; *Klopfer v. Keller*, 1 Colo. 410; *Murry v. Burris*, 6 Dakota 170; *Witz v. Haynes*, 43 Ind. 470; *Abbott v. Norton*, 53 Me. 158; *Tordsen v. Gummer*, 37 Minn. 211; *Comstock v. Cole*, 28 Neb. 470; *Grohousky v. Long*, 20 Neb. 362; *Myers v. Koenig*, 5 Neb. 419; *Williams v. Wait*, 2 S. Dak. 210.

Leased Premises. — Where, in an action to recover possession of leased premises, the defendant alleged that he had purchased the said premises and paid a certain sum as purchase money on the said lot, and that he was not the tenant of the plaintiff, but claimed the said lot by the right of purchase, it was held that the title to land was not put in issue by such plea, it not appearing whether the alleged purchase was before or after the commencement of the tenancy, or whether the defendant had purchased from the plaintiff or not, and, moreover, that there was no conveyance alleged. *Millikan v. Davenport*, 5 Ind. App. 257.

After Foreclosure of Mortgage. — Where a plaintiff in a justice's court claimed possession of land, on the ground that after a foreclosure of a mortgage under a power of sale the time to redeem it expired, and the title had become absolute in him, and the answer claimed that the defendant had three years, instead of one as claimed by the plaintiff, in which to redeem, and that he had redeemed within that time, it was held that the question of title did not come in issue. *Goenen v. Schroeder*, 8 Minn. 387.

Title Involved. — The plaintiff sued for possession of fifty acres of land claimed by the defendant under a will in which the testator left all his real property to his wife, and the remainder to the plaintiff in fee, except fifty acres at some suitable place to the defendant on his performance of certain conditions. The defendant pleaded title to the land, that it was in a suitable place, and that he had performed the conditions. It was held that the title to land was involved in the action so as to oust the justice of jurisdiction. *Wright v. Harris*, 116 N. Car. 460.

1. *State v. Marshall*, 24 S. Car. 507; *Swygert v. Goodwin*, 32 S. Car. 146; *Menominee River Lumber Co. v. Philbrook*, 78 Wis. 142. See also article *LANDLORD AND TENANT*.

Defendant Claiming under Third Person. — In an action against a tenant for unlawfully holding over after the expiration of his term, the defendant answered that he had entered into possession under a contract of purchase with a third person, and that the plaintiff had acquired title subject to such contract. It was held that the question in issue was as to whether the relation of landlord and tenant existed between the parties, and that the title to land was not in issue. *Menominee River Lumber Co. v. Philbrook*, 78 Wis. 142.

Proceedings by Landlord's Assignee. — If, on the return day of a duly served summons, in a proceeding by an assignee of a landlord's reversionary interest to dispossess a tenant, the tenant does not appear, or, appearing, does not demand proof of the jurisdictional facts authorizing his dispossession, there is no trial, and no questions respecting title to lands can arise. *Watson v. Idler*, 54 N. J. L. 467.

2. *Jordan v. Henderson*, 37 Ark. 120; *Matthews v. Morris*, 31 Ark. 222; *Ghiradelli v. Greene*, 56 Cal. 629; *Randle v. Sutton*, 43 Md. 64.

relation of landlord and tenant has ceased to exist by reason of a superior title having vested in himself or in a third person, the title comes in question, and the justice loses jurisdiction of the case.¹

c. HOW QUESTION RAISED—(1) *In General*.—The statutes forbidding a justice of the peace to take jurisdiction of actions involving the title to land prescribe the manner in which the question is to be raised, and the mode therein prescribed must be pursued in order to oust the justice of jurisdiction.²

Assumpsit for Use and Occupation.—Title to land is not so involved as to oust the justice of jurisdiction in an action of assumpsit for use and occupation, where the plaintiff declares upon a promise to pay as a consideration for the use and occupancy, by the sufferance and permission of the plaintiff, and the defendant files a plea averring title in himself. *Clough v. Horton*, 42 Vt. 10.

In an action of assumpsit to recover compensation for the use of certain real estate, brought before a justice, if the defendant pleads the general issue and files a brief statement in which he denies that the plaintiff has any title to the premises, but alleges that he occupied under one who had title, such brief statement does not put the title to land in issue so as to authorize a removal of the action to the District Court to be there tried and determined without any trial or judgment by the justice of the peace. *Hatch v. Allen*, 27 Me. 85.

1. *Meier v. Thieiman*, 90 Mo. 433; *Messler v. Fleming*, 41 N. J. L. 108; *Van Etten v. Van Etten*, 69 Hun (N. Y.) 499; *Main v. Cooper*, 25 N. Y. 180; *Lane v. Young*, 66 Hun (N. Y.) 563.

Plaintiff Claiming as Assignee of Reversion.—In an action of assumpsit before a justice for use and occupation, the declaration showed that the plaintiff claimed as an assignee of the reversion. It was held that the defendant's plea of nonassumpsit put the plaintiff's title in issue and deprived the justice of jurisdiction. *Smith v. Harris*, 3 Blackf. (Ind.) 416.

2. *Wall v. Albertson*, 18 Ind. 145; *Edgar v. Anness*, 47 N. J. L. 465; *Verbeck v. Verbeck*, 6 Wis. 159.

The practitioner is advised always to consult the statutes of his own state.

Indiana.—To raise issue of title the defendant must put in a plea supported by affidavit, or it must clearly appear from the evidence that title is involved.

Deacon v. Powers, 57 Ind. 489; *Wall v. Albertson*, 18 Ind. 145; *Parker v. Bussell*, 3 Blackf. (Ind.) 411.

New Jersey.—In an action of trespass brought in a justice's court the defendant need, by formal plea and tender of bond, arrest the jurisdiction of the justice in those cases only in which for his own acts he seeks legal justification by the establishment of title in himself or in another under whom he claims in respect to the land in controversy. In all other cases where the decision of a question of title becomes an essential feature of the plaintiff's case, the justice must dismiss the suit without requiring the statutory plea, notwithstanding the offer of proof may have emanated from the defendant. *Ely v. Schanck*, 52 N. J. L. 119; *Messler v. Fleming*, 41 N. J. L. 108.

New York.—Where, in an action of trespass *quare clausum* in a justice's court, the defendant justifies by plea of title, and delivers to the justice the undertaking provided by statute, the justice is ousted of jurisdiction and is bound to discontinue the proceedings. *Hall v. Hodskins*, 30 How. Pr. (N. Y. Supreme Ct.) 15; *Van Etten v. Van Etten*, 69 Hun (N. Y.) 499.

Not Available on Appeal.—When a defendant fails to set up properly in the justice's court the defense of title to land, he cannot avail himself of such defense on appeal. *Randolph v. Montfort*, 16 N. J. L. 226.

Unverified Answer.—Where the statute requires an answer putting in issue the title to land to be supported by affidavit, if the answer is unsupported by affidavit the justice is not ousted of jurisdiction. *Delzell v. Burlington, etc., R. Co.*, 89 Iowa 208. But see *People v. House*, 4 Utah 369.

Question Not Raised by Demurrer.—In an action concerning real estate, if the petition alleges ownership of the land, a demurrer thereto does not raise the point that the justice had no jurisdiction.

(2) *On Plaintiff's Own Showing.* — In some cases it is held that where, by the plaintiff's own showing, the title is in dispute, a justice loses jurisdiction.¹

(3) *By Defendant's Pleading.* — In most of the states, if the defendant in a justice's court wishes to raise the question of title to land, he must set up the defense specially in his plea or answer,²

tion, because no question of title to land may arise, since the demurrer admits the plaintiff's ownership of the land. *Delzell v. Burlington, etc., R. Co.*, 89 Iowa 208; *Stoppenbach v. Zohrlant*, 21 Wis. 385.

Stranger Cannot Set Up Title. — The question of title which arrests further proceedings before a justice is between the original parties to the action, and jurisdiction, once acquired, cannot be divested by the intervention of a stranger to the suit, asserting a paramount title in himself. *Davis v. Davis*, 83 N. Car. 71. And see *Cunningham v. Holland*, 40 Ark. 556.

1. *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96; *Lybrand v. Carson*, 2 Pin. (Wis.) 33; *Ohse v. Bruss*, 45 Wis. 442. But see *Koon v. Mazuzan*, 6 Hill (N. Y.) 44.

2. *Williams v. Mecartney*, 69 Cal. 556; *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Lynch v. Rosseter*, 6 Pick. (Mass.) 419; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Strout v. Berry*, 7 Mass. 385; *Colby v. Stevens*, 38 N. H. 191; *Foster v. Leavitt*, 8 N. H. 353; *Flagg v. Gotham*, 7 N. H. 266; *Lowitz v. Leverentz*, 57 Wis. 596.

Maine — Special Pleading Abolished. — Since the statute of 1831, c. 514, abolishing special pleading, the general issue, with a brief statement of soil and freehold, in an action of trespass *quare clausum fregit* brought before a justice of the peace, is sufficient to bar any further proceedings before him except the taking of a recognizance to prosecute the plea of the court of common pleas, this statute having virtually repealed so much of the statute of 1821, c. 76, § 10, as requires that in such cases the title to the *locus in quo* should be specially pleaded. *Hodgdon v. Foster*, 9 Me. 113. Compare *Otis v. Ellis*, 78 Me. 75.

Michigan — Notice with General Issue. — Under How. Ann. Stat. Mich., §§ 6890-6894, a defendant in a justice's court may raise the defense of title by giving notice with the general issue that title will come in question. *Vandoozer v. Dayton*, 45 Mich. 247.

Sufficient Notice. — In an action of trespass in a justice's court, the defendant's notice of title stated that the land on which the injuries complained of were committed was a legal highway, and that the defendant in removing a fence of the plaintiff's was acting as highway commissioner under the statute, but the notice did not describe all of the land claimed to have been trespassed upon. This was held sufficient to apprise the plaintiff of the nature of the defense, and under it all pertinent testimony might be admitted. *Weber v. Stagrays*, 75 Mich. 32.

Failure to Set Up Title. — Where the complaint in a justice's court is so drawn that the defendant can set up title in his answer, and on giving the requisite security oust the justice of his jurisdiction, but he omits to set up title, the justice retains his jurisdiction, and the defendant will be precluded from drawing it in question on the trial. *Adams v. Rivers*, 11 Barb. (N. Y.) 390.

Refusal of Justice to Receive Plea of Title. — If a justice of the peace refuses to receive a plea of title to land when offered in an action before him, the defendant should appeal from such refusal; but where, instead of appealing, the defendant pleaded the general issue, and after a trial and judgment against him appealed from this judgment, and the Court of Common Pleas, upon motion, gave him leave to file his plea of title, it was held that the proceeding of that court was correct. *Blood v. Kemp*, 4 Pick. (Mass.) 169.

Informal Plea. — Where the plea and affidavit intended to apprise a justice that the title to land was involved, was informal and not in compliance with the statute, it was held that nevertheless, if the question decisive of the case was whether or not the plaintiff had the title, the justice's jurisdiction was at an end, and he could only thereafter perform the ministerial duty of transmitting the papers to the Circuit Court. *State v. Ganzhorn*, 52 Mo. App. 220.

Must Show that Title Will Come in Question. — In order to oust a justice of

and, failing to do so, cannot introduce evidence of title under the general issue.¹

(4) *Proof that Title Is in Issue.* — In some states it has been held that merely pleading title to land is not of itself sufficient to oust the justice of jurisdiction, but that it must appear from the evidence or the nature of the suit that title is involved.²

(5) *Where Bond Required.* — When the statute directs the filing of a bond or undertaking by a defendant who sets up title to land in a justice's court, such bond must be filed in order to oust the justice of jurisdiction.³

jurisdiction, it is not sufficient merely to answer facts showing that the plaintiff may seek to prove his case by proof of title to land, which the defendant denies; the defendant must plead facts showing that the title to land will come in question. *Melloh v. Demott*, 79 Ind. 502; *Fredonia, etc., Plank Road Co. v. Wait*, 27 Barb. (N. Y.) 214; *Browne v. Scofield*, 8 Barb. (N. Y.) 239; *Ohse v. Bruss*, 45 Wis. 442; *Verbeck v. Verbeck*, 6 Wis. 159. And see *Heritage v. Wilfong*, 58 Pa. St. 137.

Where Facts May Be Confessed and Avoided. — In an action before a justice of the peace for the possession of land, an answer that upon foreclosure of a mortgage made by the plaintiff, the sheriff had sold and conveyed to a purchaser, who had made a lease to the defendant, under which he had taken and was holding peaceable possession, does not necessarily bring the title in issue. The facts stated may be confessed and avoided. *Melloh v. Demott*, 79 Ind. 502.

Sufficient Answer. — Under the *New York Code Civ. Pro.*, § 2951, requiring a justice to discontinue a case where the answer sets forth "facts showing that the title to real property will come in question," if the defendant's answer alleges that at the time of the trespass for which the action was brought they were the "owners in fee," it is sufficient. *Manfredi v. Wiederman*, 14 Misc. Rep. (N. Y. C. Pl.) 342.

1. *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Lynch v. Rosseter*, 6 Pick. (Mass.) 419; *Stone v. Hubbard*, 17 Pick. (Mass.) 217; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Strout v. Berry*, 7 Mass. 385; *Schergens v. Wetzell*, 12 Mo. App. 596; *Foster v. Leavitt*, 8 N. H. 353; *Flagg v. Gotham*, 7 N. H. 266; *Dewey v. Bordwell*, 9 Wend. (N. Y.) 65; *Eagle v. Swayze*, 2 Daly (N. Y.) 140; *Willard City v. Woodland*, 7 Utah 192.

Must Be Plead Before General Issue.

— In an action of trespass on land, in a justice's court, the defendant cannot, after pleading the general issue, interpose a plea of title, nor can he, under the general issue, give evidence of title. *Quimby v. Hart*, 15 Johns. (N. Y.) 304.

Evidence Admissible to Identify Property.

— In an action of trover brought before a justice for the conversion of a quantity of hoops, it was held proper to show, under a plea of the general issue, that they were cut from lands belonging to a certain estate, and to put in evidence the government patent to the former owner and a power of attorney from his heirs, including the plaintiff, empowering the defendant to sell and convey any of the property belonging to them. The introduction of such testimony would not be litigating a claim of title, and the evidence would be admissible for the purpose of identifying the property in suit. *Hart v. Hart*, 48 Mich. 175.

2. *Jansen v. Strayhorn*, 59 Ark. 330; *Randle v. Sutton*, 43 Md. 64; *Radley v. O'Leary*, 36 Minn. 173; *Goenen v. Schroeder*, 8 Minn. 387; *Heritage v. Wilfong*, 58 Pa. St. 137; *Essler v. Johnson*, 25 Pa. St. 350. And see *Cox v. Graham*, 3 Iowa 347.

In Maine, in trespass *quare clausum* before a justice of the peace, if the defendant plead a title to the soil and freehold, this plea, without any replication from the plaintiff, puts an end to the magistrate's jurisdiction over the cause, except that he must take the recognizance of the party for its prosecution to the Court of Common Pleas, where the pleadings are to be closed. *Low v. Ross*, 3 Me. 256.

3. *Ostrom v. Potter*, 71 Mich. 44; *Edgar v. Anness*, 47 N. J. L. 465; *Randolph v. Montfort*, 16 N. J. L. 226; *Little v. Denn*, 34 N. Y. 452; *Laliette*

d. WHAT ACTION JUSTICE MUST TAKE. — When it is properly brought to the notice of a justice of the peace that title to land is involved in a suit commenced before him, he must, according as the statute directs, either dismiss the suit ¹ or certify it to a higher court.²

e. PROCEEDINGS IN HIGHER COURT — (1) *Jurisdiction.* — When, in an action commenced before a justice of the peace, the question of title to lands has been properly raised and the case certified to the higher court in accordance with the statute, that court acquires jurisdiction of the case ³ and proceeds with it to

v. Van Keuren, 7 How. Pr. (N. Y. Ct. App.) 409; *Fredonia, etc., Plank Road Co. v. Wait*, 27 Barb. (N. Y.) 214; *Lowitz v. Leverentz*, 57 Wis. 596; *State v. Blonien*, 36 Wis. 303; *State v. Preston*, 34 Wis. 676; *State v. Huck*, 29 Wis. 202; *Ashbough v. Walter*, 24 Wis. 466; *Barteau v. Appleton*, 23 Wis. 414.

Where a defendant in a justice's court files an affidavit showing that the title to land will come in question, and delivers an undertaking to admit service if the suit is brought in the proper court, the justice cannot retain jurisdiction by refusing to approve the undertaking without examining the surety, and without giving any reasons for his disapproval. *Harding v. Ellston*, 19 Civ. Pro. Rep. (Orange County Ct.) 252.

1. *Fitzgerald v. Beebe*, 7 Ark. 305; *Comstock v. Cole*, 28 Neb. 470; *Grohousky v. Long*, 20 Neb. 362; *Davis v. Morse*, 21 N. H. 345; *Edgar v. Anness*, 47 N. J. L. 465; *Lane v. Young*, 66 Hun (N. Y.) 563; *Harding v. Ellston*, 19 Civ. Pro. Rep. (Orange County Ct.) 252; *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96; *Evans v. Williamson*, 79 N. Car. 86; *Parker v. Allen*, 84 N. Car. 466; *Williams v. Williams*, 6 Kulp (Pa.) 415; *Warwick v. Mayo*, 15 Gratt. (Va.) 528. See the statutes of the several states.

2. *California.* — *Henderson v. Allen*, 23 Cal. 519; *Doherty v. Thayer*, 31 Cal. 140; *Dickinson v. Maguire*, 9 Cal. 47; *Lick v. O'Donnell*, 3 Cal. 59.

Colorado. — *Klopfer v. Keller*, 1 Colo. 410.

Dakota. — *Murry v. Burris*, 6 Dakota 170.

Indiana. — *Bibbler v. Walker*, 69 Ind. 362; *Wall v. Albertson*, 18 Ind. 145; *Love v. Bohan*, 4 Ind. 235.

Iowa. — *Delzell v. Burlington, etc.*, R. Co., 89 Iowa 208.

Kansas. — *Douglass v. Easter*, 32 Kan. 496.

Maine. — *Abbott v. Norton*, 53 Me. 158; *Low v. Ross*, 3 Me. 256; *Hodgdon v. Foster*, 9 Me. 113.

Massachusetts. — *Magoun v. Lapham*, 19 Pick. (Mass.) 419; *Pitman v. Flint*, 10 Pick. (Mass.) 504; *Spear v. Bicknell*, 5 Mass. 125.

Michigan. — *Orris v. Kempton*, 105 Mich. 229; *Dolahanty v. Lucey*, 101 Mich. 113.

Minnesota. — *Lindekugel v. Angelhofer*, 24 Minn. 324; *Steele v. Bond*, 28 Minn. 267.

Missouri. — *State v. Ganzhorn*, 56 Mo. App. 519; *Bennett v. McCaffery*, 28 Mo. App. 220.

Nevada. — *State v. Rising*, 10 Nev. 97; *Tull v. Anderson*, 15 Nev. 426.

Oregon. — *Sweck v. Galbreath*, 11 Oregon 516; *Aiken v. Aiken*, 12 Oregon 203.

South Dakota. — *Williams v. Wait*, 2 S. Dak. 210.

United States. — *Langford v. Monteith*, 102 U. S. 145.

See the statutes of the several states.

In *Wisconsin*, where the defendant in a justice's court justifies by a plea of title, the case is certified to the Circuit Court; but if it appears by the plaintiff's own showing that title to lands is in question, then the case must be dismissed. *Ohse v. Bruss*, 45 Wis. 442; *Lybrand v. Carson*, 2 Pin. (Wis.) 33.

Mandamus to Compel Certification. — A justice of the peace will be compelled by mandamus to certify the cause to the Circuit Court, where an affidavit that the suit involves the title to real estate, as an issue therein, has been filed before the justice. *Bennett v. McCaffery*, 28 Mo. App. 220.

3. *Lindekugel v. Angelhofer*, 24 Minn. 324; *Lybrand v. Carson*, 2 Pin. (Wis.) 33; *Kimball v. Adams*, 52 Wis. 554.

Case Erroneously Certified. — Where the justice, erroneously thinking that

final judgment, as though it had been originally commenced therein.¹

(2) *Pleadings*. — It is the general rule that where an action is removed on a plea of title to land from a justice of the peace to a higher court, the parties cannot new assign in the latter court, but will be restricted to the issue raised by the plea of title.²

the title to land was in question, certified the cause to the Circuit Court, it was held that the Circuit Court had no jurisdiction thereof and should have dismissed it on motion of the defendant. *Miles v. Chamberlain*, 17 Wis. 446.

How Objection Taken. — An objection that it did not appear, from the evidence before the justice, that title to land was involved in the action, should be taken advantage of by seasonably bringing it to the notice of the District Court upon affidavit, and upon a motion for a further return from the justice showing what evidence of title, if any, was given. *Lindekugel v. Angelhofer*, 24 Minn. 324.

1. *Bibbler v. Walker*, 69 Ind. 362; *Love v. Bohan*, 4 Ind. 236; *Douglass v. Easter*, 32 Kan. 496.

Evidence of Title or Adverse Possession. — Where an action of trespass commenced before a justice has been certified to the Circuit Court because it appeared from the plaintiff's evidence that a question of a title to land was involved, the fact that the defendant had failed to give notice with his plea that title would come in question does not, on the trial in the Circuit Court, operate as an admission of the plaintiff's title so as to exclude evidence of adverse possession or of title in the defendant. The case stands in the Circuit Court subject to the same rules of proof and disproof as though it had been originally commenced there. *Rawson v. Finlay*, 27 Mich. 268.

May Allow Amendments. — Under the *California* Code of Civ. Pro., § 838, which provides that, on the transfer of an action involving the title to land from a justice to the Superior Court, the Superior Court shall have the same jurisdiction as if the action had been commenced therein, that court in such action may allow an amendment of the complaint. *Baker v. Southern California R. Co.*, 114 Cal. 501.

2. *Magoun v. Lapham*, 19 Pick. (Mass.) 419; *Cross v. Kenip*, 45 N. J. L. 51; *Hawk v. Segraves*, 34 N. J. L. 355;

Brain v. Snyder, 30 N. J. L. 56; *Campfield v. Johnson*, 21 N. J. L. 83; *Tindall v. Tindall*, 20 N. J. L. 146; *Phillips v. Kent*, 20 N. J. L. 686; *Appleby v. Obert*, 16 N. J. L. 336; *Tuthill v. Clark*, 11 Wend. (N. Y.) 643; *Brotherton v. Wright*, 15 Wend. (N. Y.) 237.

Repleader Granted. — Where an action was removed to the Court of Common Pleas on a plea of title, and in that court the plaintiff new assigned, and thereupon the defendant pleaded a title to the land new assigned, and also the general issue, and the cause was tried and a verdict found for the plaintiff upon these issues, it was held that as the court had no authority to allow a new assignment, repleader could be granted. *Magoun v. Lapham*, 19 Pick. (Mass.) 419.

Motion to Strike Out Pleadings. — Where the pleadings in the higher court are different from those interposed in the justice's court, the proper manner of raising the objection is by motion to strike out such pleas. *Cross v. Kemp*, 45 N. J. L. 51; *Campfield v. Johnson*, 21 N. J. L. 83; *Tuthill v. Clark*, 11 Wend. (N. Y.) 643.

Where No Objection Raised. — Where the pleadings in the higher court are variant from what they were before the justice, and there is no objection raised on account of such variance, the cause must be tried upon the pleadings as they exist. *Tuthill v. Clark*, 11 Wend. (N. Y.) 643.

Demurrer Not a Departure. — Where a case was removed to the Court of Common Pleas on plea of title, it was held that a demurrer to the defendant's plea tendering an issue of law upon the matters contained in such plea was not a departure from the pleading to which the parties were limited by the statute. *Dorman v. Lang*, 3 How. Pr. (N. Y. Supreme Ct.) 59.

New Jersey — Plaintiff Enlarging Demand. — In New Jersey it is held that, where the plaintiff enlarges his demand in the higher court, it discharges the defendant's obligation to plead title only. *Chambers v. Wambough*, 28 N.

However, the pleadings need not be identical with those filed in the justice's court; it is sufficient if they are substantially the same.¹

9. Of Criminal Matters. — At common law justices of the peace were merely conservators of the peace and examining magistrates.² In this country all of their criminal jurisdiction is derived from and limited by statute, and therefore the statutes should always be consulted.³ In some states justices have no

J. L. 530; *Snedicker v. White*, 11 N. J. L. 87. See also *Phillips v. Phillips*, 21 N. J. L. 42.

Plaintiff's Proof Confined to Declaration.

— Where a cause is removed from a justice's court on a plea of title, the plaintiff's proof in the Common Pleas must be confined to his declaration. *Houghtaling v. Houghtaling*, 5 Barb. (N. Y.) 379.

How Pleadings Proved. — Where an action involving the title to land is removed from a justice's court to the Court of Common Pleas, the justice before whom the suit was commenced may prove the pleadings exhibited before him without producing his docket or a transcript. *Brotherton v. Wright*, 15 Wend. (N. Y.) 237.

Court Will Take Notice of Suit Below.

— Where an action of trespass *quare clausum fregit* is brought in a justice's court and title pleaded, and a suit for the same trespass brought in the Supreme Court thereupon, although the suit in the court below is not referred to in the pleadings, the Supreme Court will take notice of the fact upon the plea being produced, countersigned by the parties, so as to enable costs to be awarded. *Van Pelt v. Phillips*, 24 N. J. L. 560.

Suggestion as to Manner of Bringing Up Cause. — Where a plaintiff declares in the Common Pleas, in an action of trespass originally commenced before a justice whose jurisdiction is taken away by a plea of title, the defendant may file a suggestion, stating the manner in which the cause was brought into the Common Pleas. It seems, however, that a suggestion in the plea would be more correct. *Wilcox v. Wood*, 9 Wend. (N. Y.) 346.

1. *Phillips v. Kent*, 20 N. J. L. 686; *Brotherton v. Wright*, 15 Wend. (N. Y.) 237; *Wiggins v. Tallmadge*, 7 How. Pr. (N. Y. Ct. App.) 404.

Plaintiff May Declare More Particularly. — Where the defendant has pleaded title to a declaration of trespass *quare*

clausum fregit in a justice's court, the plaintiff, if he prosecutes the suit in the Common Pleas, may there declare particularly describing the close, although he did not do so in the justice's court. *Tindall v. Tindall*, 20 N. J. L. 146; *People v. Albany C. Pl.*, 19 Wend. (N. Y.) 123.

Defendant May File Any Plea of Title.

— When, in an action of trespass, brought in a justice's court, the defendant pleads *liberum tenementum*, and suit is thereupon brought in the Supreme Court, the defendant is not confined to precisely the same plea filed before the justice, but is at liberty to file in that court any other plea which only sets up, by way of defense, the title to real estate. A plea of "title by way of justification" is sufficient. *Hawk v. Segraves*, 34 N. J. L. 355.

2. *Horton v. Elliott*, 90 Ala. 480; *Ellis v. White*, 25 Ala. 540; *Dunnagan v. Shaffer*, 48 Ark. 476; *Willey v. Strickland*, 8 Ind. 453; *Matter of Way*, 41 Mich. 299.

3. As to the Jurisdiction of Justices in Particular Cases, see the specific criminal titles throughout this work.

Territorial Limits. — As to the territorial limits of a justice's criminal jurisdiction, see the statutes and the following cases: *Ex p. Cook*, (Cal. 1895) 39 Pac. Rep. 16; *Neth v. Crofut*, 30 Conn. 580; *Atchison, etc., R. Co. v. Rice*, 36 Kan. 593; *Guelot v. Pearce*, (Ky. 1897) 38 S. W. Rep. 892; *Hart v. State*, 15 Tex. App. 202.

Jurisdiction Should Appear on Face of Proceedings.

— A conviction of crime in justice's court must appear on its face to be within the justice's jurisdiction. *Hepler v. State*, 43 Wis. 479.

Prosecution Dismissed for Defects in Complaint.

— Where the prosecuting attorney dismisses a prosecution in a justice's court on account of defects in the complaint, if an information is filed by the coroner against the same person for the same offense before another justice, the latter justice will have juris-

criminal jurisdiction except as committing magistrates.¹

10. Of Equitable Matters. — Since justices' courts derive their jurisdiction wholly from statutes, and the statutes do not usually confer upon them equitable powers, it is the general rule that such courts cannot assume jurisdiction of equity causes.² Thus it is

diction to make a preliminary examination and commit to jail. *Ex p. Claunch*, 71 Mo. 233.

Wherever a Special Power Is Given to a Justice of the peace, by statute, to convict an offender in a summary way, without a trial by jury, he must strictly pursue that power. *State v. Barrow*, 3 Murph. (N. Car.) 121.

Concurrent Jurisdiction with Circuit Court. — Where a party is arrested and brought before a justice, charged with the commission of a misdemeanor of which the justice and the District Court have concurrent original jurisdiction, the defendant has a right to demand a trial before the justice, and the state has no right to elect to treat the proceeding before the justice as a mere preliminary examination and have the party committed for a final trial at the next term of the District Court. *Matter of Donnelly*, 30 Kan. 424.

Duty of Justice to Try Charge. — The *Alabama Code*, § 4237, provides that "in all trials before a justice of the peace of causes which are within his jurisdiction, he must determine both the law and the facts without the intervention of a jury." Section 4239 provides that if the defendant does not demand a jury trial the trial must proceed before the justice. It was held that where the justice had jurisdiction of the misdemeanor with which the defendant was charged, and the defendant did not demand a jury, it was the duty of the justice to try the charge himself, instead of holding the defendant to the Circuit Court. *Ex p. Pruitt*, 99 Ala. 225.

1. *Jackson v. State*, 33 Fla. 620; *St. Landry v. Bloch*, 45 La. Ann. 1090.

2. **Cannot Grant Equitable Relief.** — A justice of the peace cannot render a judgment which grants equitable relief. *Nattin v. Riley*, 54 Ark. 32; *Whiteside v. Kershaw*, 44 Ark. 380; *Boyce v. Bowman*, 15 Mo. App. 578.

Relief Against Judgment. — A justice has not the jurisdiction in equity to grant relief against a judgment valid only on its face. *Brown v. Goble*, 97 Ind. 86.

Specific Performance. — A justice has no such equitable jurisdiction as to compel the specific performance of a contract. *Enlow v. Newland*, 22 Mo. App. 581.

Should Dismiss Case. — Where a plaintiff in a justice's court tenders an issue the decision of which requires the exercise of an equity power, it is the duty of the justice to dismiss the case. *Moore v. Freeman*, 50 Ohio St. 592.

An Action by One Partner Against Another on an unsettled account of more than a single item is strictly an equitable action, over which a justice has no jurisdiction. *Rankin v. Fairley*, 29 Mo. App. 587.

An Action Against a Married Woman upon a promise to pay for work done on premises owned and held as her separate estate is not cognizable in the court of a justice of the peace. Such court is a common-law court, and its jurisdiction does not therefore embrace causes of an equitable nature. *Dougherty v. Sprinkle*, 88 N. Car. 300.

Controversy between Heirs. — The power to hear and determine controversies between the heirs of an intestate, where the fact of advancements to such heirs is to be ascertained and the legal effect thereof upon their several rights on distribution adjudicated, is an equity power, and cannot be exercised by a justice of the peace. *Moore v. Freeman*, 50 Ohio St. 592.

May Act upon Equitable Principles. — It has been held that where the justice has jurisdiction of the subject-matter, unless there is some special provision of law to the contrary, he may act upon established equitable principles in deciding the case. *Nattin v. Riley*, 54 Ark. 32; *Snell v. Mohan*, 38 Ind. 494; *Brown v. Goble*, 97 Ind. 86.

Prayer for Equitable Relief — Surplusage. — While a justice of the peace has no jurisdiction to administer equity affirmatively, still, where the allegations and proof show that the plaintiff is entitled to relief which the justice can administer, the complaint should not be dismissed because the plaintiff's prayer asks for equitable relief. Such

held that a justice of the peace has no jurisdiction to try a case where affirmative equitable relief is sought by the answer and is necessary to the defense.¹

In some States, however, justices are given equitable jurisdiction in certain cases;² but even in such cases they cannot exercise the extraordinary powers of a court of chancery.³

11. Objections to Jurisdiction — *a. WHEN RAISED* — (1) *Of the Person*. — It is the general rule that objections to the jurisdiction of a justice of the peace over the person of the defendant must be raised in the justice's court, else they are waived.⁴ Such

prayer should be treated as surplusage. *Holden v. Warren*, 118 N. Car. 326.

1. *Duffy v. Moran*, 12 Nev. 94; *Petsch v. Biggs*, 31 Minn. 392; *Orr v. McCurdy*, 34 Mo. App. 418.

Estoppel in Pais. — A justice of the peace has no jurisdiction over the question of estoppel *in pais*. That is a defense peculiar to equity jurisprudence. *Hicks v. Martin*, 25 Mo. App. 359; *Phillips v. Burrows*, 2 Mo. App. Rep. 1001.

In *Delaware* a justice of the peace has no equitable powers or jurisdiction. Therefore, the statute providing for a trial in a justice's court in certain cases on an affidavit filed by the defendant setting forth any "just defense," does not include equitable defenses, but only such defenses as are cognizable at common law or by special provision of the same statute. *Messick v. Stafford*, 2 Houst. (Del.) 243.

In *Minnesota*, under Gen. Stat. 1878, c. 84, § 18, providing that all matters in excuse, justification, or avoidance of the allegations in a complaint shall be set up in an answer, equitable defenses are not intended to be included. *Petsch v. Biggs*, 31 Minn. 392.

Remedy by Application to District Court. — Where a defendant has an equitable defense to an action in a justice's court, his remedy is by application to the District Court, and if essential to the justice of the case that court may, by injunction pending his action, protect him against proceedings before the justice. *Petsch v. Biggs*, 31 Minn. 392.

2. *Sherwood v. Campbell*, 1 B. Mon. (Ky.) 54; *Searcy v. Switzer*, 13 B. Mon. (Ky.) 352; *Bryan v. Buckholder*, 8 Humph. (Tenn.) 561; *Flanagan v. Oliver Finnie Grocery Co.*, 98 Tenn. 599.

In *Texas* the distinction between equitable and legal titles and rights, as respects the form, has no existence. Therefore, where the subject-matter of

an action is within the jurisdiction of a justice, it is in his province to take cognizance of it and to decide it in favor of the party who has the right, notwithstanding the defendant relies solely upon an equitable defense. But the justice cannot exercise the powers of chancellor or any of the extraordinary powers belonging exclusively to a court of chancery. *Gibson v. Moore*, 22 Tex. 611.

3. *Flanagan v. Oliver Finnie Grocery Co.*, 98 Tenn. 599; *Bryan v. Buckholder*, 8 Humph. (Tenn.) 561; *Gibson v. Moore*, 22 Tex. 611.

4. *Gresham v. Landens*, 2 Ga. Dec. 149; *Brisco v. Brewer*, 2 Ga. Dec. 105; *Wallingford v. Hall*, 45 Conn. 350; *Fagg v. Clements*, 16 Cal. 389; *Western R. Co. v. Lazarus*, 88 Ala. 453; *Tisdale v. Minonk*, 46 Ill. 9; *Ludwick v. Beckamire*, 15 Ind. 198; *Cahill v. Texas Mexican R. Co.*, 76 Tex. 100; *Galveston, etc., R. Co. v. McTigue*, 1 Tex. App. Civ. Cas., § 460.

A **General Appearance** waives all defects in the process. See article APPEARANCES, vol. 2, p. 639 *et seq.* And see article SUMMONS AND PROCESS.

By Appealing from a Justice's Decision and participating in a trial *de novo* the defendant waives all objection to the justice's jurisdiction of his person. *Schoolfield v. Brunton*, 20 Colo. 139; *Union Pac., etc., R. Co. v. Perkins*, 7 Colo. App. 184; *Cunningham v. Bostwick*, 7 Colo. App. 169; *Dean v. Kinman*, 15 Neb. 492. But see *Barber v. Kennedy*, 18 Minn. 216.

Too Late on Appeal. — When a defendant in a justice's court fails to object in that court to the jurisdiction of his person, the objection will come too late if raised for the first time on appeal. *Western R. Co. v. Lazarus*, 88 Ala. 453; *Tisdale v. Minonk*, 46 Ill. 9; *Ludwick v. Beckamire*, 15 Ind. 198; *Cahill v. Texas Mexican R. Co.*, 76

objections must usually be raised at the earliest opportunity in the justice's court, and after the defendant has appeared and gone into the merits of the case he will not be heard to object.¹

Objection Taken and Overruled. — Where the defendant has properly raised an objection to the justice's jurisdiction of his person and the objection has been overruled, he does not waive the objection by appearing generally and pleading to the merits.²

Tex. 100; Galveston, etc., R. Co. v. McTigue, 1 Tex. App. Civ. Cas., § 460. But see Poyser v. Murray, 6 Ind. 35; Richardson v. Welcome, 6 Cush. (Mass.) 331.

Not Available in Collateral Proceedings. — Any objection to the jurisdiction of a justice depending on matters outside the record should be made before the justice, and cannot be taken advantage of for the first time in a collateral proceeding. Wallingford v. Hall, 45 Conn. 350.

Judgment Not Set Aside by Bill in Equity. — Where an objection to the jurisdiction of a justice of the peace has been waived by failure to raise it in that court, the judgment cannot be set aside on that ground by a bill in equity. Brisco v. Brewer, 2 Ga. Dec. 105.

1. By Appearing and Pleading to the Merits in a justice's court the defendant waives any objection to the jurisdiction of such court over his person. Storm v. Worland, 19 Ind. 203; Brandon v. Avery, 22 N. Y. 469; Osburne v. Gilbert, 52 Barb. (N. Y.) 158; Weidenhamer v. Bertle, 103 Pa. St. 448; Agee v. Dement, 1 Humph. (Tenn.) 332; Wheeler, etc., Mfg. Co. v. Donahoe, 49 Ark. 318; Kuhn v. Mount, 13 Utah 108. But see Boyer v. Moore, 42 Iowa 544; Cornell v. Smith, 2 Sandf. (N. Y.) 290; Willins v. Wheeler, 28 Barb. (N. Y.) 669. See also article APPEARANCES, vol. 2, p. 639 *et seq.*

Demanding Jury. — Where the justice has jurisdiction of the subject-matter, and the parties agree on a day of trial, and the defendant demands a jury, he thereby waives all objection to the jurisdiction. Pittsburgh, etc., R. Co. v. Fleming, 30 Ohio St. 480.

Objection After Verdict. — Where it appeared from the justice's transcript and from the testimony of both parties at the trial that the justice had jurisdiction it was too late after verdict to object that the statement filed was jurisdictionally defective. Kennedy v. Pruett, 24 Mo. App. 414.

Cause Removed to Another Justice. — Where, after a cause is removed from one justice to another, the parties appear before the latter justice and proceed to trial, they thereby waive any want of jurisdiction over the person. Nesbit v. Long, 37 Ind. 300; Burt v. Bailey, 21 Minn. 403; Magner v. Renk, 65 Wis. 364.

After Adjournment. — Where a defendant in a justice's court appears and obtains an adjournment, he cannot afterwards object to the justice's jurisdiction of his person. Rahn v. Greer, 37 Iowa 627; Bohn v. Devlin, 28 Mo. 319; Roberts v. Warren, 3 Wis. 736.

Where Defendant Not Bound to Appear. — In *Illinois* there is no law making it the duty of the defendant to appear to a summons issued by a justice of the peace, and his nonappearance should work him no prejudice. Therefore it was held that where a defendant failed to appear in a justice's court, a motion by him to dismiss for want of jurisdiction, made at the earliest moment on appeal to the Circuit Court, did not come too late, under the rule requiring dilatory defenses to be set up at the earliest opportunity. Evans v. Bouton, 85 Ill. 579.

2. Chase v. Hagood, (Idaho 1893) 34 Pac. Rep. 811; Belden v. New-York, etc., R. Co., 15 How. Pr. (N. Y. Supreme Ct.) 17; Shannon v. Comstock, 21 Wend. (N. Y.) 457; Roe v. Hanson, 5 Lans. (N. Y.) 304; Miner v. Francis, 3 N. Dak. 549; Torbet v. Coffin, 6 Ohio 33. But see Burgen v. Dwinal, 11 Ark. 314; Prosser v. Chapman, 29 Conn. 515.

Bill of Exceptions. — In *New Jersey* it is an irregularity to take a bill of exceptions in a justice's court. Elkinton v. Bennet, 3 N. J. L. 219.

In *New York* it is not necessary in a justice's court to take an exception to the jurisdiction; it is enough that an objection is made and overruled. Roe v. Hanson, 5 Lans. (N. Y.) 304.

In *Indiana* an exception before a justice of the peace is of no value because

(2) *Of the Subject-matter.* — Where a justice has no jurisdiction of the subject-matter, it is the general rule, although the decisions are not uniform on the subject, that a failure to take the objection in the justice's court does not waive it, but that it may be taken advantage of at any time.¹

b. HOW RAISED — Plea in Abatement. — Where a justice's want of jurisdiction does not appear on the face of the declaration or complaint, the objection is ordinarily taken by a plea in abatement.²

Demurrer — Motion to Dismiss. — Where it appears from the face of the declaration or complaint that the justice has no jurisdiction, the objection may be taken by demurrer³ or by a motion to dismiss.⁴

on appeal the whole case is tried *de novo* and final judgment rendered without regard to errors committed before the justice. *Rhodes Burford Furniture Co. v. Mattox*, 135 Ind. 372.

In *Kansas*, however, a justice may allow a bill of exceptions in a case tried before him. *Stager v. Harrington*, 27 Kan. 414. And see *West v. Rice*, 4 Kan. 563.

1. *Wyatt v. Judge*, 7 Port. (Ala.) 37; *McMeans v. Cameron*, 51 Iowa 691; *Collins v. Collins*, 37 Pa. St. 387.

For a full discussion of this question, see article EXCEPTIONS AND OBJECTIONS, vol. 8, pp. 173-175.

2. *Burns v. Henry*, 67 Ala. 209; *Louisville, etc., R. Co. v. Barker*, 96 Ala. 435; *Long v. Bakefield*, 48 Ala. 608; *Ludwick v. Beckamire*, 15 Ind. 198; *Richardson v. Bachelder*, 19 Me. 82. See article ABATEMENT IN PLEADING, vol. 1, p. 3.

General Issue. — In some early *Indiana* cases it was held that in a justice's court the defendant may show want of jurisdiction under the general issue. *Thomas v. Winters*, 4 Blackf. (Ind.) 161; *Perkins v. Smith*, 4 Blackf. (Ind.) 299.

Plea in Bar. — In *Colorado* it is held that a defect in the jurisdiction of the justice may be pleaded in bar of the action in a justice's court. *Melvin v. Latshaw*, 2 Colo. 81.

Michigan — Special Appeal. — A question affecting the jurisdiction of a justice of the peace to render a judgment may as well be raised by special appeal as in any other manner. *Rosevelt v. Hanold*, 65 Mich. 414; *Fowler v. Hyland*, 48 Mich. 179.

Objection Taken by Answer. — In some cases it has been held that an objection to a justice's jurisdiction might be taken by answer and the facts proved

on the trial. *Holbrook v. Superior Ct.*, 106 Cal. 589; *Kansas City Hardware Co. v. Neilson*, 10 Utah 27.

Not Raised by Instruction to Jury. — Want of jurisdiction in the justice cannot be taken advantage of by asking for an instruction to the jury to find for the defendant on that ground. *Dougherty v. Thompson*, 7 Blackf. (Ind.) 277.

Defective Plea. — Where the defendant in a justice's court pleaded that he was a citizen of a county other than that in which the suit was brought, and that he had not waived the privilege of being sued in the county of his residence, the plea was held defective in not alleging that he was not a citizen of the county in which the suit was brought. *Noel v. Denman*, 76 Tex. 306.

Lack of Jurisdiction Must Be Proved. — In order to have a case dismissed by a justice for want of jurisdiction, the lack of jurisdiction must be proved. *Kendall v. Justices*, 2 Ga. Dec. 186; *Pinckard v. Ware*, 2 Ga. Dec. 172.

Subject Matter Beyond Jurisdiction. — A plea in abatement is not necessary to destroy the jurisdiction of a justice depending on the amount in controversy, if shown on the trial to be excessive. *Chilson v. Jennison*, 60 Mich. 235.

3. *Long v. Bakefield*, 48 Ala. 608.

4. *Burns v. Henry*, 67 Ala. 209; *Louisville, etc., R. Co. v. Barker*, 96 Ala. 435; *Dougherty v. Thompson*, 7 Blackf. (Ind.) 277.

Reason for Motion Must be Stated. — Where objection is made by motion to the justice's jurisdiction, the reason for the motion must be specifically stated. *Bell v. White Lake Lumber Co.*, 21 Neb. 525.

Motion to Dismiss Denied. — Where a defendant in a justice's court, before

II. CIVIL PROCEDURE — 1. In General. — Proceedings before justices of the peace should be construed with great liberality, substance, not form, being regarded; and technical informalities should be overlooked if such proceedings are intelligible and substantially attain the ends of justice.¹ But where a justice is limited by statute to a certain course of proceedings, such course

filing his answer, moved to dismiss on the ground that it did not appear from the record that the justice had acquired jurisdiction of the person of the defendant, it was held that the motion was properly denied; that the defendant could not thus defeat the whole proceedings upon the insufficiencies of the record, though the action might be thus dismissed, if the facts were shown to be such that the record could not be amended. *Hamilton v. McDonald*, 18 Cal. 128.

1. *Georgia*. — *Davis v. Wilson*, 61 Ga. 388.

Illinois. — *Zuel v. Bowen*, 78 Ill. 234.

Iowa. — *Francis v. Bentley*, 50 Iowa 59; *Taylor v. Barber*, 2 Greene (Iowa) 350; *Levi v. McCraney*, 1 Morr. (Iowa) 91.

Kansas. — *School Dist. No. 67 v. Vedder*, 19 Kan. 527.

Michigan. — *Kinyon v. Fowler*, 10 Mich. 16; *People v. Foote*, 1 Dougl. (Mich.) 102.

Missouri. — *Weese v. Brown*, 102 Mo. 299; *Harrington v. Fortner*, 58 Mo. 468; *Kruse v. Hagedorn*, 50 Mo. 576; *Holland v. Steamboat R. H. Winslow*, 25 Mo. 57; *Mooney v. Williams*, 15 Mo. 442; *Myers v. Woolfolk*, 3 Mo. 348.

New Jersey. — *M'Cannon v. Anderson*, 3 N. J. L. 147.

Tennessee. — *Heffly v. Hall*, 5 Humph. (Tenn.) 581.

Texas. — *International, etc., R. Co. v. Philips*, 63 Tex. 590; *Davis v. Rankin*, 50 Tex. 279; *Clay v. Clay*, 7 Tex. 250; *Perry v. McKinzie*, 4 Tex. 154.

Wisconsin. — *Storm v. Adams*, 56 Wis. 137.

See the cases cited throughout this section.

In *Davis v. Wilson*, 61 Ga. 388, *Bleckley, J.*, said: "Justice courts are not courts of record; their proceedings are summary and simple; professional skill is not required to conduct them; full and regular pleadings in them are impracticable, and not to be demanded."

In *Zuel v. Bowen*, 78 Ill. 234,

Walker, J., said: "The policy of our statute seems to be to free proceedings before justices of the peace as far as possible from technicalities, and still enable the parties to have a fair trial. It is not practicable, before persons who have not made the study of pleadings, evidence, and practice, to have observed the same niceties in these branches of jurisprudence as obtain in the superior courts, nor is it desirable that it should. The great object is that the parties litigant in that forum may have a cheap and speedy administration of justice, freed from unnecessary forms and the burthens imposed upon litigation in the superior courts by the employment of counsel."

In *Kinyon v. Fowler*, 10 Mich. 16, *Martin, C. J.*, said: "Technicality and form are neither required nor expected in the proceedings of justices' courts. If the action and judgment of the court can be clearly ascertained from inspection of the files, and the docket entries required by statute to be made, no technicalities, imperfections, or omissions in the entry of the proceedings and judgment will avail to reverse or avoid the judgment. All that is requisite is that the language used shall be such as will inform a person of ordinary intelligence and mental capacity of the action of the court."

Form of Action Immaterial. — It is generally held that if the plaintiff proves a ground for recovery, he will be entitled to a judgment without regard to the technical form of the action. *Allen v. Nichols*, 68 Ill. 250; *Chicago, etc., Co. v. Reid*, 24 Ill. 144; *Stier v. Surget*, 10 Smed. & M. (Miss.) 154.

No Seal Required. — In *Kansas* a justice of the peace is not required to use a seal. *Stager v. Harrington*, 27 Kan. 414.

Who May Object to Errors and Irregularities. — Errors and irregularities in proceedings before a justice may be objected to only by the party to the cause who was affected thereby. *Glenn v. Shannon*, 12 S. Car. 570.

must be adhered to unless waived by the party who has a right to insist thereon.¹

2. Institution of Suit. — Actions before justices of the peace are commenced either by summons or by the voluntary appearance of the parties.² Where the suit is instituted by process it is generally deemed to have been commenced upon the delivery of the writ to the constable for service.³

3. Pleadings — *a.* GENERAL PRINCIPLES — (1) *Pleadings Oral or Written.* — Under the statutes of most of the states, the pleadings in justices' courts are not required to be in writing. They

1. *Brisbane v. Macomber*, 56 Barb. (N. Y.) 375.

Where a power is conferred on a justice by statute he must proceed in the mode described by the statute. *Bigelow v. Stearns*, 19 Johns. (N. Y.) 39.

Consulting with Another Justice. — Where a justice, with the consent of both parties, consults with another justice in relation to the practice in opening a case after both parties have rested, that question being presented to him by a request of the defendant for such opening, the defendant is estopped from objecting to such consultation. *Chivers v. Lytle*, 97 Mich. 477.

Where a justice, with consent of the parties, was assisted by another justice who sat and consulted with him on the trial, it was held to be no objection to the judgment pronounced in the cause. *Dougherty v. Mason*, 4 Blackf. (Ind.) 432.

2. *Evans v. Pierce*, 3 Ill. 468; *Duffy v. Dale*, 42 Iowa 215; *Rahn v. Greer*, 37 Iowa 627; *Vliet v. Westenhaver*, 42 Mich. 593; *Bersch v. Schneider*, 27 Mo. 101; *Lester v. Crary*, 1 Den. (N. Y.) 81; *Sperry v. Reynolds*, 65 N. Y. 179; *Jewett v. Sundback*, 5 S. Dak. 111.

As to process from a justice's court, see the article SUMMONS AND PROCESS.

As to appearance, see the article APPEARANCES, vol. 2, p. 588.

The Fact of Actual Notice Without Service of Process will not give jurisdiction. *Vliet v. Westenhaver*, 42 Mich. 593.

Agreement of Parties. — To authorize a justice to enter an action by agreement of the parties, without process, under the 18th section of the *New Jersey* act for the trial of small causes (Rev. Laws 634), the plaintiff and the defendant should appear before the justice to manifest their consent, or some person on behalf of the plaintiff, having competent authority; and such authority should be verified before the

justice. *Young v. Stout*, 10 N. J. L. 302.

If the parties in a justice's court "agreed to come to trial," it is a sufficient agreement "to enter, without process, an action before a justice," in order to give such justice jurisdiction. *Vanderveer v. Ingleton*, 7 N. J. L. 140.

Adjournment Before Issue Joined. — In *New York*, a suit in a justice's court can only be commenced by process or by the voluntary appearance of the parties and joining issue. Where parties appeared before a justice, with the view of commencement of a suit by one of them as plaintiff against the other as defendant, and an adjournment was then had, on request of the defendant, without any issue joined or any pleadings put in, it was held that no suit was thereby commenced and that a judgment rendered for the plaintiff on the adjourned day was erroneous. *Lester v. Crary*, 1 Den. (N. Y.) 81.

3. *Ruddell v. Walker*, 7 Ark. 457; *Howell v. Shepard*, 48 Mich. 472; *Boyce v. Morgan*, 3 Cai. (N. Y.) 133; *Keeble v. Bailey*, 3 Tex. 492.

Summons Must Be Issued. — A suit is not begun, for the purposes of the statute of limitations, by merely filling out a summons and leaving it in a justice's office until the return day, or by retaining it in the plaintiff's custody; it must be issued with the intent that, if practicable, it shall be served. *Howell v. Shepard*, 48 Mich. 472.

Filing a Note with a Justice for Collection is not the commencement of a suit. *Keeble v. Bailey*, 3 Tex. 492. And see *Ruddell v. Walker*, 7 Ark. 457.

In *Illinois*, however, under the Justices' Act of 1857, § 27, a suit in a justice's court could not be considered to have commenced until there was personal service on the defendant or a copy of the process had been left at the defendant's residence. *Bell v. Dart*, 54 Ill. 526.

may generally be written or oral at the election of the parties.¹

Noting Oral Pleadings in Docket. — The statutes providing for oral pleadings in justices' courts generally direct that the substance thereof shall be written down by the justice in his docket.²

(2) **Construction of Pleadings—Formality Not Required.** — It is universally held that strict formality and accuracy are not to be required of pleadings in justices' courts, and where such pleadings are sufficient in substance, mere technical defects are disregarded,³ especially where no objection is made on their account

1. In **Arkansas** pleadings before a justice of the peace may in all cases be oral. *Brown v. Higgins*, 45 Ark. 456.

In **Georgia** no written pleadings are required for the trial of a case before a justice. *Howell v. Field*, 70 Ga. 592.

In **Illinois**, in ordinary actions before justices, no written pleadings are required, and the rights of the parties are to be determined from what is proved rather than upon what is alleged or pleaded. *Dodge v. People*, 113 Ill. 491.

In **Iowa** the pleadings in justices' courts may be either written or oral. *Glidden v. Higbee*, 31 Iowa 379; *Stone v. Murphy*, 2 Iowa 35; *West v. Moody*, 33 Iowa 139; *Dilley v. Nusum*, 17 Iowa 238.

In **Michigan** it is held that oral pleadings are admissible in replevin before a justice. *Smith v. Dodge*, 37 Mich. 354.

In **New Mexico** the statute providing that the pleadings in a justice's court may be oral and that the plaintiff's cause of action shall be entered on the docket of the justice by a brief statement thereof is directory merely, and does not preclude the filing of written pleadings setting out the cause of action by the plaintiff, and denial thereof or statement of any other defense by the defendant. *Crolot v. Maloy*, 2 N. Mex. 198.

In **Tennessee** the pleadings before justices of the peace may be oral except in the case of pleas required to be under oath. *Neville v. Northcutt*, 7 Coldw. (Tenn.) 294; *Wood v. Hancock*, 4 Humph. (Tenn.) 465.

In **Texas** the pleadings in justices' courts are oral, except in certain cases specially provided for by statute. *Ethridge v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 204; *Sanger v. Noonan*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1056; *Moore v. Jordan*, 67 Tex. 394; *Brunawig v. Kramer*, 2 Tex. App. Civ. Cas., § 804;

Mensing v. Ayres, 2 Tex. App. Civ. Cas., § 562; *Texas, etc., R. Co. v. Wright*, 2 Tex. App. Civ. Cas., § 339; *Whitley v. Jackson*, 1 Tex. App. Civ. Cas., § 576; *Henry v. Blasco*, 1 Tex. App. Civ. Cas., § 765; *Kerr v. Murrell*, 1 Tex. App. Civ. Cas., § 891.

A Petition Asking for an Attachment is not one of the matters which are required to be pleaded in writing. *Henry v. Blasco*, 1 Tex. App. Civ. Cas., § 765.

In **West Virginia**, under the Act of 1881, c. 8, the pleadings in a civil action before a justice may be either oral or in writing. *Poole v. Dilworth*, 26 W. Va. 583.

In **Wisconsin** the pleadings in justices' courts may be oral or in writing. *Maynard v. Tidball*, 2 Wis. 34.

All Evidence Admissible. — Where the pleadings are oral, effect is given to all evidence which would be admissible under proper pleadings in courts of record. *Miner v. Reed*, 25 Ill. App. 175; *Stockon v. Lochnutt*, 31 Ill. App. 214; *Wood v. Hancock*, 4 Humph. (Tenn.) 465.

2. *Glidden v. Higbee*, 31 Iowa 379; *Jordan v. Quick*, 11 Iowa 9; *Silberberg v. Trilling*, 82 Tex. 523; *Moore v. Jordan*, 67 Tex. 394; *Poole v. Dilworth*, 26 W. Va. 583.

Particularity Not Required. — The pleadings need not be noted down in the docket with that particularity required in formal pleadings. *Glidden v. Higbee*, 31 Iowa 379; *Stone v. Murphy*, 2 Iowa 35; *West v. Moody*, 33 Iowa 137; *Dilley v. Nusum*, 17 Iowa 238.

Statute Directory. — The statute directing oral pleadings to be reduced to writing by a justice is directory merely, and a party is not to be prejudiced by his failure to follow it. *West v. Moody*, 33 Iowa 137; *Sinnawon v. Melbourn*, 4 Greene (Iowa) 309.

3. **Alabama.** — *Martin v. Higgins*, 23 Ala. 775.

Arkansas. — *Hibbard v. Kirby*, 38

at the proper time.¹

Must State a Cause of Action. — It is essential, however, that the pleadings be sufficient in substance to form an issue in some way,² and for this purpose all that seems to be necessary is that the

Ark. 102; Chowning v. Barnett, 30 Ark. 560.

California. — Stuart v. Lander, 16 Cal. 373.

Georgia. — Wilson v. Garrick, 72 Ga. 660; Howell v. Field, 70 Ga. 592; Dorsey v. Black, 55 Ga. 315.

Indiana. — Stewart v. Hutchins, 31 Ind. 252; Robinson v. Skipworth, 23 Ind. 312; Decatur County v. Wheel-don, 15 Ind. 147; Brush v. Carpenter, 6 Ind. 78; Hall v. Johnson, 3 Blackf. (Ind.) 363.

Iowa. — West v. Moody, 33 Iowa 137; Shea v. Livingston, 32 Iowa 158; Root v. Illinois Cent. R. Co., 29 Iowa 102; Emerick v. Clemens, 26 Iowa 332; Blake v. Graves, 18 Iowa 312; Greff v. Blake, 16 Iowa 222; Teagarden v. Baker, 9 Iowa 271; Hall v. Monohan, 6 Iowa 216; Delany v. Reade, 4 Iowa 292; Burton v. Hill, 4 Greene (Iowa) 379; Packer v. Cockayne, 3 Greene (Iowa) 111.

Kansas. — Pate v. Fitzhugh, 46 Kan. 129; McAboy v. Talbot, 37 Kan. 19; Galbraith v. McCormick, 23 Kan. 706; Atchison, etc., R. Co. v. Bartlett, 2 Kan. App. 167.

Michigan. — Port Huron First Nat. Bank v. Carson, 60 Mich. 432; Nugent v. Teachout, 67 Mich. 571; Holbrook v. Cooper, 44 Mich. 373; Snyder v. Winsor, 44 Mich. 140; Smith v. Dodge, 37 Mich. 354; Hartford v. Holmes, 3 Mich. 460.

Minnesota. — McGrath v. O'Brien, 42 Minn. 13; Rauen v. Burg, 38 Minn. 389; Polk v. American Mortg., etc., Co., (Minn. 1897) 70 N. W. Rep. 1078.

Missouri. — Hamblin v. Dunn, 53 Mo. 137; McCartney v. Auer, 50 Mo. 395; Quinn v. Stout, 31 Mo. 160; Bobb v. Syenite Granite Co., 41 Mo. App. 642; Gaty v. Sack, 19 Mo. App. 470.

New Jersey. — Patten v. Heustis, 26 N. J. L. 293; Hixon v. Schooley, 26 N. J. L. 461.

New Mexico. — Crolot v. Maloy, 2 N. Mex. 198.

New York. — Osborn v. Nelson, 59 Barb. (N. Y.) 376; Willard v. Bridge, 4 Barb. (N. Y.) 361; Cohen v. Dupont, 1 Sandf. (N. Y.) 260; Legg v. Robinson, 7 Wend. (N. Y.) 194; West v. Stanley,

1 Hill (N. Y.) 69; Chamberlin v. Graves, 2 Hill (N. Y.) 504.

Oklahoma. — Brewer v. Black, 5 Okla. 57.

Texas. — Sanger v. Noonan, (Tex. Civ. App. 1894) 27 S. W. Rep. 1056; Austin, etc., R. Co. v. Anderson, 85 Tex. 88; International, etc., R. Co. v. Donalson, 2 Tex. App. Civ. Cas., § 239; Texas, etc., R. Co. v. Wright, 2 Tex. App. Civ. Cas., § 339; Brunswick v. Kramer, 2 Tex. App. Civ. Cas., § 804.

Wisconsin. — Swineford v. Pomeroy, 16 Wis. 553; Meyer v. Prairie du Chien, 9 Wis. 233; Phillips v. Bridges, 3 Wis. 270.

In *Force v. Squier*, 133 Mo. 306, MacFarlane, J., said: "Justice courts are established for the convenience of the people, in order that petty disputes may be settled without delay and with the least possible expense. Forms and formal pleadings are dispensed with, in order that litigants may prepare their own statements and conduct their own trials. No more should be required in pleading than that the statement should be sufficiently specific to advise the opposite party of the nature of the claim made and to bar a subsequent action for the same cause."

Verification. — Pleadings before justices, whether written or oral, may be without verification. *Shinn v. Tucker*, 37 Ark. 580.

1. *Smith v. Dodge*, 37 Mich. 354; *Hamblin v. Dunn*, 53 Mo. 137; *West v. Stanley*, 1 Hill (N. Y.) 69; *Chamberlin v. Graves*, 2 Hill (N. Y.) 504; *Avery v. Leach*, 9 Hun (N. Y.) 106; *Meyer v. Prairie du Chien*, 9 Wis. 233; *Phillips v. Bridges*, 3 Wis. 270.

Formerly, in *New York*, it was held that where pleadings were objected to in a justice's court, they were to be governed by the same rules of pleading as in other courts; and where upon demurrer the justice adjudged a declaration good, when in fact it was defective in form or substance, his judgment was reversed. *Stone v. Case*, 13 Wend. (N. Y.) 283.

2. *Hixon v. Schooley*, 26 N. J. L. 461; *Crolot v. Maloy*, 2 N. Mex. 198; *Phillips v. Bridges*, 3 Wis. 270. See also the following sections.

opposite party shall be clearly apprised of the grounds relied on either to support or to defeat the action.¹

Where Pleadings in Writing. — Where the parties in a justice's court choose to resort to written pleadings, they are generally held to all the substantial averments required in a court of record;² but even then technicality of pleading and exact correspondence of proof are not usually required.³

(3) **Amendments — Power to Allow.** — In general, justices of the peace are given the same power in regard to allowing the amendment of pleadings as courts of record; and wherever substantial justice requires it, the justice of the peace should allow an amendment.⁴ No absolute rule can be laid down as to when such

1. *Legg v. Robinson*, 7 Wend. (N. Y.) 194; *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260.

For full citation of authorities see the following sections.

A **More Explicit Statement** may be required of the pleader where the opposite party cannot clearly see what is intended. *McKenney v. Hopkins*, 20 Iowa 495; *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260.

2. In *Iowa*, where the pleadings are written they are required to be "substantially the same as in the District Court." *Glidden v. Higbee*, 31 Iowa 379.

In *Michigan*, where a plaintiff in a justice's court declares in writing, the declaration must conform in substance to the rules of the Circuit Court. *Benalleck v. People*, 31 Mich. 200.

In *Wisconsin* it was held that where the parties themselves choose to resort to the usual technical forms of pleading before a justice of the peace, they will be held to reasonable precision and accuracy. *Maynard v. Tidball*, 2 Wis. 34; *Goodrich v. Compound School Dist. No. 5*, 2 Wis. 102; *Lester v. French*, 6 Wis. 580; *Fobes v. School Dist.*, 10 Wis. 117.

Demurrer Reaches Back to First Error. — When parties in a justice's court resort to written pleadings, a demurrer will reach back to the first error committed. *Goodrich v. Compound School Dist. No. 5*, 2 Wis. 102; *Maynard v. Tidball*, 2 Wis. 34.

3. *Glidden v. Higbee*, 31 Iowa 379.

No Particular Form Required. — In *West Virginia*, if written pleadings are employed, they need be of no particular form, but must be such as to enable a person of common understanding to

know what is intended. *Poole v. Dilworth*, 26 W. Va. 583.

4. *Linhart v. Buiff*, 11 Cal. 280; *Butler v. King*, 10 Cal. 342; *Snyder v. Winsor*, 44 Mich. 140; *Turner v. St. Louis, etc., R. Co.*, 76 Mo. 261; *Babcock v. Lipe*, 1 Den. (N. Y.) 139; *Mosher v. Lawrence*, 4 Den. (N. Y.) 419; *Fulton v. Heaton*, 1 Barb. (N. Y.) 552; *DeWitt v. Greener*, 11 Civ. Pro. Rep. (Chemung County Ct.) 327; *Vaughn v. Lego*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 164; *Bull v. Colton*, 22 Barb. (N. Y.) 94; *Doughty v. Crozier*, 9 Abb. Pr. (N. Y. C. Pl.) 411; *Hibbard v. Peek*, 75 Wis. 619.

For a general discussion of the subject of amendments, see article AMENDMENTS, vol. 1, p. 458.

In *Texas* the plaintiff in a justice's court is not required to make a written statement of his demand, but if, after having made it, it is imperfect, he can amend the same orally in either the justice's court or the County Court on appeal. *Texas, etc., R. Co. v. Wright*, 2 Tex. App. Civ. Cas., § 339.

It is **Not Wholly Discretionary** with a justice whether or not to allow amendment of pleadings; and where a party has a clear right to an amendment, it is error for the justice to refuse it. *Middelstadt v. McIntyre*, 55 Minn. 69; *Vaughn v. Lego*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 164; *Turck v. Richmond*, 13 Barb. (N. Y.) 533; *Hilliard v. Austin*, 17 Barb. (N. Y.) 141; *Smith v. Mitten*, 13 How. Pr. (N. Y. Supreme Ct.) 325; *Wood v. Shultis*, 4 Hun (N. Y.) 309; *Leonard v. Foster*, 7 Hun (N. Y.) 464; *Walsh v. Cornett*, 17 Hun (N. Y.) 27; *Ryan v. Lewis*, 3 Hun (N. Y.) 429. Compare *White v. Stevenson*, 4 Den. (N. Y.) 193; *Fogarty v. Horrigan*, 28 Wis. 142.

amendments shall be allowed. Each case must be controlled by the facts surrounding it.¹ However, it may be taken as a general rule that where the pleading does not sufficiently apprise the opposite party of what is intended, it should be amended.²

At What Stage Allowable. — Amendments in matters of form or substance in furtherance of justice may be allowed by a justice of the peace at any time before the final submission of the cause.³

1. *De Witt v. Greener*, 11 Civ. Pro. Rep. (Chemung County Ct.) 327.

To Bring Case Within Justice's Jurisdiction. — A justice of the peace may permit a plaintiff to amend his statement so as to bring the amount within his jurisdiction. *Bensch v. Farnsworth*, 9 Ind. App. 547; *Burden v. Hornsby*, 50 Mo. 238; *Jaycox v. Pinney*, 62 Barb. (N. Y.) 344.

Under the *Indiana* statute, a justice of the peace has no jurisdiction over actions for the recovery of real estate, except where the relation of landlord and tenant has existed between the parties and the tenant has unlawfully held over. Where the plaintiff in such a case omitted to allege the relationship of landlord and tenant, it was held that he might amend his complaint in that respect so as to state a cause of action within the justice's jurisdiction. *Blair v. Porter*, 12 Ind. App. 296.

To Change Form of Action. — A justice of the peace has power to allow the amendment of a complaint at any time before or during the trial, so as to substitute one form of action for another, if such amendment will not work injustice to the defendant. *De Witt v. Greener*, 11 Civ. Pro. Rep. (Chemung County Ct.) 327. And see *Bigelow v. Dunn*, 53 Barb. (N. Y.) 570.

To Change Parties. — A justice of the peace may allow a pleading to be amended by adding or striking off the name of a party. *Hanlin v. Baxter*, 20 Kan. 134; *Schergens v. Wetzell*, 12 Mo. App. 596; *Lapham v. Rice*, 55 N. Y. 472; *Lowe v. Rommell*, 5 Daly (N. Y.) 17. But see *Emerson v. Wilson*, 11 Vt. 357.

To Let In Testimony. — Where a complaint in a justice's court is insufficient to let in testimony necessary to maintenance of the action, the court will, on proper application, grant an amendment. *Fobes v. School Dist.*, 10 Wis. 117.

To Set Up Title to Land. — A justice should allow a defendant to amend his answer so as to set up title to land.

Smith v. Mitten, 13 How. Pr. (N. Y. Supreme Ct.) 326.

Cannot Change Cause of Action. — A justice of the peace cannot allow a pleading to be amended so as to change the cause of action. *Dows v. Morrison*, 2 Misc. Rep. (N. Y. C. Pl.) 54; *Emerson v. Wilson*, 11 Vt. 357. And see *Bensch v. Farnsworth*, 9 Ind. App. 547; *Turner v. St. Louis, etc.*, R. Co., 76 Mo. 261; *Doughty v. Crozier*, 9 Abb. Pr. (N. Y. C. Pl.) 411.

Striking Out Plaintiff — Cannot Be Restored. — Where a justice has allowed an amendment by striking out the name of one of several plaintiffs in an action of tort, he cannot, on a subsequent day, restore him again as co-plaintiff, if objection is taken by the defendant. And the defendant will not waive the objection by consenting to a subsequent motion to amend the complaint or by going to trial. *Gates v. Ward*, 17 Barb. (N. Y.) 424.

2. *Lovette v. Essig*, 92 Mich. 461.

Alleging Negligence. — The plaintiff's statement, in an action before a justice, charging the defendant with negligence in general terms, may be amended so as to show specifically of what the negligence consisted. *Norville v. St. Louis, etc.*, R. Co., 1 Mo. App. Rep. 171.

3. *Webster v. Williams*, 69 Mich. 135; *Bigelow v. Dunn*, 53 Barb. (N. Y.) 570; *Hinds v. Page*, 6 Abb. Pr. N. S. (Chenango County Ct.) 58; *Weeks v. Stroble*, 36 How. Pr. (Ulster County Ct.) 123.

Pleading Treated as Amended. — After the evidence is introduced in a justice's court, the declaration will be treated as amended if it is such as would be allowed as a matter of course and will not operate as a surprise. *Webster v. Williams*, 69 Mich. 135.

After Adjournment. — A justice may allow a plaintiff to add a new county to his declaration after the cause has been adjourned. *Babcock v. Lipe*, 1 Den. (N. Y.) 139.

(4) *Objections.* — Where a pleading in a justice's court is objected to as not being sufficiently definite, the opposite party may require it to be made more specific;¹ but if the objection is not raised at the proper time and in the proper manner, it will be deemed waived,² and such objection

Not Allowed After Final Submission. — A justice of the peace has no power to allow any substantial amendments to the declaration after the cause is submitted and taken under advisement. *Webster v. Williams*, 69 Mich. 135.

But see *Martin v. McClellan*, 30 Ark. 405, wherein it was held that where an account in proper form is filed before a justice of the peace as the foundation of an action, and is lost, and a substituted account is filed, in which the name of the creditor is omitted, he should be permitted to amend at any time, either before trial or after judgment.

Where an Appeal Has Been Taken from a justice and the papers have been filed in the Circuit Court, the justice has no power to make an amendment or alteration therein without consent of the parties and under the direction of the Circuit Court. *Horton v. St. Louis, etc., R. Co.*, 21 Mo. App. 147.

1. *McKenney v. Hopkins*, 20 Iowa 495; *Hartford v. Holmes*, 3 Mich. 460; *Crolo v. Maloy*, 2 N. Mex. 198; *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260; *Meyer v. Prairie du Chien*, 9 Wis. 233; *Connors v. Taylor*, 13 Wis. 231; *Dehnel v. Komrow*, 37 Wis. 336.

Refusal to File Bill of Particulars. — Where a plaintiff refuses to comply with the order of the justice to file a bill of particulars, where properly demandable under How. Anno. Stat. Mich., § 6880 the justice may exclude all testimony on his part and dismiss the case, such refusal being a virtual discontinuance of the suit; and where in such a case a motion to dismiss is refused, the consent of the defendant to an adjournment and his pleading to the declaration and joining in striking a jury will not preclude him from objecting to the reception of any evidence on the trial. *Lovette v. Essig*, 92 Mich. 461.

Sufficiently Specific. — Where the plaintiff, in an action in a justice's court, claimed for making "a set of teeth upon silver plate," for making a "set of teeth on gold," for "filling teeth," and for "extracting and filling teeth," giving the dates of the several

items, it was held that the charges were sufficiently specific to require the defendant to respond thereto, and that the court below did not err in overruling the defendant's motion for a more specific statement. *Brownell v. Smith*, 13 Iowa 287.

2. Going to Trial Without Objection. — A defendant in a justice's court waives formal defects in the plaintiff's statement of his cause of action if he pleads to the merits and goes to trial without raising the objection. *Cronise v. Garghill*, 4 Cal. 120; *Whelpley v. Nash*, 46 Mich. 25; *Chancey v. Skeels*, 43 Mich. 347; *Hartford v. Holmes*, 3 Mich. 460; *Webb v. Robertson*, 74 Mo. 380; *Vandervere v. Ogburn*, 2 N. J. L. 63; *Bigelow v. Pine*, 3 N. J. L. 114; *Willard v. Bridge*, 4 Barb. (N. Y.) 361; *Hall v. McKechnie*, 22 Barb. (N. Y.) 244; *Young v. Rummell*, 7 Hill (N. Y.) 503; *St. Lawrence Mut. Ins. Co. v. Paige*, 1 Hilt. (N. Y.) 430; *Parish v. Gilmore*, 33 Wis. 608; *Connors v. Taylor*, 13 Wis. 231.

No Objection Before Evidence Offered to Jury. — A declaration in a justice's court, although extremely informal, is sufficient if not objected to before the plaintiff offers evidence to the jury. *Snyder v. Winsor*, 44 Mich. 140.

Objection Not Taken by Answer. — Where, on a trial in a justice's court, the defendant moved for a nonsuit on the ground of nonjoinder of proper parties plaintiff, it was held that the objection should have been taken by answer, and not having been so taken, it was waived (*Tappan, J.*, dissenting). *Frazier v. Gibson*, 15 Hun (N. Y.) 37.

Waiver by Consenting to Filing of Complaint. — In what was intended to be an action of detinue, the justice made use of printed forms of the affidavit, bond, and writ in attachment. No complaint was filed, but the property was seized and the defendant notified orally. On the day set for the trial, the plaintiff, with the defendant's consent, filed a proper complaint. It was held that by consenting to the filing of the complaint the defendant waived previous irregularities. *Hamner v. Holman*, (Ala. 1897) 22 So. Rep. 286.

cannot afterwards be raised.¹

Demurrer. — In some states no such thing as a demurrer to pleadings is known in a justice's court.² In other states, however, a demurrer is allowed in certain cases specified by statute,³ and in

Defect Cured by Reference. — A defective statement of demand in a justice's court is cured by a reference. *Bozorth v. Prickett*, 2 N. J. L. 251. And see *Ayers v. Burt*, 3 N. J. L. 310.

Defect Cured by Defendant's Affidavit. — Where, in an action before a justice to enforce on the defendant's crop a lien for rent, the plaintiff omitted to state in his affidavit that the land rented was situated in the county of the justice, and that the crop seized was grown therein during the year, it was held that the defects were cured by a statement of these facts in the defendant's affidavit of defense. *Tinman v. McMeekin*, 42 S. Car. 311.

Defect Cured by Confession of Judgment. — Where a judgment is confessed in a justice's court, the Supreme Court will not reverse the judgment because of defects in the statement of demand. *Branson v. Eayre*, 12 N. J. L. 127. See also *Hunt v. Shivers*, 4 N. J. L. 99; *Goltry v. Ruckman*, 3 N. J. L. 21.

Defect Cured by Default. — Where, in a justice's court, the evidence shows that the plaintiff has a good cause of action, if the defendant does not appear he waives formal defects in the plaintiff's statement. *Stafford v. Williams*, 4 Den. (N. Y.) 182; *Copley v. Rose*, 2 N. Y. 115.

But see *St. Louis, etc., R. Co. v. McReynolds*, 24 Kan. 368, wherein it was held that where a defendant did not make any appearance in an action before a justice of the peace, except to take an appeal to the District Court and to make a case for the Supreme Court, he did not waive the defects or insufficiency of the bill of particulars.

1. See *infra*, IV. II. §. (2) *Matters Pleadable Before a Justice*. And see the article EXCEPTIONS AND OBJECTIONS, vol. 8, pp. 173 175.

2. *Kane v. Dauernheim*, 51 Mo. App. 635; *Anderson v. McClure*, 57 Mo. App. 93; *Martin v. Creech*, 58 Mo. App. 391; *Miller v. Mesick*, 15 Neb. 646; *Simons v. Sowards*, 29 Neb. 487.

The Proper Remedy is by motion to dismiss, to strike out, or to make the complaint more definite and certain. *Martin v. Creech*, 58 Mo. App. 391; *Anderson v. McClure*, 57 Mo. App. 93.

Judgment May Be Rendered on Pleadings. — While a demurrer to a pleading is unknown in actions before a justice of the peace, yet where the bill of particulars states a cause of action, and an answer in writing is filed thereto which purports to set up a complete defense to the action, and is insufficient, the case in effect being submitted on the pleadings, the justice may render judgment thereon unless the defendant desires to amend his answer and set up additional matters. *Simons v. Sowards*, 29 Neb. 487.

3. For Uncertainty of Complaint. — In *New York* the defendant in a justice's court may demur where the complaint is not sufficiently certain and explicit. Code Civ. Pro., § 2939; *Hall v. McKechnie*, 22 Barb. (N. Y.) 244; *New York v. Mason*, 1 Abb. Pr. (N. Y. C. Pl.) 344.

Illustration. — Where the complaint in a justice's court charging the defendant with a violation of the excise law fails to disclose any facts which would apprise him of the nature of his offense, a demurrer thereto should be sustained, under the New York Code Civ. Pro., § 2939, providing for a demurrer in a justice's court "where the complaint is not sufficiently explicit to be understood." *Cortland v. Howard*, 1 N. Y. App. Div. 131.

Action Brought in Wrong County. — Under the New York Code Civ. Pro., § 2939, the only demurrer which is allowed to a complaint in a justice's court is where the complaint is not sufficiently explicit to enable the defendant to understand it and where it states no cause of action. An objection that the action was brought in the wrong county cannot be raised by demurrer, and there seems to be no way to take advantage of the objection except as ground for nonsuit on the trial. *Lapham v. Rice*, 63 Barb. (N. Y.) 485.

Answer Improperly Denying Knowledge. — Under the New York Code Civ. Pro., § 2935, subd. 4, which provides for a demurrer by the plaintiff in a justice's court, "to one or more counterclaims stated in the answer," a demurrer is not the appropriate method for taking objection to an answer

such cases the pleadings must be governed by the same rules which govern in other courts.¹

b. DECLARATION, COMPLAINT, OR STATEMENT OF DEMAND —

(1) *Necessity for* — (a) *In General.* — While it is true that formal and technical pleadings are not required in courts of justices of the peace, still the plaintiff must in some way, either orally or in writing, place before the court a statement of his demand.²

which improperly denies any knowledge or information as to the allegation of the complaint. *Singer v. Effler*, 16 N. Y. Misc. Rep. (Albany City Ct.) 334.

1. *Van Hoesen v. Van Alstyne*, 3 Wend. (N. Y.) 75; *Harker v. New York*, 17 Wend. (N. Y.) 199.

General Demurrer Sufficient. — In a justice's court, a general demurrer wherein the grounds of objection to the complaint are not stated is sufficient. *Stern v. Drinker*, 2 E. D. Smith (N. Y.) 402.

Court Should Order Amendment. — On demurrer to the complaint in an action in a justice's court, the court, if it deems the objection well taken, should order the pleading to be amended, and if it is not amended should disregard it. A justice has no power to pronounce judgment on a demurrer without such order. *Glaspe v. Keulsen*, 3 Abb. Pr. (N. Y. C. Pl.) 100; *Stern v. Drinker*, 2 E. D. Smith (N. Y.) 402.

Overruling Demurrer — Judgment for Plaintiff. — Where the defendant in a justice's court demurred to the complaint as not stating a cause of action, and the cause was submitted on demurrer, it was held that the justice on overruling the demurrer properly rendered judgment for the plaintiff, as the demurrer admitted the facts stated in the complaint and dispensed with the proof of the plaintiff's case (but see *New York Code Civ. Pro.*, § 2939.) *Excise Com'rs v. Doherty*, 16 How. Pr. (Saratoga County Ct.) 46.

Where the defendant files a demurrer to a complaint in a justice's court, and a date is fixed by the justice for the hearing of the demurrer, and notice to that effect is served upon the defendant, if he fails to appear at the appointed time the justice may, under *Cal. Code Civ. Pro.*, §§ 858, 872, overrule the demurrer and make an order that the defendant answer "at once;" and upon his failure to do so the justice may render judgment by default in favor of the plaintiff. *Stewart v. Justice's Ct.*, 109 Cal. 616.

2. *In Illinois* the statute conferring upon justices jurisdiction in penal actions for violations of a by-law of a corporation authorizes them to proceed as in other civil cases; and therefore no complaint in writing is necessary as a basis of the suit, which may be commenced in the same manner as any other civil suit before a justice. *Jacksonville v. Block*, 36 Ill. 507.

In Indiana, when the cause of action is not based upon a written instrument, there must be a written statement of the cause of action, though no formality is required. *Crocker v. Hoffman*, 48 Ind. 207.

In Iowa a written petition is ordinarily unnecessary in an action before a justice of the peace. *Hall v. Monohan*, 1 Iowa 554, 6 Iowa 216; *Finch v. Central R. Co.*, 42 Iowa 304; *Brandt v. Chicago, etc., R. Co.*, 26 Iowa 114; *Taylor v. Barber*, 2 Greene (Iowa) 350.

In Kansas, where a claim or demand for money arises out of contract, either express or implied, and is for something furnished or performed by one party for another, but is not founded upon a promissory note or other instrument in writing, and a statement of such claim or demand is made out in detail and in writing by the claimant or demandant and presented to the other party, such statement constitutes an account, within the meaning of section 84 of the Justices' Act, and section 108 of the Civil Code. *Southern Kansas R. Co. v. Gould*, 44 Kan. 68.

In Missouri, in a suit in a justice's court, not founded on an account nor on an instrument of writing filed with the justice, a statement of the facts constituting the cause of action, such as will inform the defendant of the nature of the claim, and specific enough to bar another action, must be filed with the justice before the summons is issued. *Pattison v. Lutz*, 1 Mo. App. 133.

In New Jersey, under *Gen. Stat.*, p. 1869, § 28, a plaintiff in a justice's court must file a statement of his de-

(b) *In Actions on Written Instruments.* — In some of the states, where an action in a justice's court is based upon a written instrument, such written instrument filed with the justice is itself a sufficient statement of demand if the plaintiff's right of action and the defendant's liability may fairly be gathered therefrom.¹ Thus it is

mand. *Sandford v. Hoover*, 2 N. J. L. 92; *Layton v. Carman*, 2 N. J. L. 151; *Sloan v. Holland*, 2 N. J. L. 132.

Failure to file such statement is ground for reversal on certiorari. *South v. Toomey*, 2 N. J. L. 91; *Gustin v. Whitaker*, 3 N. J. L. 195; *Sprague v. Crane*, 3 N. J. L. 510; *Addis v. Evans*, 2 N. J. L. 132.

A *Confession of Judgment* by the defendant in a justice's court obviates the necessity for filing a statement of demand. *Hunt v. Shivers*, 4 N. J. L. 99; *Goltry v. Ruckman*, 3 N. J. L. 21.

Where a Cause Is Referred from a justice's court to referees, no statement of demand need be filed. *Ayers v. Burt*, 3 N. J. L. 310.

In *West Virginia*, before there can be a trial in a justice's court, there must be a complaint, either oral or written. Where the defendant demanded a jury, and after it was sworn and before any evidence was introduced the plaintiff made his complaint orally, it was held that as the summons made a demand for a specific sum of money and the defendant controverted that claim by demanding a jury, the verdict would not be set aside for the reason that the complaint was made after the jury was sworn. *Straley v. Payne*, (W. Va. 1897) 27 S. E. Rep. 359.

In *Wisconsin* the issue before a justice need not be framed with technical precision; but the plaintiff may and should be required either to declare in writing or to make a brief verbal statement of his cause of action, and such statement should be entered on the docket. *Roberts v. Warren*, 3 Wis. 736.

In *Georgia* — *Summons.* — There is no pleading in a justice's court save the summons, to which the justice is required to attach a copy of the note, account, or cause of action sued on, at the time the same is issued. *Carnes v. Mattox*, 71 Ga. 515; *Farkas v. Stewart*, 73 Ga. 90; *Shuford v. Alexander*, 74 Ga. 293; *Patterson v. Newton*, 74 Ga. 366.

Alabama — *Less than Twenty Dollars.* — In *Alabama* it seems that where the amount in controversy in a justice's court is less than twenty dollars, the

plaintiff need file no statement. *Stockdale v. Riddle*, 22 Ala. 678.

To Recover Penalty. — Where jurisdiction is given a justice to try an action for the recovery of a penalty, the suit is brought in the same manner as any other civil suit before a justice, and therefore no complaint need be filed. *Ewbanks v. Ashley*, 36 Ill. 177.

In *Replevin* in a justice's court the affidavit is generally a sufficient statement of demand. *Hanner v. Bailey*, 30 Ark. 681; *Andre v. Johnson*, 6 Blackf. (Ind.) 188; *Perkins v. Smith*, 4 Blackf. (Ind.) 299; *Hill v. Wilkinson*, 25 Neb. 103.

In *Attachment* in a justice's court the affidavit is generally considered a sufficient statement of demand. *Tignor v. Bradley*, 32 Ark. 781; *Smith v. Wilson*, 58 Ga. 322; *Crolot v. Maloy*, 2 N. Mex. 198; *Ruthe v. Green Bay, etc., R. Co.*, 37 Wis. 344.

Action on Judgment. — In an action in a justice's court on a judgment, a declaration stating that the plaintiff claims to recover on a former judgment, identifying it, is sufficient, unless the defendant objects by demurrer. *Groff v. Griswold*, 1 Den. (N. Y.) 432.

Need Not File Transcript. — It is not necessary to file the transcript of the judgment. *Collins v. Rodolph*, 3 Greene (Iowa) 299.

Transcript Not Sufficient Statement. — In *New Jersey* the filing of a transcript is not a sufficient state of demand. *Ward v. Williamson*, 14 N. J. L. 470.

1. *Crocker v. Hoffman*, 48 Ind. 207; *Lester v. French*, 6 Wis. 580. And see *Sears v. Tubbs*, 4 Greene (Iowa) 409; *Stone v. Murphy*, 2 Iowa 35.

Action on Bond. — In *Indiana* the filing of a bond before a justice as a cause of action is sufficient without a declaration. *Barber v. Summers*, 5 Blackf. (Ind.) 339; *Vandagriff v. Tate*, 4 Blackf. (Ind.) 174; *Evans v. Shoemaker*, 2 Blackf. (Ind.) 237. And see *State v. Mowbray*, 6 Blackf. (Ind.) 90.

No Assignment of Breaches is necessary in such action. *Vandagriff v. Tate*, 4 Blackf. (Ind.) 174; *Evans v. Shoemaker*, 2 Blackf. (Ind.) 237.

Bond and Oral Pleading. — In an action

generally held that in an action on a promissory note the note itself is a sufficient statement of demand.¹ In order, however,

on a penal bond before a justice, where the plaintiff filed a bill of items specifying the services referred to in the bond, and afterwards, on a motion to dismiss, made by one of the defendants because the bill of items did not charge anything against him, the plaintiff withdrew his bill of items, and relied upon his bond and oral pleading, it was held that he could do so. *Stone v. Murphy*, 2 Iowa 35.

Assigned Account.—In an action by an assignee of an open account before a justice, the filing of the account with the assignment indorsed upon the back of it is a sufficient statement of the cause of action. *Dodd v. Cohen*, 7 Mo. App. 589.

No Averment that Instrument Was Signed or Sealed.—It is not necessary in a justice's court, in an action upon a sealed instrument, that the declaration should contain an averment that the instrument was signed and sealed by the parties or either of them. It is enough to declare generally for a breach of contract, referring to the contract or agreement in such terms as to identify it, for the breach of which damages are sought to be recovered; or to set out the contract according to its legal effect, without averring that it was sealed by the parties (*Hoyt, J.*, dissenting). *Smith v. Kerr*, 3 N. Y. 144.

Missouri—Statute Directory.—The Missouri statute requiring the instrument in writing on which a suit before a justice is founded, to be filed with the justice, is directory merely, and the failure to file such instrument is no ground for dismissing the suit. *Sublett v. Noland*, 5 Mo. 516; *Boatman v. Curry*, 25 Mo. 433; *Schenck v. Stumpf*, 6 Mo. App. 381; *Kleiboldt v. Grober*, 6 Mo. App. 574; *Lord v. Koenig*, 7 Mo. App. 453.

1. *California.*—*Hamilton v. McDonald*, 18 Cal. 128.

Indiana.—*Audleur v. Kuffel*, 71 Ind. 543; *Baldwin v. Webster*, 68 Ind. 133; *Tucker v. Gardiner*, 63 Ind. 299; *Barnett v. Juday*, 38 Ind. 86; *Griffin v. Cox*, 30 Ind. 242; *Garner v. Cook*, 30 Ind. 331.

Missouri.—*Mastin Bank v. Hammerslough*, 72 Mo. 274; *Deshon v. Leffler*, 7 Mo. App. 595.

Nebraska.—*Phoenix Ins. Co. v.*

Lemke, 18 Neb. 184; *Wells v. Turner*, 14 Neb. 445.

Wisconsin.—*Swineford v. Pomeroy*, 16 Wis. 553; *Roberts v. Warren*, 3 Wis. 736.

Contra.—In *New Jersey*, in an action on a promissory note in a justice's court, the note itself is not a sufficient statement of demand. *Heritage v. Daniels*, 3 N. J. L. 138; *Longstreet v. Cummins*, 2 N. J. L. 195.

Assigned Note.—In a suit commenced before a justice of the peace by the assignee against the assignor of a promissory note, the plaintiff need only file, as a cause of action, the note with the assignment. *Watson v. New*, 4 Blackf. (Ind.) 313; *Hardesty v. Kinworthy*, 8 Blackf. (Ind.) 304.

The assignee of a promissory note must prove his title to the paper by evidence of the assignments under which he claims it, without a written plea by the defendant denying the assignment. *Stone v. Bond*, 2 Heisk. (Tenn.) 425.

Sufficient Bill of Particulars.—In an action on a promissory note in a justice's court, the indorsement thereon is a sufficient bill of particulars. *Brenner v. Weaver*, 1 Kan. 488.

A bill of particulars in a justice's court which sets out a copy of the notes sued on, and alleges that there is due thereon from the defendant to the plaintiff a specified sum, is sufficient. *Freeman v. Burks*, 16 Neb. 328.

Filing Copy.—Under the *Mississippi Code of 1880*, § 2196, providing that "any one desiring to sue before a justice of the peace shall lodge with him the evidence of debt, statement of account, or other written statement of the cause of action," it is sufficient, when instituting a suit on a promissory note, to file a copy thereof with the justice; the original need not be filed. *Duncan v. Scott County*, 64 Miss. 38.

Original Used Instead of Copy.—There was no error in refusing to dismiss an action pending on the appeal in the Superior Court from a justice's court, on the ground that the promissory note sued on, instead of a copy of the same, was attached to the original summons by which the action was begun. *Bull v. Edward Thompson Co.*, 99 Ga. 134, 25 S. E. Rep. 31.

Note as Amendment to Complaint.—In

for such written instrument alone to constitute a sufficient statement in a justice's court, it should disclose a demand in favor of the plaintiff.¹

(2) *Time of Filing.* — As is the case with all matters of practice in justices' courts, the time of filing the plaintiff's statement of his cause of action is regulated by statute in the various states. Usually such statement should be filed on or before the return day of the summons.²

an action before a justice on a promissory note, the complaint failed to show that the defendant made the note, or that the plaintiff was the lawful owner or holder thereof. On the trial, the plaintiff introduced in evidence and filed with the justice a note executed by the defendant as maker, to the plaintiff as payee, and otherwise answering the description of the note described in the complaint. It was held that as the complaint contained a sufficient statement of the sum due upon the note to the plaintiff from the defendant, for which sum the plaintiff claimed a recovery, the delivery of the note to the justice might properly be treated as an amendment of the original complaint, the effect of which was to make a good complaint. *Royce v. Gray*, 21 Minn. 329.

1. *Latham v. Jones*, 6 Ark. 371; *Hull v. Conover*, 35 Ind. 372; *Barber v. Taylor*, 1 Mich. 352; *Smith v. Zimmerman*, 29 Mo. App. 249. Compare *Martin Bank v. Hammerslough*, 72 Mo. 274.

An Administrator, Sued as Such on a note which shows no demand in his favor, must file a statement of the facts constituting the cause of action and allege that he sues in his representative capacity. *Smith v. Zimmerman*, 29 Mo. App. 249.

No Averment of Presentation and Notice of Nonpayment. — Where the plaintiff in a justice's court exhibits a promissory note indorsed by the defendant, and states that he declares against the defendant as indorser, without making any averment or statement as to the presentation of the note for payment and notice of nonpayment to defendant, the declaration is bad in substance, and the judgment will be reversed. *Barber v. Taylor*, 1 Mich. 352.

No Indorsement to Plaintiff. — A sued B before a justice of the peace upon a promissory note made by B, payable to the order of C. There was no indorsement of the note by C to A. It was

held that the filing of the note as the only cause of action was insufficient, and that the case was not one of a mere defect of parties. *Hull v. Conover*, 35 Ind. 372.

Showing Plaintiff Transferee. — The plaintiff in a justice's court declared on the common counts, and filed, as specifying the exact nature of his demand, an instrument which in itself constituted a contract sufficient to sustain an action and on which the transferee could sue. It was in terms payable to bearer, but bore the indorsement "without recourse," signed by the payee. It was understood by both parties as the substance of the declaration, and it fairly imported that the plaintiff was the transferee. There was no demurrer for uncertainty. It was held that under the liberal rules for construing pleadings in a justice's court there was enough to entitle the plaintiff to show that he was the lawful transferee and to put the instrument itself in evidence. *Soper v. Mills*, 50 Mich. 75.

2. **Arkansas.** — In an action before a justice of the peace, it is immaterial whether "the statement of the facts upon which the action is founded," required by Mansf. Dig., § 4036, is filed before or after issuance of summons, if the defendant enters his appearance. *Buffington v. Sipe*, 53 Ark. 235.

In the earlier cases it was held that the cause of action must always be filed with the justice before suing out the summons. *Everett v. Clements*, 9 Ark. 478; *Keath v. Berkley*, 7 Ark. 469; *Pendleton v. Fowler*, 6 Ark. 41; *Levy v. Shurman*, 6 Ark. 182; *Ex p. Anthony*, 5 Ark. 358.

Iowa. — In Iowa, except where a writ of replevin is asked for, the filing of the petition forms no part of the commencement of an action before a justice, and need be done only upon the day of trial. *Duffy v. Dale*, 42 Iowa 215.

Massachusetts. — Under the Massachusetts statute of 1862, c. 20, it was

(3) *Sufficiency* — (a) *In General*. — As has been stated hitherto, the pleadings in justices' courts are always liberally construed, and the same formality and technical precision required of pleadings in higher courts are not to be expected or required of the plaintiff's statement of his cause of action before a justice of the peace.¹ If such statement sets forth facts sufficient to show a substantial cause of action it is good.²

held that in an action brought before a justice of the peace, the declaration could not be filed after the entry of the writ. *Keenan v. Knight*, 9 Allen (Mass.) 257.

Minnesota. — In an action before a justice the right to plead must be exercised on the return day of the summons or at such other time, not exceeding one week thereafter, as may be appointed by the justice with the consent of the parties. *Mattice v. Litcherding*, 14 Minn. 142; *O'Brien v. Pomroy*, 22 Minn. 130.

A justice of the peace has no power to receive pleadings in an action after one week from the return day of the summons. *Holgate v. Broome*, 8 Minn. 243.

A consent to an adjournment of a cause before a justice is not a consent that the pleadings be made on the adjourned day. *Mattice v. Litcherding*, 14 Minn. 142.

New Jersey. — Under the New Jersey statute the plaintiff in a justice's court must file his statement of demand on or before the return day of the summons. Where, on the return day, the justice adjourned the cause, and after adjournment, but on the same day, the plaintiff filed his statement, it was held that the statement was filed too late. *Hunt v. South*, 5 N. J. L. 571.

1. *Indiana.* — *Howe v. Young*, 16 Ind. 312; *Jenks v. Lima Tp.*, 17 Ind. 326; *Taylor v. Webster*, 3 Ind. 513; *Ruble v. Massey*, 2 Ind. 636.

Kansas. — *Missouri Pac. R. Co. v. Henning*, 48 Kan. 465; *Krouse v. Pratt*, 37 Kan. 651; *Kansas Pac. R. Co. v. Taylor*, 17 Kan. 566.

Michigan. — *Fletcher v. Bradford*, 45 Mich. 349; *Bradshaw v. McLoughlin*, 39 Mich. 480.

Missouri. — *Kleiboldt v. Grober*, 6 Mo. App. 574; *Morris v. Buckley*, 9 Mo. App. 577; *Schluter v. Wiedenbrocker*, 23 Mo. App. 440; *Witte v. Quinn*, 38 Mo. App. 681; *Harrison v. St. Louis, etc., R. Co.*, 58 Mo. App. 463; *Early v. Fleming*, 16 Mo. 154.

Nebraska. — *Crossley v. Steele*, 13 Neb. 219.

New Jersey. — *Scott v. Beatty*, 23 N. J. L. 256.

New York. — *Hall v. McKechnie*, 22 Barb. (N. Y.) 244.

Texas. — *Doyle v. Glasscock*, 24 Tex. 200.

Wisconsin. — *Berkley v. Johnson*, 4 Wis. 215.

See also the cases cited throughout this section.

The Omission of Precise Dates and Items of a copy of a book account filed in a justice's court is no cause of reversal. *Cole v. Williams*, 3 N. J. L. 145.

Laying Venue. — In a justice's court the venue is sufficiently laid if it appears in the margin of the statement. *Stoker v. Crane*, 46 Mo. 264.

Dollars and Cents in Figures. — A bill of particulars in a justice's court, in the form of a running book account, is sufficient although the figures intended to represent dollars and cents may not be designated in express terms, but only by implication as dollars and cents. *Bancroft v. Atyeo*, 22 Kan. 32.

Need Not Be Signed. — The fact that a complaint in a justice's court is not signed by either the plaintiff or his attorney does not render it insufficient on demurrer or motion in arrest of judgment, if it sufficiently shows the nature of the plaintiff's demand and is so explicit that a judgment thereon may be used as a bar to another suit for the same cause of action. *Montgomery v. Superior Ct.*, 68 Cal. 407; *Hewett v. Jenkins*, 60 Ind. 110.

In Form of Count for Money Had and Received. — A statement of a cause of action in a justice's court is sufficient if it is drawn in the form of a count at common law for money had and received. *Penninger v. Reilley*, 44 Mo. App. 255.

2. *Stuart v. Lander*, 16 Cal. 373; *Dunsworth v. Walter A. Wood Mach. Co.*, 29 Ill. App. 23; *Smithson v. Dillon*, 16 Ind. 169; *Burbage v. Squires*, 3 Metc. (Ky.) 77; *Johnson v. Knoblauch*,

(b) *Tests of Sufficiency.* — In many cases the rule is laid down that the plaintiff's statement of his cause of action in a civil action before a justice of the peace is sufficient if it clearly apprises the

14 Minn. 16; *Smith v. Monks*, 55 Mo. 106; *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419; *Hill v. Page*, 1 N. H. 191; *Lewis v. Albertson*, 2 N. J. L. 93; *Burt v. Hicks*, 3 N. J. L. 53; *Brewer v. Black*, 5 Okla. 57.

An Account for Goods Sold filed before a justice of the peace is a sufficient statement of the cause of action. *Phillips v. Fitzpatrick*, 34 Mo. 276.

Conditions Precedent — No Averment of Performance. — In a suit before a justice the plaintiff may file as his cause of action a contract containing conditions precedent to be performed by the plaintiff, without an averment of performance of the conditions. *Wiley v. Shank*, 4 Blackf. (Ind.) 420.

On Bond — Need Not Specify Breaches. — In an action on a bond in a justice's court it is not necessary to specify the breaches complained of. *Stone v. Murphy*, 2 Iowa 35.

Conversion — Need Not Allege Ownership. — Where a person sues before a justice of the peace for the conversion of personal property, setting up that he is the owner thereof, it is not necessary for him to allege how he became the owner. *Robbins v. Sackett*, 23 Kan. 301.

Trespass — Need Not Allege Quantity and Value. — A state of demand in trespass for breaking the plaintiff's close and cutting and taking away his grain, grass, wood, hay, etc., without alleging the quantity and value of each article, is sufficient. *Van Dyk v. Dodd*, 6 N. J. L. 129.

Trover — Description of Property. — Technicality is not required of pleadings in a justice's court. A statement in trover describing the property taken as "certain household goods" is sufficiently definite after verdict. *Meyer v. McCabe*, 73 Mo. 236.

Forcible Entry and Detainer — Description of Land. — In forcible entry and detainer, a description of the land sufficiently definite to enable the administration of substantial justice is all that is required in actions before justices of the peace. *Hernandez v. Simon*, 4 Cal. 183.

Trespass Quare Clausum — Locating Premises. — A statement filed before a justice in an action in the nature of

trespass *quare clausum*, which located the premises in the city of St. Louis and fixed the date only by the month and year, was held to be sufficient. *Muckel v. Rose*, 15 Mo. App. 393.

For Work and Labor. — A bill of particulars in a justice's court for work and labor, which states the title of the court and the names of the parties, and alleges that the defendant is indebted to the plaintiff in a sum certain for work and labor performed at the instance and request of the defendant, and that the amount is due and unpaid, states a good cause of action. *Twine v. Kilgore*, 3 Okla. 640.

No Statement of Kind of Work. — The plaintiff demanded of the defendant compensation for one year's work, from or about the first of January in one year to the first of March in the next, without stating the kind of work. The demand was held sufficient. *Righter v. Spear*, 15 N. J. L. 169.

Indebitatus Assumpsit. — A declaration in general *indebitatus assumpsit*, in a justice's court, is good on general demurrer though it contain neither time nor place nor any request to pay. *Keyser v. Shafer*, 2 Cow. (N. Y.) 437.

For Overflowing Land. — A declaration in case before a justice for overflowing the defendant's land sufficiently sets forth the cause of action in alleging that the defendant dammed or caused to be dammed a ditch which the plaintiff had used as a matter of right for more than twenty years and which was situated on a road laid out by the commissioners of highways, and that by the obstruction of the ditch the plaintiff had suffered damage as specified. *Enright v. Hartsig*, 46 Mich. 469.

For Back Taxes. — An oral declaration in justice's court which states that the action is brought for back taxes, levied and assessed against a designated parcel of land prior to its purchase by and conveyance to the plaintiff by the defendant by warranty deed, sufficiently apprises the defendant that the plaintiff claims that the deed covenanted against such taxes, and that the plaintiff seeks to recover for a breach of said covenant, and is sufficient under the liberal rules governing oral pleadings

defendant of the demand against him and is so explicit that a judgment thereon will bar another action for the same cause.¹ In other cases the rule is laid down in less explicit language,

in justices' courts. *Lynch v. Craney*, 95 Mich. 199.

Injury to Animals. — A declaration which charges that the defendant is a corporation owning a railroad in a given township, which it has been operating for over a year last past, and has not fenced its road at any place through the township, and that on a given date the plaintiff was the owner of a colt, of the value of one hundred dollars, which was lawfully in said township, and which went onto the track of the said railroad, and was there killed through the negligence of the defendant and because its track was not fenced, sets out a cause of action, and is as full as is usual or necessary in a justice's court. *Talbot v. Minneapolis, etc., R. Co.*, 82 Mich. 67.

No Allegation of Ownership. — In an action before a justice for an injury to animals, it was held that under the liberal rules of pleading in justices' courts the failure of the plaintiff to allege that he was the owner of the animals did not render his statement defective. *Johnson v. Moffett*, 19 Mo. App. 159.

No Allegation of Negligence. — The statement in a case commenced before a justice of the peace charged that the "defendant did wrongfully maim, wound, and kill the hogs of plaintiff." The proof on the plaintiff's part was that the defendant's dogs were fierce, and in the habit of worrying stock, and that the defendant knew of their propensity. There was no evidence that he set them on, or knew that they were worrying the plaintiff's hogs. It was held that the statement sufficiently set forth the plaintiff's cause of action. *Hale v. Van Dever*, 67 Mo. 732.

In an action before a justice for damages done to the plaintiff's cow by the defendant's dog, a complaint setting forth the fact that the "defendant kept a dog that was in the habit of worrying and injuring cattle, and that defendant, knowing its propensity, permitted it to run at large, and that said dog worried and injured the cow of plaintiff, for which he asks damages," etc., is sufficient without the further allegation that the defendant "wrongfully or negligently suffered the dog to run

at large," etc. *Forbes v. Shellabarger*, 50 Mo. 558.

If the Defendant Desires a More Specific Statement of the cause of action, he is entitled to have a bill of particulars. *McKenney v. Hopkins*, 20 Iowa 495; *Hartford v. Holmes*, 3 Mich. 460; *Crolot v. Maloy*, 2 N. Mex. 198; *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260; *Meyer v. Prairie du Chien*, 9 Wis. 233; *Dehnel v. Komrow*, 37 Wis. 336. See also *supra*, II. 3. a. (4) *Objections*.

1. *Indiana*. — *Anderson v. Lipe*, 114 Ind. 464; *Rice v. Manford*, 110 Ind. 596; *Hasty v. Huntington*, 105 Ind. 541; *Western Union Tel. Co. v. Huff*, 102 Ind. 535; *Pennsylvania Co. v. Rusie*, 95 Ind. 236; *Louisville, etc., R. Co. v. Zink*, 92 Ind. 406; *Beineke v. Wurgler*, 77 Ind. 468; *De Priest v. State*, 68 Ind. 571; *Goshen v. Kern*, 63 Ind. 469; *Smith v. Stanford*, 62 Ind. 392; *Hewett v. Jenkins*, 60 Ind. 110; *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Murphy v. Lambert*, 59 Ind. 478; *Sherrod v. Shirley*, 57 Ind. 13; *Powell v. De Hart*, 55 Ind. 94; *Crocker v. Hoffman*, 48 Ind. 207; *Indiana Cent. R. Co. v. Leamon*, 18 Ind. 173; *Clark v. Benefiel*, 18 Ind. 405; *Mullen v. Decatur County*, 9 Ind. 502; *Maggart v. Chester*, 4 Ind. 124; *Chicago, etc., R. Co. v. Woodard*, 13 Ind. App. 296; *Clifford v. Meyer*, 6 Ind. App. 633; *Watson v. Conwell*, 3 Ind. App. 518; *Milhollin v. Fuller*, 1 Ind. App. 58; *Smith v. District Trustees*, 5 Blackf. (Ind.) 40; *Denby v. Hart*, 4 Blackf. (Ind.) 13.

Missouri. — *Force v. Squier*, 133 Mo. 306; *Weese v. Brown*, 102 Mo. 299, 28 Mo. App. 521; *Butts v. Phelps*, 90 Mo. 670; *Razor v. St. Louis, etc., R. Co.*, 73 Mo. 471; *Key v. St. Louis, etc., R. Co.*, 73 Mo. 475; *Iba v. Hannibal, etc., R. Co.*, 45 Mo. 469; *Wilkinson v. Metropolitan Ins. Co.*, 54 Mo. App. 661; *Johnson v. Loomis*, 50 Mo. App. 142; *Bauer v. Barnett*, 46 Mo. App. 654; *Polhans v. Atchison, etc., R. Co.*, 45 Mo. App. 153; *Leas v. Pacific Express Co.*, 45 Mo. App. 598; *Dahlgren v. Yocum*, 44 Mo. App. 277; *Boefer v. Sheridan*, 42 Mo. App. 226; *Fleischmann v. Miller*, 38 Mo. App. 177; *Gregg v. Dunn*, 38 Mo. App. 283; *Hill v. Scott*, 38 Mo. App. 370; *Sturdy v. St. Charles Land, etc., Co.*, 33 Mo.

though with virtually the same effect, that where the plaintiff's statement apprises the defendant clearly of the demand against him, it is sufficient.¹ In still other cases the rule laid down is that the complaint is sufficient if it states the cause of action in

App. 44; *Damhorst v. Missouri Pac. R. Co.*, 32 Mo. App. 350; *Witting v. St. Louis, etc.*, R. Co., 28 Mo. App. 103; *Lewis v. Baker*, 24 Mo. App. 682; *Von Phul v. Menne*, 16 Mo. App. 561; *Dewey v. Massingale*, 14 Mo. App. 579; *Gibbs v. Missouri Pac. R. Co.*, 11 Mo. App. 459; *Lin v. Terre Haute, etc.*, R. Co., 10 Mo. App. 125; *Sappington v. Elrod*, 9 Mo. App. 581; *Fitzgerald v. Murphy*, 9 Mo. App. 572; *Joyaile v. Keber*, 8 Mo. App. 584; *Lord v. Koenig*, 7 Mo. App. 453; *McDonough v. Daly*, 6 Mo. App. 598; *Barbaro v. Occidental Grove No. 16*, 4 Mo. App. 429.

Montana. — *Balden v. Thomasen*, 17 Mont. 487.

New Jersey. — *Patten v. Heustis*, 26 N. J. L. 296; *Lippencott v. Smith*, 4 N. J. L. 106; *Woodruff v. Woodruff*, 4 N. J. L. 430.

New Mexico. — *Crolot v. Maloy*, 2 N. Mex. 198.

Insufficient Statements. — The following statements were held insufficient as not being sufficiently specific to bar another action for the same claim:

"Plaintiff states that defendant is indebted to him in the sum of \$50 lawful currency, for which he asks judgment." *Butts v. Phelps*, 79 Mo. 302.

"Defendant is justly indebted to them [plaintiffs] in the sum of one hundred and sixty-two and fifty one-hundredths dollars (\$162.50), for money had and received heretofore on the — day of —, 1882." *Rosenburg v. Boyd*, 14 Mo. App. 429.

"Due on contract on exchange of horses, as difference, thirty dollars." *Danser v. Boyle*, 16 N. J. L. 395.

Sufficient Statements. — A statement in a justice's court showing that the cause of action was based on an insurance policy, giving the name of the assured and the date and number of the policy — the policy being filed with the statement — is sufficiently specific to advise the defendant of the nature of the claim and to bar another action thereon. *Wilkinson v. Metropolitan Ins. Co.*, 54 Mo. App. 661.

A complaint in an action in a justice's court wherein the complaint avers that "on the 4th day of January, 1888, he commenced working for the defendant

by the day, and that he worked one hundred and forty-four days, which is worth seventy-five cents per day, making one hundred and eight dollars, which is wholly unpaid," sufficiently states the nature of the demand and is such that a judgment rendered thereon may be used as a bar to another suit for the same claim. *Milbollen v. Fuller*, 1 Ind. App. 58.

1. *Iowa*. — *Fauble v. Stewart*, 35 Iowa 379.

Kansas. — *Lobenstein v. McGraw*, 11 Kan. 645; *Missouri, etc.*, R. Co. v. *Brown*, 14 Kan. 557; *Pate v. Fitzhugh*, 46 Kan. 129.

Michigan. — *Wilcox v. Toledo, etc.*, R. Co., 43 Mich. 584; *Nugent v. Teachout*, 67 Mich. 571; *Costello v. Ten Eyck*, 86 Mich. 348.

Missouri. — *Armstrong v. Keleher*, 71 Mo. 492; *Kansas City v. Johnson*, 78 Mo. 661; *Kleiboldt v. Grober*, 6 Mo. App. 574; *Freimuth v. Rupp*, 8 Mo. App. 567; *Strickland v. Quick*, 45 Mo. App. 610.

Nebraska. — *Cook v. Hester*, 21 Neb. 369.

New Jersey. — *Kline v. Ramsay*, 4 N. J. L. 159; *Reed v. Rocap*, 9 N. J. L. 347; *Brown v. Ramsay*, 29 N. J. L. 117.

New York. — *Hubbell v. Clark*, 1 Hilt. (N. Y.) 67; *Willard v. Bridge*, 4 Barb. (N. Y.) 361.

Texas. — *St. Louis Southwestern R. Co. v. Denson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 265.

Sufficient Statements. — A state of demand in form of an account charging the defendant with seven days' work done by plaintiff's son, J. W., harvesting and haying, giving the date, price per day, and sum total, sufficiently apprises the defendant of the demand against him, and is good. *Brown v. Ramsay*, 29 N. J. L. 117.

Where the plaintiff in a justice's court filed as his complaint what purported to be a copy of an account for "one hundred dollars, for money borrowed the thirty-first day of January, 1884," it was held that this complaint was sufficient to show the nature of the plaintiff's claim, especially as the defendant had not demurred thereto. *Montgomery v. Superior Ct.*, 68 Cal. 407.

such a way that a person of common understanding can readily know what is intended.¹ It will be seen from these rules that the sufficiency of such statements depends entirely upon substance, and not at all upon form.²

1. *Hall v. Chicago, etc., R. Co.*, 48 Wis. 317; *Hamlin v. Haight*, 32 Wis. 237.

An oral complaint in justice's court was entered by the justice thus: "Plaintiff complains for money had and received by the defendant from the plaintiff, and interest thereon, for balance due him, to the amount of two hundred and thirty dollars, and asks judgment for two hundred dollars, with costs of action." This was held sufficient under the statute, which only requires the pleading to be "such as to enable a person of common understanding to know what is intended." *Dehrfel v. Komrow*, 37 Wis. 336.

2. *Sufficient Statements.* — The following have been adjudged to be sufficient statements of the cause of action in justices' courts:

For Indebtedness. — A complaint averring that the defendant "justly owes the plaintiffs the sum of sixty-three and 21-100 dollars * * * and * * * the further sum of eleven and 26-100 dollars as interest on the same." *Smith v. Heller*, 119 Ind. 212.

"Augustus Gorla to Henry Strathmann, Dr. To one-half amount of judgment for debt and costs in favor of C. E. Smith and against said Strathmann, in case No. 34, August, 1880, before Von Gerichten, J. P., instituted by Smith against Strathmann & Gorla on their joint contract. Total amount, \$44.30. \$22.15." *Strathmann v. Gorla*, 14 Mo. App. 1.

"A, Dr. to B. For one cow, weight 1063 lbs., at \$2.60 per cwt., \$27.63. May 21, by 11 lbs. beef, \$.65. Balance due, \$26.98. B." *Ingalls v. Averitt*, 34 Mo. App. 371.

For Purchase Price of Horse. — "A B to C D, Dr. To one horse sold him on the 2d day of November last, \$90. St. Louis, February 1, 1858." *Quinn v. Stout*, 31 Mo. 160.

For Personal Services. — A complaint in which the plaintiff alleges merely "that the defendant is indebted to him in the sum of one dollar and fifty cents for services to defendant in looking up title to property in the fall of 1883." *Guthrie v. Olson*, 32 Minn. 465.

A complaint consisting of an account,

made out as a "bill rendered," for threshing grain, together with averments that the plaintiffs were partners and that the defendant was indebted to them as such in the amount of the bill and interest, and a prayer for judgment. *Davies v. Skinner*, 58 Wis. 638.

"1884, Henry Brown to Joseph Weese, Dr. To amount due on contract for digging well, \$60." *Weese v. Brown*, 102 Mo., 299, reversing 28 Mo. App. 521.

An account purporting to be for a certain amount "for wages as common laborer, ten days." *Grabbe v. St. Louis Drayage Co.*, 42 Mo. App. 522.

Balance Due. — "To balance due on settlement." *Tichenor v. Colfax*, 4 N. J. L. 173.

An account headed "Rodney Parker to August Taylor, Dr.," containing items of debit and credit, and the balance struck, subscribed by the plaintiff and sworn to before the justice to whom it was delivered by the plaintiff as his complaint. *Taylor v. Parker*, 1, Minn. 469.

Balance Due on Rent. — Complaint: "Santa Barbara, October 20th, 1879. The Santa Barbara Gas Co., Dr. to Maria Antonia Lataillade. To balance due on rent of land, two hundred and fifty dollars." Indorsed: "Filed October 20th, 1879. R. D. Smith, Justice of the Peace." *Lataillade v. Santa Barbara Gas Co.*, 58 Cal. 4.

Use of Horse and Wagon. — "The plaintiff alleges for his cause of action against J. H. the use of one two-horse wagon from the 26th day of September, 1887, to the 21st day of November, 1887, 50 days in time between dates, at twenty-five cents per day, \$12.50." *High v. Hill*, 46 Kan. 96.

To Recover Subscription. — A declaration in an action to recover the amount of a subscription to provide for a public dinner, alleging that the "defendant, with others, desiring to serve a free dinner to the soldiers, and desiring to raise money therefor, did designate plaintiff as a proper person to raise said money by subscription, and to disburse the same; all which was agreed to and accepted by said defendant; and that defendant, for the carry-

(c) **Averring Jurisdictional Facts.** — Notwithstanding the extreme liberality with which the pleadings in justices' courts are construed it is generally held that the plaintiff's statement must allege all the facts necessary to show the justice's jurisdiction over the case.¹

(d) **Must State Cause of Action.** — Regardless of mere form or technicality, which, we have seen, are not considered in construing the pleadings in a justice's court, the plaintiff's statement must

ing on of said purpose became indebted to plaintiff, and promised to pay," etc., referring to the subscription on file. *Comstock v. Howd*, 15 Mich. 237.

For Gun Obtained by Fraud. — "W. P., Dr. to J. M., thirty dollars for one gun, obtained by fraud. April 14, 1857. [Signed] J. M." *Milholland v. Pence*, 11 Ind. 203.

Money Had and Received. — A complaint alleging that the defendants are indebted to the plaintiff "for money had and received at their special instance and request, in the sum of one hundred dollars, which is due and unpaid." *Koons v. Williamson*, 90 Ind. 599.

For Damages. — A statement alleging that the plaintiff and one A. were partners in the years 1875 and 1876; that in 1875 A. delivered to the defendant a check or draft upon Stroud & McBride for the sum of one hundred and twenty-five dollars and directed it to be sent to Prindle & Bros., Arkansas, for collection; that before it was sent by the defendant, the plaintiff gave some directions, and that the defendant, disregarding the same, sent the draft to one Moore, of Arkansas; that by reason of the conduct of the defendant in disobeying the order and directions of plaintiff, the plaintiff is damaged in the sum of fifty dollars. *Butts v. Phelps*, 90 Mo. 671.

Injury to Horse and Buggy. — "Plaintiff declared in trespass to his damage one hundred dollars for injury to buggy and horse." *Daniels v. Clegg*, 28 Mich. 33.

Damage to Building and Premises. — "E. W. Warne in acc't Calvin C. Burt, Dr. To damage done to building and premises in block 84 of the city of St. Louis, \$50." *Burt v. Warne*, 31 Mo. 296.

For Killing Plaintiff's Hogs. — A statement that the defendant "did kill five head of hogs, the property of plaintiff, of the value of \$25, wherefore the

plaintiff asks judgment." *Glenn v. Weary*, 66 Mo. App. 75.

Conversion. — "J. McM., Dr. to S. W. A. To nine head of sheep, \$25." *Allen v. McMonagle*, 77 Mo. 478.

Sufficient to Allow Amendment. — A statement in a justice's court consisting of but a single item "for work and labor, \$329.32," was held to be sufficient to allow an amendment. *Lamb v. Bush*, 49 Mo. App. 337.

An account in a justice's court, "To balance for services as traveling salesman, \$64.15," is not so fatally defective as to be incapable of amendment. *Lustig v. Cohen*, 44 Mo. App. 271.

Sufficient for Judgment by Default. — A statement that "plaintiff claims \$50 for work and materials" is a sufficient informal count in assumpsit to sustain a judgment by default and a writ of inquiry in a justice's court. *Martin v. Higgins*, 23 Ala. 775.

Description of Property. — In an action before a justice to recover the possession of personal property, the complaint described the property in controversy as "one crib of corn, said crib being the north crib of three cribs, situated south of the house." On motion to dismiss the action for want of sufficient complaint and on motion in arrest of judgment, it was held that the complaint sufficiently described the property. *Smith v. Stanford*, 62 Ind. 392.

1. *Haggard v. Atlantic, etc.*, R. Co., 63 Mo. 302; *Mier v. St. Louis, etc.*, R. Co., 56 Mo. App. 655; *Jones v. Chicago, etc.*, R. Co., 52 Mo. App. 381; *Wiseman v. St. Louis, etc.*, R. Co., 30 Mo. App. 516; *Kinion v. Kansas City, etc.*, R. Co., 30 Mo. App. 573. But see *Perkins v. Smith*, 4 Blackf. (Ind.) 299.

Defect Not Amendable. — Where jurisdiction does not appear, the defect cannot be supplied by amendment. *Haggard v. Atlantic, etc.*, R. Co., 63 Mo. 302. But see *Mier v. St. Louis, etc.*, R. Co., 56 Mo. App. 655.

in some way set out all the facts necessary to show a cause of action.¹ Of course it is not possible nor desirable in this discussion to lay down any definite rules as to what facts must be alleged in order to state a cause of action, for each case must in

1. *Arkansas*. — *Jacks v. Nelson*, 34 Ark. 531.

Kansas. — *Hover v. Cockins*, 17 Kan. 514; *St. Louis, etc., R. Co. v. McReynolds*, 24 Kan. 368; *St. Louis, etc., R. Co. v. Byron*, 24 Kan. 350.

Michigan. — *Smith v. Hobart*, 43 Mich. 465; *Barber v. Taylor*, 1 Mich. 352.

Missouri. — *Hill v. St. Louis Ore, etc., Co.*, 90 Mo. 103; *Webster v. Atchison, etc., R. Co.*, 57 Mo. App. 451; *Dahlgren v. Yocum*, 44 Mo. App. 277.

New Jersey. — *Winans v. Denman*, 2 N. J. L. 116; *Gifford v. Gifford*, 2 N. J. L. 153; *Van Dyke v. Speer*, 3 N. J. L. 546; *Woodruff v. Woodruff*, 4 N. J. L. 430; *Miller v. Stoy*, 5 N. J. L. 548; *Meeker v. Potter*, 5 N. J. L. 677; *Weaver v. Wallace*, 9 N. J. L. 251; *Folwell v. Ford*, 12 N. J. L. 68; *Teel v. Tice*, 14 N. J. L. 444; *Hutchinson v. Targee*, 14 N. J. L. 386; *Youngs v. Shough*, 15 N. J. L. 27; *Meeker v. Garland*, 16 N. J. L. 486; *Denny v. Quintin*, 28 N. J. L. 134.

New York. — *People v. Judges*, 21 Wend. (N. Y.) 20; *Ehel v. Smith*, 3 Cal. (N. Y.) 187; *King v. Fuller*, 3 Cal. (N. Y.) 152; *Houghton v. Strong*, 1 Cal. (N. Y.) 486.

Wisconsin. — *Harris v. Harris*, 10 Wis. 467.

Facts, Not Conclusions of Law. — The statement of a cause of action before a justice of the peace must be a statement of facts as distinguished from a conclusion of law. *Dahlgren v. Yocum*, 44 Mo. App. 277; *Butts v. Phelps*, 79 Mo. 302.

Account—Should Set Out Items. — A copy of account in a justice's court must set out the items of the account. *Magee v. Buckbee*, 3 N. J. L. 133; *Freeman v. Vanderveer*, 3 N. J. L. 586; *Sawyer v. Miller*, 8 N. J. L. 139.

Assigned Account—Should Aver Assignment. — In an action upon an assigned account in a justice's court, the complaint should aver the assignment, such averment being essential to the cause of action. *Balden v. Thomasen*, 17 Mont. 487.

Promise—Should State Consideration. — In an action in a justice's court on a promise, the state of demand must

allege a consideration for the promise. *Shepherd v. Layton*, 3 N. J. L. 202. But see *Smith v. Monks*, 55 Mo. 106.

Time When Services Rendered. — In an action in a justice's court to recover for services rendered, the state of demand should allege the time when the services were rendered. *Vanguilder v. Stull*, 10 N. J. L. 233.

By Whom Services Performed. — A state of demand for work and labor must show by whom the services were performed. *Erving v. Ingram*, 24 N. J. L. 520.

Right to Wages. — If a parent brings an action to recover wages due to his daughter, he should in his state of demand state sufficient to show that he is entitled to the wages for which he sues. *Collett v. Smith*, 12 N. J. L. 125.

Averment of Damage. — In action *ex delicto* in a justice's court, the plaintiff must allege in substance that he has sustained some damage by the act or omission of the defendant and should set out in an intelligible manner the nature of the act of which he claims. *Phillips v. Bridges*, 3 Wis. 270.

Specifying Exact Sum Due. — In a suit for rent before a justice of the peace, the plaintiff's complaint must specify the exact sum, or if rent be payable in particular products or material, the exact amount thereof, demanded and due. *Cook v. Decker*, 63 Mo. 328.

Contract and Breach. — In an action in a justice's court for breach of contract, a state of demand should set out the contract and the breach. *Lowry v. Powel*, 2 N. J. L. 360.

Promise Made by Wrong Name. — In a suit in a justice's court on a written promise made to the plaintiff by a wrong name, the declaration should aver that the promise was made to him by the wrong name. *Williams v. Dickerson*, 8 Blackf. (Ind.) 287.

For Visits and Medicine. — In a suit in a justice's court, the demand filed was for visits and medicine. It was held that the state of demand was insufficient, in not showing how much was for visits and how much for medicine, nor for what purpose the visits were made. *Smith v. Dunn*, 26 N. J. L. 212.

this respect be governed by circumstances. However, a number of statements which have been held insufficient are given in the notes.¹

(c) *In Actions on Statutes.*—Although it is a general rule that a party seeking the recovery of a statutory penalty must declare on the statute creating it, such is not the case in a justice's court,

1. Insufficient Statements.—The following statements have been adjudged insufficient as not setting out a cause of action:

"A debtor to B, to \$50." *Brashears v. Strock*, 46 Mo. 221.

"To cash had to my use." *Bruen v. Douglass*, 3 N. J. L. 55.

"To cash paid him on account." *Barnes v. Fairholme*, 3 N. J. L. 213.

"To A B, debt and interest, \$100." *Keen v. Scull*, 3 N. J. L. 133.

"To amount of goods received." *Evans v. McClellan*, 12 N. J. L. 123.

"To amount of accounts unsettled, due me, one hundred dollars." *Hagerman v. Titus*, 2 N. J. L. 151.

"For the service of the season of 1887, two mares, balance \$18." *Nutter v. Houston*, 32 Mo. App. 451.

"Le Roy, Barton county, Mo., Sept. 10th, 1872. C. S. Nicholson, debtor to Marion Swartz, fourteen dollars." *Swartz v. Nicholson*, 65 Mo. 508.

Money Had and Received—From Whom and for Whose Use.—A demand for money had and received, without saying from whom or for whose use, is insufficient. *Brannin v. Voorhees*, 14 N. J. L. 590.

Money Lent—By Whom and to Whom.—A state of demand containing a single charge "to money lent," without stating by whom or to whom, is insufficient. *Denny v. Quintin*, 28 N. J. L. 134.

Balance—Uncertainty of Amount.—An item in a plaintiff's state of demand, charging the defendant with a "balance struck by the defendants on plaintiff's pass book," with interest thereon, giving the date but omitting to carry out or state the amount of the balance, and affording no means for ascertaining the amount by calculation, and how much is demanded for principal and how much for interest, is bad for uncertainty, and a judgment rendered for the whole sum claimed in the state of demand will be reversed on certiorari. *Carter v. Lackey*, 20 N. J. L. 608.

A state of demand containing a charge for a certain sum, "being the

amount of principal and interest due on printing done in the year 1817," without stating whether at one time or several times, and how much is claimed for principal and how much for interest, is insufficient. *Gordon v. Myers*, 8 N. J. L. 69.

Uncertain Whether Contract or Negligence.—A statement in a justice's court was as follows: "Pacific Express Company, bought of George Leas * * * 1 crank shaft for 4 x 6 eng., \$18. This shaft was shipped C. O. D. to Frank E. Wells, Eufala, Indian Territory, May 31. Broken by Pacific Company." The statement was held insufficient, as it did not appear thereby whether the action was based on contract or negligence. *Leas v. Pacific Express Co.*, 45 Mo. App. 598.

Damage to Fence—Ownership.—A state of demand in a justice's court, "to damage, \$100, by taking away a line of fence," was held insufficient for not showing that the fence was the fence of the plaintiff. *Katts v. Armstrong*, 3 N. J. L. 383.

Fraud and Misrepresentation.—A state of demand in a justice's court was in the following words: "This plaintiff comes into court and pleads that the defendant is indebted to said plaintiff \$25, by a defraud in contract, by a false representation." It was held insufficient for not setting out the circumstances of the fraud and misrepresentation. *Sexton v. Cramer*, 3 N. J. L. 467.

Trespass on Case.—The following statement of demand: "The plaintiff complains of the defendant for this: that on, etc., at, etc., the plaintiff was possessed of a certain sow, of great value, etc.; that afterwards on, etc., at, etc., he the defendant with force and arms did enter in and upon the pen wherein said sow was kept, and broke down and destroyed the said pen, by means whereof the plaintiff lost said sow; and other wrongs, etc.," was held insufficient, because it did not state that the pen was on the land of the plaintiff or that he was in possession of it. *Angus v. Flood*, 15 N. J. L. 437.

where the pleadings are construed liberally and without regard to form.¹ If the statement sets out facts enough to bring the case within the statute it is sufficient.²

(4) *Parties — How Designated* — Strict technical accuracy is not required of the plaintiff's statement in designating the parties in a justice's court.³ Thus, in an action by or against a firm it is not essential that the statement should set out the names of the individual members of the firm.⁴

1. *O'Callaghan v. Booth*, 6 Cal. 63. But see *Benallick v. People*, 31 Mich. 200.

2. Where a statement in a justice's court did not in terms refer to the statute under which recovery was sought, but stated facts bringing the case within the scope of the statute, it was held that the statement was sufficient and that the action was properly treated as being founded on the statute. *Blewett v. Smith*, 74 Mo. 404. But see *Benallick v. People*, 31 Mich. 200.

Need Not Use Words of Statute. — In a justice's court the fact that a plaintiff's statement is not in the words of the statute under which suit is brought does not render it defective, if a good cause of action is stated. *Berry v. Kauffman*, 70 Mo. 186; *Sieckman v. Armein*, 10 Mo. App. 259.

In Pleading an Ordinance in a justice's court it is not necessary to set out its title, the date of its passage, or a copy of it; it is only necessary to set out its substance. *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419.

Action for Violation of By-law. — In an action of debt by a corporation before a justice of the peace for the violation of a by-law it was held that the declaration, instead of setting out the by-law, might refer to it as contained in the printed copy of the by-laws of the company filed with the declaration. *White Water Valley Canal Co. v. Boden*, 8 Blackf. (Ind.) 130.

Complaint Treated as Statement of Demand. — In a justice's court, a complaint under a penal statute is treated as a state of demand setting out the plaintiff's cause of action. *Roeber v. Society, etc.*, 47 N. J. L. 237.

3. *Suit by Corporation.* — Where a suit in a justice's court was commenced by a summons to answer "The Wilson Sewing Machine Company," this was held to be a sufficient averment that the plaintiff was a corporation and to supply this omission in the declaration.

Wilson Sewing Mach. Co. v. Spears, 50 Mich. 534.

Suit Against Corporation. — Where, in a suit in justice's court, the defendant, a corporation, was correctly named in the summons as "The Sands & Maxwell Lumber Company," and the plaintiff declared orally "against the defendant, a corporation doing business under * * * the name of the 'Pentwater Lumber Company,'" and, in default of the defendant's appearance — the summons having been personally served — a judgment was rendered against it in its corporate name, the record was given such construction as would support the judgment, by construing the language in the declaration as stating that the defendant was doing business under the name of the Pentwater Lumber Company. *Bole v. Sands, etc., Lumber Co.*, 77 Mich. 239.

Defect Cured by Answer. — Where the complaint filed in the court of a justice of the peace by an administrator set out the initials only of the plaintiff's Christian name, but the defendant in the written answer filed by him set out the full names of the parties, it was held that the complaint was defective, but that such defect was cured by the answer. *Sherrod v. Shirley*, 57 Ind. 13.

4. *Clark v. Dunlap*, 2 Ind. 551; *Martin v. District Ct.*, 13 Nev. 85.

In *Rohrbough v. Reed*, 57 Mo. 292, it was held that a written lease from one firm to another, although executed in their partnership names, was a sufficient statement of the cause of action in a suit in a justice's court by the lessors against the lessees.

How Defect Cured. — When the complaint before a justice of the peace is defective on account of being in the firm name of the plaintiffs, it may be cured by the process, amendment, or a pleading or suggestion of record, wherein the names are all properly stated. If the full names appear in

(5) *Allegations and Proof.* — While the rules of pleading applied to justices' courts are extremely liberal, a cause of action must be as fully proved in those courts as in any other.¹ However, the rules regarding the correspondence of the allegations and proof in such courts are very loose, and it seems that under a general claim almost any evidence may be introduced to prove the cause of action.² Even a material variance will not be

the writ and title of the case they need not appear in the complaint. *Hellyer v. Bowser* 76 Ind. 35.

1. *Lewiston v. Proctor*, 27 Ill. 414; *Cicotte v. Morse*, 8 Mich. 424; *Raymond v. Traffarn*, 12 Abb. Pr. (Oneida County Ct.) 52. And see *infra*, II. 5. f. (1) *Plaintiff Must Prove His Case.*

Taken as True unless Denied on Oath. — Under the *Kansas Justices' Code*, § 84, where the plaintiff filed a bill of particulars in a justice's court setting forth a cause of action upon a written guaranty indorsed on a promissory note, giving a copy of the note and guaranty, and alleging their due execution, and the defendant filed no affidavit denying the execution of such instrument or the making of such indorsement, it was held that the allegations as to the note and indorsement must be taken as true without any proof thereof, and what they would reasonably prove by way of inference, presumption, or implication must also be taken as true unless the contrary was shown. *Eggen v. Briggs*, 23 Kan. 710; *Baughman v. Hale*, 45 Kan. 453.

2. **Special Damages.** — In *Missouri* it is held that the rule requiring the plaintiff to plead special damages as a condition precedent to their recovery does not apply to justices' courts. *Glenville v. St. Louis R. Co.*, 51 Mo. App. 629.

Conversion Proved under Account. — Where the plaintiff's statement of his cause of action in a justice's court was in the form of an account for certain designated property, it was held that under this he could prove a conversion without there being a variance between the statement and the proof. *Kehoe v. Phillipi*, 42 Mo. App. 292. But see *Sandeen v. Kansas City, etc., R. Co.*, 79 Mo. 278.

Open Account for Wages. — In a suit before a justice of the peace on an open account for wages, no formal complaint having been required or filed, the plaintiff may prove a verbal contract for stipulated wages if any was made, or, if not, the value of the services rendered. *Hibbard v. Kirby*, 38 Ark. 112.

Account Stated. — Although in a court of record it is necessary, in declaring upon an account stated, to allege that the defendant promised to pay the balance so found to be due, such an allegation is not necessary in a justice's court to enable the plaintiff to recover as upon an account stated. *Lustig v. Cohen*, 44 Mo. App. 271.

Damages — Warranty in Sale. — Where in an action in a justice's court the cause of action stated in the notice was "\$40 damages in the sale of oxen," it was held that evidence of warranty made in the sale of oxen was admissible. *Dilley v. Nusum*, 17 Iowa 238.

Special Agreement — Recovery on Quantum Meruit. — Where the plaintiff in a justice's court declared a special agreement only, which was not put in evidence, it was held that recovery might be had upon a *quantum meruit* for work and labor proved to have been performed, since the case was submitted without objection and decided, apparently, with the whole merits before the court. *Irvine v. Wortendyke*, 2 E. D. Smith (N. Y.) 374.

Contract for Conveyance of Land. — Where the declaration in a justice's court was "for moneys due on contract (lost by fire), damages for nonperformance of contract," etc., and the defendant, instead of calling for a more full statement of the cause of action, pleaded the general issue, it was held that the plaintiff might give in evidence a written contract between him and the defendant for the conveyance of lands, and recover the money due thereon. *Young v. Rummell*, 5 Hill (N. Y.) 60.

Sealed Instrument — No Averment of Seal. — A declaration in writing in a justice's court, without naming the form of action, set forth that the defendant leased certain premises of the plaintiffs, and went on to state a cause of action for a breach of one of the engagements in the lease. Annexed to the declaration was a paper purporting to be a copy of the lease, together with a notice addressed to the defendants

regarded as error when not objected to at the time the evidence is offered.¹ But the plaintiff will not be allowed to recover on a cause of action different from the one on which he declared.²

stating that it was a copy of the lease referred to. The instrument purported to be signed by all the parties, but there were no marks indicating that the original had been sealed, nor was it averred in the declaration that it was sealed. It was held, nevertheless, that the plaintiffs might upon the trial give in evidence and recover upon the lease, although it was a sealed instrument. *Smith v. Kerr*, 3 N. Y. 144.

Where the plaintiff in a justice's court declared on a special agreement as a parol writing, which, when produced on the trial, turned out to be under the hands and seals of the parties, it was held to be a variance which was amendable and that it might be disregarded by the justice. *Mosher v. Lawrence*, 4 Den. (N. Y.) 419.

For Back Taxes—Special Tax Rolls.—An oral declaration in a justice's court stated that the action was brought for back taxes levied and assessed against certain land previous to date of the purchase, and that on that date the defendant had given the plaintiff a warranty deed of the premises. It was held that this declaration sufficiently apprised the defendant of the plaintiff's claim that this deed covenanted against such taxes, for breach of which the plaintiff sought to recover, and under it the plaintiff might introduce special tax rolls to establish the lien on the land. *Lynch v. Craney*, 95 Mich. 199.

False Imprisonment.—A declaration in a justice's court for false imprisonment averred that the plaintiff was "thereby delayed and injured in his business," to wit, at the venue stated. It was held sufficient to warrant evidence of damage. *Thompson v. Ellsworth*, 39 Mich. 719.

Wrongful Seizure of Goods.—The statement of the cause of action filed with the justice was in the following form: "L. & S. to P. J. C., Dr. 1855, Feb. 20th, to 41 hams, 464 1-2 lbs., at 10 cents, \$46.45; 2 bbls. whiskey, 77 1-2 galls., at 28 cts., \$21.70; total, \$68.15." It was held that the cause of action was made good by proof that the articles enumerated, being the property of the plaintiff, P. J. C., had been wrongfully seized, at the instance of the defendants, L. & S., in an attachment suit

against a third person. *Coughlin v. Lyons*, 24 Mo. 533.

Overflowing Land—Value of Crop.—In an action in a justice's court for damages for injury to the plaintiff's crop by an overflow caused by the defendant, it was held that in order to admit proof of the value of the crop the plaintiff need only file an account of the nature and damages and allege the amount thereof. *Ethridge v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 204.

For Loss of a Trunk.—In an action in a justice's court for the loss of a trunk, the plaintiff may prove how the trunk came into the hands of the defendant, and the manner of the loss, under a general claim. *Byers v. Des Moines Valley R. Co.*, 21 Iowa 54.

1. *Mosher v. Lawrence*, 4 Den. (N. Y.) 419.

2. *Botkin v. Earl*, 6 Wis. 393.

Contract—No Recovery in Tort.—The rule that a party cannot sue in contract and recover in tort is applicable to justices' courts. *Edwards v. Albrecht*, 42 Mo. App. 497.

Trespass—Goods Sold and Delivered.—In an action before a justice where the defendant was summoned to answer an action of trespass, it was held that the plaintiff could not recover on a claim for goods sold and delivered. *Weisberger v. White*, 2 Pa. Dist. Rep. 626.

Money Had and Received—Goods Sold and Delivered.—Where the plaintiff's statement in a justice's court was drawn in the form of a count for money had and received, it was held that he could not recover thereunder for goods sold and delivered. *Penninger v. Reiley*, 44 Mo. App. 255.

Contract for Payment of Money—Payment in Merchandise.—A state of demand which sets out a contract for the payment of a sum of money is not supported by proof of a contract to pay in articles of merchandise. *Stroud v. Shimer*, 8 N. J. L. 134.

Negligence.—Where, in an action against a railroad company for personal injury, the plaintiff merely alleged that the defendant had been guilty of negligence in not giving her time to alight, it was held that she

(6) *Joinder of Causes.* — Under the liberal rules of pleading prevailing in justices' courts, the plaintiff may join two or more causes of action not inconsistent with each other.¹ A misjoinder of causes is no defense to the merits, and the objection is waived if not properly taken.² Where the complaint, in addition to a good cause of action, alleges a cause of action over which the justice has no jurisdiction, he should disregard the latter and render judgment on the former.³

c. PLEA OR ANSWER — (1) *Necessity For* — (a) *In General.* — A Written Plea or Answer is not usually required in a justice's court.⁴

could not depend upon the fact that the door of the car had been left ajar and unfastened as an act of negligence. *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.

1. *Roberts v. Quincy, etc., R. Co.*, 43 Mo. App. 287; *Wentworth v. Buhler*, 3 E. D. Smith (N. Y.) 305.

Need Not Be Separately Stated. — In *Missouri* the plaintiff in a justice's court may unite in his suit as many causes of action as he may have, but there is no requirement that the causes of action shall be separately stated. *Loomis v. Wabash, etc., R. Co.*, 17 Mo. App. 341.

No Particular Mode of Distinguishing. — There is no particular mode by which counts or causes of action are to be separated and distinguished from each other in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient. *Hall v. McKechnie*, 22 Barb. (N. Y.) 244.

Inconsistent Causes. — While it is true that the court will not regard the mere forms of proceedings before justices of the peace, yet the two classes of action, *ex delicto* and *ex contractu*, cannot be blended or united together, and a recovery cannot be had under the one form if the action be of the other. *Roberts v. Quincy, etc., R. Co.*, 43 Mo. App. 287; *Beasley v. Bradley*, 2 Swan (Tenn.) 180.

Actions of Contract and Tort should not be joined in the same complaint in a justice's court, but where they are joined in the same complaint, the only remedy is to require the plaintiff, upon joining issue, or before proceeding to trial, to elect to which class of actions he will be confined. *Burdick v. McAmbly*, 9 How. Pr. (Oswego County Ct.) 117.

Where No Objection Is Taken for such misjoinder, the plaintiff may be per-

mitted to recover in either form of action on making a proper case by his proof. *Willard v. Bridge*, 4 Barb. (N. Y.) 361.

Debt and Assumpsit. — In *New Jersey* a state of demand in a justice's court must not join a count in debt with a count in assumpsit for unliquidated damages. *Rutan v. Hinchman*, 29 N. J. L. 112.

2. *Gerould v. Cronk*, 85 Hun (N. Y.) 500; *Dunham v. Simmons*, 3 Hill (N. Y.) 609; *Willard v. Bridge*, 4 Barb. (N. Y.) 361.

Does Not Warrant Dismissal. — Misjoinder of causes of action before a justice of the peace does not warrant a dismissal of the suit. *Koons v. Williamson*, 90 Ind. 599.

3. *Van Etten v. Jilson*, 6 Cal. 19; *Howard v. Valentine*, 20 Cal. 282; *Singer Mfg. Co. v. Barrett*, 95 N. Car. 36.

4. *Alabama.* — In a justice's court the defendant's plea need not be in writing unless it is a plea requiring an affidavit to verify it. *Noles v. Marable*, 50 Ala. 366.

Arkansas. — It is not necessary for a defendant to file a written answer to the complaint or affidavit in replevin in the justice's court. *Texas, etc., R. Co. v. Hall*, 44 Ark. 375.

Illinois. — In Illinois pleadings in a justice's court are oral, and every defense may be considered as pleaded which appears under the evidence. *Stockon v. Lochnitt*, 31 Ill. App. 214. See also *Zuel v. Bowen*, 78 Ill. 234.

Iowa. — In an action in a justice's court, if the petition, although sworn to, does not call for a sworn answer, an oral answer is admissible. *Freibertsheyser v. Rischatch*, 10 Iowa 587.

Kansas. — In Kansas the defendant is not, as a general rule, required to file any written answer in a justice's court, but may introduce evidence to

Thus, it is quite proper to plead orally such defenses as the statute of frauds,¹ a former adjudication,² another suit pending,³ or payment;⁴ and, indeed, such defenses are commonly admitted under a general denial without special pleading.⁵ However, in certain cases, usually specified in the statute, the defendant must file a plea or answer in writing.⁶

sustain any defense he may have. *Douglass v. Easter*, 32 Kan. 496; *Wagstaff v. Challiss*, 29 Kan. 505; *Ziegler v. Osborn*, 23 Kan. 464; *German v. Ritchie*, 9 Kan. 106.

New Jersey. — In New Jersey a defendant in a justice's court need file no written plea except where he claims a set-off. *Bray v. Van Note*, 2 N. J. L. 133; *Phillips v. McCullough*, 2 N. J. L. 65; *Hewes v. Mungan*, 2 N. J. L. 240; *Freeman v. Marsh*, 3 N. J. L. 65; *Mintas v. White*, 3 N. J. L. 121; *Ivins v. Ellis*, 3 N. J. L. 136.

South Carolina. — In South Carolina, the defendant in a justice's court may orally answer a written complaint. *Williams v. Irby*, 15 S. Car. 458.

Tennessee. — Pleadings before justices of the peace, or in suits originating before them and carried to a higher tribunal, are *ore tenus*, except in cases in which the plea is required to be under oath. *Neville v. Northcutt*, 7 Coldw. (Tenn.) 294; *Richardson v. Cato*, 9 Humph. (Tenn.) 464.

Texas. — Rev. Stat., §§ 1603, 1604, provide that the pleadings in a justice's court shall be oral except in certain specified cases. *Whitley v. Jackson*, 1 Tex. App. Civ. Cas., § 576; *Low v. Griffin*, (Tex. Civ. App. 1897) 41 S. W. Rep. 73; *Silberberg v. Trilling*, 82 Tex. 523.

When a Defendant Elects to File a Written Answer before a justice of the peace, or an appeal in the Circuit Court, he will be held to the issues tendered by his answer. *Hecht v. Caughron*, 46 Ark. 132.

Where the defendant filed written defenses and there were no entries in the docket, it was held that the written answer could be looked to for the purpose of ascertaining such defense. *Silberberg v. Trilling*, 82 Tex. 523.

Failure to Enter Oral Defense on Docket. — A justice should enter an oral defense on his docket, unless it is imperfect in substance, but his failure to do so will not deprive the defendant of his defense. If it is imperfect the defendant should be allowed to amend. *Eddy v. Manshaun*, 42 Mich. 532.

Actions on Written Instruments. —

Under the statutes of some states, where suit is brought in a justice's court on a written instrument, if the defendant wishes to deny its execution he must file a sworn statement of his denial. *Dodge v. People*, 113 Ill. 491; *McBride v. Kilgore*, 55 Miss. 242. See also *Glazier v. Streamer*, 57 Ill. 91; *Eggen v. Briggs*, 23 Kan. 710.

Nonassumpsit. — Although not strictly formal, a plea of nonassumpsit, sworn to and not objected to by the plaintiff, will put in issue the execution of a promissory note sued on in a justice's court. *Glazier v. Streamer*, 57 Ill. 91.

Non Est Factum. — In an action before a justice on a note for the payment of money, the defendant offered as a plea an affidavit which described the note and stated that the defendant did not sign said note nor make his mark thereto, nor authorize any person to do so for him, and that said note was wholly unjust and forged. This affidavit was held to be a sufficient plea of *non est factum* in a justice's court. *State v. Roberts*, 11 Humph. (Tenn.) 539.

Failure to File Denial at Execution. — Where the person sued in a justice's court on a written guaranty indorsed upon a promissory note does not file any affidavit denying the execution of such instrument or the making of such indorsement, he thereby admits nothing beyond the execution of the instrument and the making of the indorsement and what those things will reasonably prove. *Eggen v. Briggs*, 23 Kan. 710.

1. *Brown v. Higgins*, 45 Ark. 456; *Williams v. Corbet*, 28 Ill. 262; *Hartwell v. Young*, 67 Hun (N. Y.) 472.

2. *Dodge v. People*, 113 Ill. 491; *Levi v. McCraney*, 1 Morr. (Iowa) 91.

3. *Steele v. Grand Trunk Junction R. Co.*, 125 Ill. 385.

4. *Whitley v. Jackson*, 1 Tex. App. Civ. Cas., § 576.

5. See *infra*, II. 3. c. (1) (b) *Benefit of General Issue Without Pleading*.

6. **A Plea of Title** in a justice's court

(b) **Benefit of General Issue Without Pleading.** — Under the statutes of some of the states the defendant in a justice's court is, in most cases, given the benefit of the general issue without pleading it;¹ but he may, at his election, waive its benefits by putting his waiver of record.²

(2) **Time of Filing** — (a) **In General.** — As to the time for filing a plea or answer in a justice's court in cases where such pleading is required, there is no general rule. Unless the statute specially designates a time for such filing,³ it seems generally sufficient to file it at any time before the actual commencement of the trial.⁴

must be in writing. *Sage v. Barnes*, 9 Johns. (N. Y.) 365.

Plea to Jurisdiction. — In *Tennessee* a plea to the jurisdiction of a justice of the peace must be in writing, as such a plea is required to be verified. *Crutchfield v. Durando*, 3 Lea (Tenn.) 68.

Forcible Entry. — Under the *Montana* Code Civ. Pro., § 769, the defendant in an action for a forcible entry and unlawful detainer of land in a justice's court must file a written answer, and, failing to do so, will not be permitted to file one on appeal to the District Court, unless there is a showing of surprise, inadvertence, or excusable neglect. *Pincus v. Dowd*, 11 Mont. 88.

And see *infra*, II. 3. c. (4) *What Admissible under General Issue.*

1. *Heyward v. Field*, 95 Ga. 714; *Cross v. Pearson*, 17 Ind. 612; *Howard v. Kisling*, 15 Ind. 83; *Button v. Lent*, 10 Ind. 366; *Howard v. Cobb*, 6 Ind. 5; *Neely v. Chinn*, 8 Blackf. (Ind.) 84; *Columbia v. Davis*, 5 Blackf. (Ind.) 358; *M'Hatton v. Bates*, 4 Blackf. (Ind.) 63; *Cowgill v. Wooden*, 2 Blackf. (Ind.) 332; *Sinnamon v. Melbourn*, 4 Greene (Iowa) 309; *Schergens v. Wetzell*, 12 Mo. App. 596; *Lewis v. Baker*, 24 Mo. App. 682; *Crolot v. Maloy*, 2 N. Mex. 198.

Where He Pleads a Special Defense the general denial is still presumed to be pleaded. *Howard v. Kisling*, 15 Ind. 83; *M'Hatton v. Bates*, 4 Blackf. (Ind.) 63.

Not Applicable to Non Est Factum. — The *Indiana* statute allowing to the defendant in a justice's court the benefit of the general issue without pleading it does not apply to the action of covenant, for in that action the general issue is *non est factum*, which plea must always be verified by oath. *Neely v. Chinn*, 8 Blackf. (Ind.) 84; *Button v. Lent*, 10 Ind. 366.

2. *Cross v. Pearson*, 17 Ind. 612.

Right to Open and Close. — In *Indiana* where the defendant expressly waives the general denial which is put in by statute without being pleaded, he is entitled to open and close the case. *Cross v. Pearson*, 17 Ind. 612.

If the defendant does not waive the general issue, the plaintiff is entitled to open and close. *Howard v. Cobb*, 6 Ind. 5.

3. **Filed Too Late.** — The *Georgia* Acts of 1882-1883, p. 103, provide that "whenever the defendant in any civil suit in the justices' courts in an unconditional contract in writing makes defense, he shall make such defense at the first term of said court." Under this act, after judgment rendered by a justice of the peace on an unconditional contract in writing, no plea and no appearance being made by the defendant at the first term, it is too late on appeal to a jury in that court to defend by filing pleas of the general issue and payment and introducing evidence thereunder. *McCall v. Tufts*, 85 Ga. 619.

Where suit is brought on a promissory note in a justice's court the plea of *non est factum* should have been filed at the first term; and where it was not filed until the second term, there was no error in striking it out on demurrer on the ground that it was filed too late. *Vaughn v. Drewry*, 79 Ga. 761.

4. *West v. Rice*, 4 Kan. 563; *Boatz v. Berg*, 51 Mich. 8; *Bowen v. Bell*, 19 Johns. (N. Y.) 390.

After Return Day of Summons. — In the court for the trial of small causes the justice may allow a defendant to file a plea of title after the return day of the summons, but not after the day to which the cause should be first adjourned. *Shannon v. Flood*, 13 N. J. L. 301.

Matters Arising After Issue Joined. — Matters of defense arising after issue joined may be pleaded *puis darrein continuance*,¹ or by amendment of the answer.²

(b) **Pleas in Abatement.** — In a justice's court, as in courts of record, dilatory defenses must be made at the earliest opportunity,³ and if not then taken they are deemed waived.⁴

(3) **Sufficiency** — (a) **In General.** — As is the case with all pleadings in a justice's court, the plea or answer is liberally construed,

Amendment on Adjourned Day. — A party arrested and brought before a justice on a civil warrant has a right to a reasonable time for pleading. If the justice requires him to plead immediately, and he pleads the general issue, and the case is then adjourned, he is entitled of right to amend his pleadings and put in any justification he may have on the adjourned day. *Meddaugh v. Williams*, 48 Mich. 173.

Loss of Right to Plead. — Where the complaint is filed at the proper time in a justice's court, and the defendant omits to plead thereto and consents to an adjournment beyond the time limited for pleading, his right to answer is gone and the pleadings are closed. *O'Brien v. Pomroy*, 22 Minn. 130.

Where a case before a justice of the peace against several defendants had been settled by one of them before the time set for trial, and before the filing of an answer, and it had been so entered upon the docket, it was held to be too late after that time to file an answer and counterclaim. *Holmes v. Hull*, 48 Iowa 177.

1. *West v. Stanley*, 1 Hill (N. Y.) 69.

Agreement to Submit to Arbitration. — In a justice's court, a plea of abatement *puis darrein continuance* is the proper, if not the only effectual, mode of taking advantage of an agreement, made after issue joined, to submit to arbitration the matters in controversy in the suit; and the defendant, after tendering such a plea, will not be deemed to have waived the discontinuance of the suit by appearing on the trial and examining witnesses. *Resseque v. Brownson*, 4 Barb. (N. Y.) 541.

2. *Price v. Peters*, 15 Abb. Pr. (N. Y. C. Pl.) 197.

3. *Beck v. Glenn*, 69 Ala. 121; *Noles v. Marable*, 50 Ala. 366; *Dodge v. People*, 113 Ill. 491.

Should Be Tried Before Merits. — Where a plea in abatement is filed in a justice's court, the justice should try the

truth of it before going to the trial on the merits of the case. *Pedrick v. Shaw*, 2 N. J. L. 54.

West Virginia — No Pleas in Abatement. — The pleadings in justices' courts are prescribed by statute, and no provision is made for pleas in abatement; such plea, therefore, to the jurisdiction of the justice, cannot be properly filed either before the justice or the County Court to which such action may be removed under the statute. *Todd v. Gates*, 20 W. Va. 464.

4. **By Pleading to the Merits** in a justice's court the defendant waives matters in abatement. *Ellis v. Galesburg Base Ball Assoc.*, 45 Ill. App. 279; *Woodruff v. Woodruff*, 4 N. J. L. 430; *Montieth v. Cash*, 1 E. D. Smith (N. Y.) 412; *Engel v. Brown*, 1 Tex. App. Civ. Cas., § 803; *Stone v. Proctor*, 2 D. Chip. (Vt.) 108.

But Where the Plea in Abatement Is Overruled by the justice the defendant does not waive the objection by afterwards pleading to the merits. *Allen v. Stone*, 9 Barb. (N. Y.) 60.

After a General Continuance in a justice's court, it is too late to interpose a plea in abatement. *Noles v. Marable*, 50 Ala. 366; *Otis v. Ellis*, 78 Me. 75.

After Jury Called. — Where the defendant in a justice's court neglected to present a plea in abatement until after the jury had been called, and two of them had been challenged and their places supplied by others, it was held that by such delay he had waived all matters in abatement, and that the refusal of the court to allow a plea in abatement to be entered then was no ground of error. *Stiles v. Homer*, 21 Conn. 507.

Waiver by Consent. — Where a dilatory plea before a justice of the peace is, even after judgment thereon, waived by the consent of parties, judgment may be rendered on the merits, and the record may be made up as if no such plea had ever been interposed. *Egerton v. Hart*, 8 Vt. 207.

and strict technical accuracy is not required.¹ Therefore, a plea or answer in a justice's court is sufficient, though inartificially drawn, if it clearly apprises the plaintiff as to what the defense is.² And a strict correspondence of the pleading and proof is not required.³

(b) *Necessity for Verification.* — The plea or answer in a justice's court being ordinarily oral, of course it need not in such cases be verified,⁴

1. *Teagarden v. Baker*, 9 Iowa 271; *Burton v. Hill*, 4 Greene (Iowa) 379; *Whittle v. Bailes*, 65 Mich. 640; *Fisher v. Northrup*, 79 Mich. 287.

General Denial of Complaint Sufficient. — Under the *California Civil Practice Act*, § 574, the answer to a verified complaint in an action in a justice's court need not controvert specifically the allegations of such complaint. A general denial of the allegations of the complaint conforms substantially to the statute. *Sullivan v. Cary*, 17 Cal. 80; *Minturn v. Burr*, 20 Cal. 49.

Amended Answer Containing No Denial. — Where the defendant in a justice's court filed a general denial of the complaint and afterwards amended his answer, setting up matters of justification and containing no denial, it was held that, under the liberal rules of pleading in such courts, the amended answer would be considered as containing a denial, since the defendant evidently intended it to be in addition to his original answer. *Van Curen v. Switzer*, (Supreme Ct.) 11 N. Y. Supp. 263.

Motion to Dismiss. — The pleadings in a justice's court are not required to be technical. Therefore, a motion by the defendant to dismiss the writ because the plaintiff's full Christian name did not appear in the affidavit, writ, or declaration may be taken as equivalent to a plea in abatement. *Fisher v. Northrup*, 79 Mich. 287.

Statute of Limitations. — In an action on a promissory note in a justice's court, the defendant pleaded the general issue and payment, and further alleged that "the note is of no legal or binding force or validity if it had not been paid eleven years ago." The defendant afterwards asked leave to amend so as to plead the statute of limitations, which the justice refused. It was held that, under the loose mode of pleading allowed in justices' courts, the answer sufficiently set up the statute of limitations to justify and require the amendment if necessary. *Leonard v. Foster*, 7 Hun (N. Y.) 464.

Suit was brought on a promissory note which was payable one day after date, and had run eight years. The defendant pleaded nonassumpsit within six years, when he should have pleaded *actio non accrevit* within six years. The error being pointed out, he asked leave to amend, but the justice refused it. It was held that the plea as it stood fairly apprised the plaintiff of the defense relied upon, namely the statute of limitations, and the justice should have allowed the defendant the benefit of it, either with or without the amendment. *Snyder v. Winsor*, 44 Mich. 140.

2. *Eddy v. Manshaun*, 42 Mich. 532; *McGrath v. O'Brien*, 42 Minn. 13; *Houghton v. Beck*, 9 Oregon 325.

Plea to Jurisdiction — Facts Must Be Stated. — In a plea to the jurisdiction of a justice, founded upon the privilege of the person, the want of proper process or return, or upon any other circumstances not relating to the cause of action, the facts exhibiting the alleged defect must be specially stated. *Swartwout v. Roddis*, 5 Hill (N. Y.) 118.

Answer Not Sufficiently Specific. — Where the defendant's answer in a justice's court is not sufficiently explicit to enable the plaintiff to understand it, the plaintiff should demur to it, or ask the justice to require the defendant to exhibit his demands or state their nature so far as is in his power; and failure of the plaintiff to take either of these steps is a waiver of the objection. *Connors v. Taylor*, 13 Wis. 231.

3. *Greff v. Blake*, 16 Iowa 222; *Schuyler v. Ross*, (Supreme Ct.) 13 N. Y. Supp. 944; *Connors v. Taylor*, 13 Wis. 230.

4. See *supra*, II. 3. c. (1) *Necessity for*; and see *infra*, II. 3. c. (4) *What Admissible under General Issue.*

Plea in Abatement. — In a justice's court a plea in abatement need not be verified by affidavit. *Henry v. Lane*, 2 Mo. 201; *Gilbert v. Vanderpool*, 15 Johns. (N. Y.) 242. But see *Storm v. Worland*, 19 Ind. 203.

but some of the statutes require the defendant to verify his answer in certain cases.¹

(4) *What Admissible under General Issue.* — As a general rule a defendant in a justice's court may introduce under the general issue evidence in support of any defense he may have.² Under the statutes of some states there are certain excepted defenses which must be specially pleaded,³ but ordinarily no special pleading is required in order to set up a special defense.⁴

1. Verified Complaint Served with Summons. — Under the *New York Laws of 1881*, c. 414, § 2, where the complaint in a justice's court is verified and served with the summons, the defendant's answer must also be in writing and verified. *Rude v. Crandell*, 11 Civ. Pro. Rep. (Allegany County Ct.) 11.

Unless a Copy of the Verified Complaint Is Served with the summons, the defendant need not verify his answer. *Vaughn v. Lego*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 164.

Sufficient Verification. — In a justice's court a verification to an answer, in effect that a party, agent, or attorney verified the pleading and believes it to be true, is sufficient. *Schwerin v. Mills*, 2 Hilt. (N. Y.) 394.

Objection to Defective Verification. — Where the plaintiff in a justice's court objected that the defendant's answer was not "duly verified as required by law," it was held that the objection was not good, because it did not specifically point out the particulars wherein the verification was defective. *Rude v. Crandell*, 11 Civ. Pro. Rep. (Allegany County Ct.) 11.

3. Patterson v. Newton, 74 Ga. 366; *Douglass v. Easter*, 32 Kan. 496; *Wagstaff v. Challiss*, 29 Kan. 505; *Zeigler v. Osborn*, 23 Kan. 464; *German v. Ritchie*, 9 Kan. 106; *Wilbur v. Taber*, 9 Gray (Mass.) 361; *Holmes v. Wood*, 6 Mass. 1; *Dwyer v. Denny*, 6 Mo. App. 578.

Special Plea Permissible. — The requirement that in cases tried before a justice the plea shall be the general issue in all cases, with notice of any special defense, is mere matter of form and will not invalidate a special defense pleaded alone. *Eddy v. Manshaun*, 42 Mich. 532.

It Is Harmless Error to sustain a demurrer to an answer in a justice's court which does not set up a defense required to be specially pleaded. *Powers v. Fletcher*, 84 Ind. 154; *Lawless v.*

Harrington, 75 Ind. 379; *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Bernhamer v. Conard*, 45 Ind. 151.

3. Statute of Limitations — Indiana. — Under the *Indiana Rev. Stat.* (1896), § 1460, the statute of limitations must be pleaded specially. *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Cincinnati, etc., R. Co. v. Ridge*, 54 Ind. 39; *Bernhamer v. Conard*, 45 Ind. 151; *McMillen v. Terrell*, 23 Ind. 163; *Forgey v. Tucker*, 11 Ind. 320; *Button v. Lent*, 10 Ind. 366; *Louisville, etc., R. Co. v. Parish*, 6 Ind. App. 89.

The rule is otherwise in other states. See the next note.

Matter in Abatement. — In some states the statutes provide that matters in abatement must be pleaded specially. *Powers v. Fletcher*, 84 Ind. 154; *U. S. Express Co. v. Keefer*, 59 Ind. 263; *Otis v. Ellis*, 78 Me. 75.

Another Action Pending. — Under the *New York Code Civ. Pro.*, § 2938, the pendency of another action for the same cause of action must be set up in the answer, else no advantage can be taken of it. It cannot be proved by testimony of witnesses, that not being the best evidence. *Wright v. Maseras*, 56 Barb. (N. Y.) 521.

Title to Land. — In some states title to land must be specially pleaded. *Otis v. Ellis*, 78 Me. 75; *Colby v. Stevens*, 38 N. H. 191. And see *supra*, I. 8. c. *How Question Raised*.

Set-off. — In some states a set-off must be specially pleaded. See *infra*, II. 3. c. (5) *Set-off*.

4. The Statute of Limitations may be taken advantage of in a justice's court under the general issue. *Sanford v. Shepard*, 14 Kan. 228; *Williams v. Root*, 14 Mass. 273. But in *Indiana* it must be specially pleaded. *Rev. Stat. Ind.* (1896), § 1460. And see the preceding note.

Statute of Frauds. — In an action before a justice on a contract within the statute of frauds, the plea of statute is presumed to be pleaded, no written

(5) *Set-off*—(a) *Must Be Set Up at Trial*.—Where the defendant in a suit before a justice of the peace has a counterclaim against the plaintiff, he must set it off at that time, else he will be forever barred from recovering thereon.¹

Must Plead Specially or Give Notice.—It is the general rule that the defendant must either plead his set-off specially or give notice of it to the opposite party at the time of joining issue, and, failing to do so, cannot afterwards avail himself of it.²

plea being necessary. *Barrett v. Riley*, 42 Ill. App. 258.

Tender.—In a justice's court a tender may be given in evidence under the general issue. *Colby v. Stevens*, 38 N. H. 191.

Infancy may be given in evidence under the general issue in justices' courts. *Smith v. Van Houten*, 9 N. J. L. 381.

Coverture.—In a suit upon a promissory note, commenced before a justice of the peace, the coverture of the defendant, the maker, at the time of the execution of the note, is a bar to the action, and may be given in evidence without being pleaded specially. *Higgins v. Willis*, 35 Ind. 371.

Payment.—Under a general denial the defendant in a justice's court may prove payment. *Lane v. Kenworthy*, 43 Ind. 116; *Hill v. Sleeper*, 58 Ind. 221; *West v. Moody*, 33 Iowa 137; *Reed v. Snodgrass*, 55 Mo. 180.

Discharge in Bankruptcy.—Under the *New Jersey* statute providing that in a justice's court no pleas are necessary except set-off and title to land, a discharge in bankruptcy may be introduced in evidence under the general issue. *Vandoren v. Gaston*, 52 N. J. L. 321.

Contributory Negligence.—In a justice's court a defendant may prove contributory negligence without pleading it. *Glenville v. St. Louis R. Co.*, 51 Mo. App. 629.

The Consideration of a Note on which an action is brought in a justice's court may be inquired into without a special plea. *Greer v. George*, 8 Ark. 131; *Davis v. Grater*, 62 Ind. 408.

The Existence of a Corporation may be put in issue by the defendant without a denial under oath, and even without a written denial of any kind. *Stanley v. Farmers' Bank*, 17 Kan. 592.

Process Issued Out of Wrong Township.—In a justice's court the defendant may show under the general issue that process did not issue out of the proper

township. *M'Cormick v. Maxwell*, 4 Blackf. (Ind.) 168.

1. *Henry v. Milham*, 13 N. J. L. 266; *Johnson v. Pennington*, 15 N. J. L. 188; *Douglas v. Hoag*, 1 Johns. (N. Y.) 283; *Serjeant v. Holmes*, 3 Johns. (N. Y.) 428; *Waring v. Lockwood*, 10 Johns. (N. Y.) 108; *Baldwin v. Walsworth*, Hill & D. Supp. (N. Y.) 340; *Felpel v. Hershour*, 128 Pa. St. 587.

No Cross-action.—If a party sued in a justice's court has a demand against the plaintiff he must plead it as set-off and cannot bring a cross-action therefor. *Johnson v. Pennington*, 15 N. J. L. 188.

Set-off Greater than Plaintiff's Demand.

—Where, in an action before a justice, the defendant produced a running account against the plaintiff by way of set-off, exceeding two hundred dollars, which the justice rejected because it was not fully substantiated, and gave judgment for the plaintiff, it was held that, the defendant being bound to set off his demand, if any part of it was proved it ought to have been allowed, and if more than twenty-five dollars, a judgment ought to have been given against the plaintiff for the balance; and that the justice erred in rejecting the set-off altogether. *Smith v. Burke*, 10 Johns. (N. Y.) 110.

May Rely on Other Defenses.—A party who files a set-off is not precluded in a justice's court from relying upon any other just defense on the trial. *Price v. Combs*, 12 N. J. L. 188.

2. *Wright v. Potter*, 38 Ind. 61; *Frisby v. Ritman*, 2 Mo. App. Rep. 1365; *Waring v. Lockwood*, 10 Johns. (N. Y.) 108; *Williams v. Irby*, 15 S. Car. 458. But see *Baughman v. Hale*, 45 Kan. 453.

Must Be Filed in Due Time.—The defendant's plea of set-off must be filed in due time. *Alexander v. M'Cleanon*, 2 N. J. L. 343.

Where Plaintiff Sets Out Entire Account.—Where the plaintiff in his bill of particulars has set out the entire

(b) *Sufficiency*. — Strict technical accuracy is not required in a plea of set-off; it is only required to be sufficiently specific and intelligible to apprise the plaintiff of the defendant's claim against him.¹ If the plaintiff, at the time a set-off is interposed, makes no objection to it for want of certainty, he cannot raise any objection on that account at the trial.²

(6) *Title to Land*. — The manner of raising the question of title to land has been treated in a preceding section.³

d. *REPLY*. — In many of the states the statutes make no provision for a reply, and where such is the case the allegation of new matter in the answer is deemed controverted, and the plaintiff may introduce evidence either in denial or by way of avoidance.⁴ But where the plaintiff does reply, an error in overruling

account — the credits as well as the debits — and the only question is as to the amount due thereon, proof may be received as to such account without the defendant pleading the same items as a set-off. *Clarine v. Nelson*, 15 Neb. 440.

Set-off as Admission of Plaintiff's Demand. — Where the defendant in a justice's court, without denying the plaintiff's claim, merely alleged a set-off, which was not proven at the trial, it was held that he admitted the plaintiff's claim by such pleading, and, failing to prove his set-off, judgment should have been rendered in favor of the plaintiff. *Gregory v. Trainer*, 1 Abb. Pr. (N. Y. C. Pl.) 209.

1. *Watkins v. Ford*, 69 Mich. 357; *M'Cormick v. Brookfield*, 4 N. J. L. 77.

The Filing of a Bill of Particulars of an account is sufficient plea of set-off before a justice. *Button v. Lent*, 10 Ind. 365.

Must Contain Items. — Where the defendant in a justice's court files a plea of set-off, it must contain the items of the account. *Walton v. Lippincott*, 2 N. J. L. 149; *Montgomery v. Snowhill*, 2 N. J. L. 341; *Doughty v. Jones*, 3 N. J. L. 233.

Must Show Breach of Contract. — In an action before a justice of the peace for damages for breach of contract, a notice of recoupment by the defendant is defective if it fails to allege wherein the plaintiff broke the contract. *Kerr v. Bennett*, (Mich. 1896) 67 N. W. Rep. 564.

Verification. — Where, to a verified complaint in a justice's court, the defendant filed an unverified answer setting up a counterclaim, it was held that the answer, being unverified,

must be treated as a nullity unless the plaintiff by some act had recognized its validity as pleading, so as to preclude him from raising objection for want of verification; and therefore the plaintiff did not admit the counterclaim by his failure to reply. *Thompson v. Killian*, 25 Minn. 111.

What Set-off Pleadable. — A set-off, to be pleadable before a justice of the peace, must not only be an account, demand, or cause of action cognizable before him, but he should enter on his docket the nature as well as the amount of it. *Huggins v. Lemmon*, 4 Houst. (Del.) 304.

2. *Bell v. Davis*, 8 Barb. (N. Y.) 210; *Civill v. Wright*, 13 Wend. (N. Y.) 403.

3. See *supra*, I. 8. c. *How Question Raised*.

4. *Patterson v. Newton*, 74 Ga. 366; *Blacker v. Dunbar*, 108 Ind. 217; *Button v. Lent*, 10 Ind. 365; *Lamb v. Bush*, 49 Mo. App. 337; *Conklin v. Field*, 37 How. Pr. (Suffolk County Ct.) 455; *Wilcox v. Palmeto*, 2 Hun (N. Y.) 517; *Hodges v. Hunt*, 22 Barb. (N. Y.) 150.

Infancy. — Where, in a justice's court, the defendant sets up infancy in his answer, the plaintiff may, without replying or amending his complaint, prove the making of a new promise by the defendant after he became twenty-one years of age. *Hodges v. Hunt*, 22 Barb. (N. Y.) 150.

Set-off — Minnesota. — In Minnesota, however, where the defendant's answer alleges a set-off, the plaintiff must reply, and failing to do so will be held to have admitted the set-off. *Taylor v. Bissell*, 1 Minn. 225.

Admits Nothing Except Set-off. — In Minnesota, where the plaintiff in a jus-

a demurrer to such reply will not be harmless error if the defendant has been injured thereby.¹

4. Jury Trial—*a.* IN GENERAL.—As a justice's court is entirely of statutory creation, the statutes should be consulted as to the right of trial by jury and the practice in relation thereto in such courts.² What is the proper stage of the proceedings at which to demand a jury is, of course, a matter dependent upon the terms of the statutes, but it may be stated as a general rule that such demand should be made before the justice has proceeded to inquire into the merits of the case.³

Waiver of Jury Trial.—Where a party in a justice's court has demanded a trial by jury, it is competent for him to waive that mode of trial, either by consent⁴ or by failure to comply with the terms of the statute.⁵ See in general article JURY, *ante*, p. 223.

justice's court fails to reply to the defendant's answer, he admits nothing except a counterclaim. *Walker v. McDonald*, 5 Minn. 455.

Sufficient Denial.—Where a plaintiff's oral reply, though informal, showed clearly his intent to put in issue the defendant's counterclaim, it was held a sufficient denial of the defendant's counterclaim as a subsisting cause of action. *Rauen v. Burg*, 38 Minn. 389.

1. *Blacker v. Dunbar*, 108 Ind. 217.

2. For a general discussion of juries and jury trials, see the article JURY, *ante*, p. 223. As to verdicts, see article VERDICTS.

In New York a party may either submit his case to the justice or call for a jury, and, having called for a jury, the justice cannot interfere with the jury. *Blumburg v. Briggs* (Buffalo Super. Ct.) 10 N. Y. St. Rep. 242.

In Massachusetts.—Under the Massachusetts Statutes of 1852, c. 314, allowing either party in an action before a justice to demand a trial by jury where the amount demanded exceeded twenty dollars, it was held that the right to a jury depended upon the amount stated in the *ad damnum* of the writ, and not upon the statement of the demand in the declaration. *Trees v. Rushworth*, 9 Gray (Mass.) 47.

Judgment by Default—Assessment of Damages.—When a party, sued before a justice of the peace, suffers judgment by default, and the case is continued for the assessment of damages, the refusal of the justice to allow the damages to be assessed by a jury is not the denial of a right which will entitle the

party to relief by petition to the County Court. *Brown v. Irwin*, 21 Vt. 68.

3. *Hall v. Chicago, etc.*, R. Co., 65 Iowa 258, *White v. Hathaway*, 50 N. J. L. 119; *Mead v. Darragh*, 1 Hilt. (N. Y.) 395. See also article JURY, *ante*, p. 223.

Too Late After Adjournment.—It is too late to demand a jury in a justice's court upon a day to which the cause has been adjourned after joining issue. *Mason v. Campbell*, 1 Hilt. (N. Y.) 291. Compare *Mead v. Darragh*, 1 Hilt. (N. Y.) 395.

The Mere Inspection of a Note presented to a justice is not such commencement of a trial of the cause as to prevent the party from demanding a trial by jury. *Olney v. Bacon*, 1 Johns. (N. Y.) 142.

4. *Hosford v. Carter*, 10 Abb. Pr. (N. Y. C. Pl.) 452.

5. Conduct Amounting to Waiver.—Where one of the talesmen was unable to attend in a justice's court, the defendant refused to try the cause before the jurors who appeared, objected to the issuing of a new venire, and refused to have a talesman called. The jury was dismissed, at his request, and he applied for an adjournment on account of the absence of witnesses, but did not show that he had attempted to procure their attendance. It was held that the defendant's conduct amounted to a waiver of a jury, and that the justice was right in refusing an adjournment and in trying the cause without a jury. *Babcock v. Hill*, 35 Barb. (N. Y.) 52.

Failure to Pay Jury Fees in season for the issuing of the venire is a waiver of

b. APPEAL TO JURY. — In some states there are statutes providing for an appeal to a jury from a judgment rendered by a justice of the peace.¹ Such proceedings are purely statutory in origin and character, and therefore the practitioner should look to the statutes for the practice in regard thereto.²

the right to a trial by jury. Kilpatrick v. Carr, 3 Abb. Pr. (N. Y. C. Pl.) 117.

Failure to Appear on Adjourned Day. — Where, in a justice's court, a party has demanded a trial by jury and has failed to appear on the adjourned day, the justice may proceed to hear the cause without a jury. Kilpatrick v. Carr, 3 Abb. Pr. (N. Y. C. Pl.) 117.

Failure to Call for New Jury. — Under the *New Jersey* Justices' Act, § 33, either party to an action in a justice's court, after the defendant has appeared or put in his plea and before the justice has proceeded to inquire into the merits of the cause, may demand a trial by jury, and thereupon the justice is required to award his venire for a jury. Under section 41, if the jury disagree, other writs of venire may issue in the same cause until a verdict be obtained. Where the jury disagreed, and, neither party calling for a new jury, the justice proceeded to try the case, it was held that the failure to call for a new jury was a waiver of the right to it, and the justice had power to proceed in due course to trial and judgment. White v. Hathaway, 50 N. J. L. 119.

The Defendant's Absence from Further Proceedings in a justice's court after demanding a jury and paying the jury fee does not amount to a waiver of the jury, and the justice cannot proceed to try the case alone. Boatz v. Berg, 51 Mich. 8.

Justice Should Be Liberal in Allowing Jury Trial. — The right of trial by jury is a valuable one, and a justice of the peace ought not to be over strenuous or technical in finding causes for a waiver. If he has any doubt, or is not able to certify in positive terms that no jury was demanded at the time provided for by statute, he should entertain the demand and allow a jury to be struck and impaneled. Pontiac, etc., Plankroad Co. v. Hopkinson, 69 Mich. 10.

Justice May Order Jury in His Discretion. — The neglect to demand a jury in a justice's court within the time prescribed by law waives only the right to the jury; it does not deprive the justice of the power to order a jury in his discretion. Van Sickie v. Kellogg, 19 Mich. 49.

1. Alabama. — Under the Alabama Code, § 3619, providing for an appeal to a jury from a judgment rendered by a justice, such appeal is not confined to actions for the recovery of specific property, but applies also to actions founded on contracts and actions for the recovery of damages. East Tennessee, etc., R. Co. v. Hughes, 76 Ala. 590.

Georgia. — In Georgia a right of appeal to a jury in a justice's court in civil cases exists in all cases over which the justice has jurisdiction. Hendrix v. Mason, 70 Ga. 523; Jackson v. Lewis, 76 Ga. 92; Bates v. Messer, 76 Ga. 696.

Question of Law or Fact. — The right of appeal to a jury in a justice's court in civil cases exists whether the judgment of the justice was rendered upon questions of law or of fact or upon a combination of both. Bates v. Messer, 76 Ga. 696.

Judgment on the Merits. — Where, on the trial of a claim case before a justice of the peace, the magistrate rendered a judgment in these words: "After hearing the evidence in this case, it is adjudged and ordered that the claim be dismissed at claimant's cost, and property found subject, and the *fs.* proceed against said property," it was held that this was an adjudication upon the merits of the claim, and that it was the claimant's right to enter an appeal to a jury in the justice's court. Reed v. De Laperiere, 99 Ga. 93.

A decision in a justice's court, made by the presiding justice, to the effect that the plaintiff's evidence is insufficient to uphold the action, though the judgment be one dismissing the suit, is an adjudication upon the merits as to the matter of fact involved in the trial, and the plaintiff is entitled, by virtue of section 4157a of the code, to appeal to a jury in that court from the judgment so rendered. There was no error in refusing to sanction the petition for certiorari. Savannah, etc., R. Co. v. McMillan, 95 Ga. 504.

2. Justice Cannot Nonsuit for Insufficiency of Evidence. — On appeal to a jury in a justice's court, the presiding

c. POWER OF JUSTICE TO INSTRUCT JURY.—While justices of the peace are not usually required to instruct juries in cases before them,¹ still it is the general rule that they may instruct as to the law of the case if they see fit to do so.² However, if a justice undertakes to instruct a jury he must instruct correctly, else it will be ground for reversal.³

justice has no power to order a nonsuit because he deems the evidence insufficient to warrant a finding for the plaintiff. *Favors v. Johnson*, 79 Ga. 553.

Must Be Appeal to Jury Before Certiorari.—A suit was brought in a justice's court on a note given for guano, upon the face of which note the defendant admitted that each of the sacks containing the guano was tagged and branded. In defense to the action he pleaded, and introduced testimony to show, that the sacks were not tagged and branded. The justice rendered a judgment against him. It was held that the case could not be carried directly to the Superior Court by certiorari, but there should first have been an appeal to a jury in the justice's court. *Shirley v. Rounsaville*, 78 Ga. 708.

Defendants Absent—Justice Cannot Dismiss.—Where, in a suit in a justice's court, judgment was rendered against the defendants, and they appealed to a jury in that court, but on the call of the case on the appeal they were not present, it was error for the justice for that cause to dismiss the appeal. *Griffin Marble, etc., Works v. Padgett*, 77 Ga. 497.

1. *Adams v. Clark*, 64 Ga. 648; *Johnson v. Nelms*, 21 Ga. 192; *Pettit v. Ide*, 12 Abb. Pr. (N. Y. Supreme Ct.) 44; *Delancy v. Nagle*, 16 Barb. (N. Y.) 96.

Where a Justice Refuses to Instruct a jury as requested by one of the parties, he will not be deemed to have charged by implication the converse of the proposition offered. *Delancy v. Nagle*, 16 Barb. (N. Y.) 96.

Jury Judges of Law and Fact.—In *New York* a justice may charge a jury upon the law, subject to the same strict rule applicable to courts of record; but if he omits to charge the jury, as he may do, the jury become the judges of the law as well as of the fact. *Blumburg v. Briggs*, (Buffalo Super. Ct.) 10 N. Y. St. Rep. 242.

Must Instruct.—In *New Jersey* it is the duty of the justice to charge the jury if required to do so. *Broadwell v.*

Nixon, 4 N. J. L. 414; *Sayres v. Ward*, 3 N. J. L. 560; *Todd v. Collins*, 6 N. J. L. 127; *Youngs v. Sunderland*, 15 N. J. L. 32; *Allen v. Wanamaker*, 31 N. J. L. 370.

2. *Adams v. Clark*, 64 Ga. 648; *Penn Yan v. Thorne*, 6 Hill (N. Y.) 326; *Delancy v. Nagle*, 16 Barb. (N. Y.) 96; *Pettit v. Ide*, 12 Abb. Pr. (N. Y. Supreme Ct.) 44; *Blumburg v. Briggs*, (Buffalo Super. Ct.) 10 N. Y. St. Rep. 242.

Further Instructions.—In *Rogers v. Moulthrop*, 13 Wend. (N. Y.) 274, it was held that after a cause had been submitted to a jury in a justice's court, and they had retired to consider their verdict, it was not irregular in the justice at the request of the jury to give them further instructions upon the law of the case, if the parties were present or had an opportunity of being so.

In *Nebraska* a justice has no authority to instruct a jury upon the law of a case. *Ives v. Norris*, 13 Neb. 252; *Wilson v. Young*, 15 Neb. 627.

In *Iowa* a justice of the peace has no power to instruct a jury called in the trial of a cause before him, and questions as to the correctness of instructions given by a justice will not be considered on appeal, although the power to instruct is not questioned by the parties. *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa 380.

3. *Chapman v. Fuller*, 7 Barb. (N. Y.) 70; *Penn Yan v. Thorne*, 6 Hill (N. Y.) 326; *Hirth v. Graham*, 50 Ohio St. 57.

In *Bendheim v. Baldwin*, 73 Ga. 594, *Blandford, J.*, said: "The law does not require a justice of the peace to charge the jury at all; his ignorance of the law, as well as propriety, would seem to demand that he should not; but if he undertakes to instruct the jury, he must do it correctly and in accordance with law."

Erroneous Instruction.—Where a justice's charge to a jury is manifestly erroneous, especially if given at the request of the successful party, it will warrant a reversal of the judgment.

5. Judgments—*a.* IN GENERAL.—The rules regarding judgments in justices' courts differ in but few respects from those governing the judgments of courts of record.¹ It is essential that the case should be one over which the justice is given jurisdiction by statute.² But where it is apparent that the justice had jurisdiction of the case, everything is presumed to have been done which it was necessary to do in order to make the judgment regular; and his judgment, like the judgment of a court of record, is in full force until reversed.³

b.* RENDITION AND ENTRY—(1) *In General.—The rendering and entering of judgments in justices' courts are regulated by statutes in the various states,⁴ and the provisions of such statutes

Pettit v. Ide, 12 Abb. Pr. (N. Y. Supreme Ct.) 44.

Where Erroneous Charge Works No Injustice.—On appeal from a justice's court, a judgment will not be disturbed for error in the charge to the jury, where it is apparent, notwithstanding, that justice has been done. *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54.

Assuming Material Point.—Where a justice, in charging a jury, assumed in favor of the defendant a material point upon which the evidence was conflicting, by instructing the jury that another question was the only point to be passed upon, it was held to be error warranting reversal of the judgment. *Pettit v. Ide*, 12 Abb. Pr. (N. Y. Supreme Ct.) 44.

1. For a general discussion of judgments in courts of record, see the article JUDGMENTS, vol. 11, p. 796.

Judgment with Costs.—How. Anno. Stat., § 6940, which provides that "whenever a judgment shall be rendered by any justice of the peace against any party, unless otherwise herein provided, it shall be with costs of suit," applies to a judgment dismissing a suit upon motion of the defendant, supported by affidavit showing that the summons was served more than twelve days before the return day. *Lane v. Jones*, 94 Mich. 540.

Setting off Judgments.—Where two parties in a justice's court obtained judgments against each other, it was held that, on proper motion, the justice might order the mutual judgments set off the one against the other. *Howk v. Meloy*, 26 Ind. 176.

Revival of Judgments.—In Georgia justices' courts may revive their judgments. It is not necessary that the applicant to revive should accompany his application with an affidavit that

the judgment has not been satisfied, nor need the justice who rendered the judgment preside. *Wilcher v. Hamilton*, 15 Ga. 435.

2. *Matheney v. Earl*, 75 Ind. 531. See *supra*, I. 1. Statutory.

Judgment on Award.—A justice of the peace has no power to enter judgment on the report of arbitrators appointed by the parties in an amicable action. Such jurisdiction is not conferred upon him by statute. *Carey v. Russel*, 2 Harr. (Del.) 280.

Counterclaim.—Under the *Missouri* Revision of 1879, a justice was given jurisdiction to enter judgment in favor of the defendant for the excess of his counterclaim over the plaintiff's claim. *Green v. Beebe*, 39 Mo. App. 465.

Where, in an action before a justice, the defendant set up a counterclaim, if the justice's judgment is necessarily decisive against the counterclaim it will not be reversed because there is no special finding upon the counterclaim. *Flesh v. Christopher*, 11 Mo. App. 483.

3. *Hiatt v. Simpson*, 13 Ired. L. (N. Car.) 72.

Where Cause of Action Insufficiently Stated.—Where the justice of the peace has jurisdiction of the subject-matter of the action and of the persons of the parties, and the bill of particulars filed in the case is informal and defective, but contains sufficient allegations to challenge judicial examination, the judgment rendered is not absolutely void on the ground that the bill of particulars insufficiently states a cause of action. *Hodgin v. Barton*, 23 Kan. 740.

4. For a full discussion of the practice in regard to the rendition and entry of judgments, see the article RENDITION AND ENTRY OF JUDGMENTS.

must be observed in order to render a judgment valid.¹

Entry a Ministerial Act. — Although it is the better practice for a justice to make a formal entry of his judgment at the time of its rendition,² still it has been held that, after the rendition of the judgment, a formal entry thereof is merely a ministerial duty, and a failure to make such entry does not render the judgment void.³

(2) *In Trials by Court.* — Under the statutes of most of the states, where a justice of the peace tries a case without a jury⁴

Distinction Between Rendition and Entry. — "Rendition" and "entry" are frequently confused, the terms being used indiscriminately both in the opinions of the courts and in the statutes. The word "rendition" should properly be applied to the making up and announcement of the judgment, while the word "entry" properly refers to the clerical act of reducing it to writing. See the article *RENDITION AND ENTRY OF JUDGMENTS*.

1. See *infra*, II. 5. b. (2) *In Trials by Court*; II. 5. b. (3) *In Trials by Jury*.

2. *Bowden v. Taylor*, 81 Ga. 199; *Ryals v. McArthur*, 92 Ga. 378.

3. *Coleman v. Roberts*, 113 Ala. 323; *Lynch v. Kelly*, 41 Cal. 232; *Ryals v. McArthur*, 92 Ga. 378; *Conwell v. Kuykendall*, 29 Kan. 707; *Swain v. Gilder*, 61 Miss. 667; *Munday v. Clements*, 58 Mo. 577; *Stemmons v. Carey*, 57 Mo. 222; *Hazeltine v. Reusch*, 51 Mo. 50; *Cason v. Tate*, 8 Mo. 45; *Fish v. Emerson*, 44 N. Y. 376; *Stephens v. Santee*, 49 N. Y. 35; *Christopher v. VanLiew*, 57 Barb. (N. Y.) 17; *Knapp v. King*, 6 Oregon 243; *Wearne v. Smith*, 32 Wis. 412. And see *Matthews v. Houghton*, 11 Me. 377.

A Justice May Be Compelled by Mandamus to enter judgment when proceedings of a case have reached such a stage that there is nothing to be done but the clerical work of entering the judgment. *Corthell v. Mead*, 19 Colo. 386.

Death of Justice — Entry by Successor. — Where a justice renders judgment, but dies before entering it upon his docket, his successor in office may enter the judgment *nunc pro tunc*. *St. Louis, etc., R. Co. v. Winfrey*, (Ark. 1891) 16 S. W. Rep. 572.

Entry by Clerk of Higher Court. — Where the records of a deceased justice of the peace have been lodged with a clerk of the Court of Common Pleas, such clerk may, from the minutes made by the justice in his docket, enter up judgment in the same manner that judgments in the Common Pleas

are entered up from minutes kept by the clerk of that court. *Carlisle v. Thompson*, 5 N. H. 411.

Clerical Error. — Where a justice of the peace in a case tried before him to a jury enters judgment on the verdict actually returned for the amount therein stated, it will not be reversed because of a clerical error in transcribing the verdict in his docket. *Tuttle v. Wilson*, 29 Neb. 424.

Sufficient Entries. — The following was the record of a judgment upon the docket of a justice: "[Title of the suit.] Debt on note, \$68.67. Credit by cash, \$22.17. \$46.50. Summons issued 11th day of November, A. D. 1846; returnable the 21st day of November, 1846. Nov. 21st, 1846. The defendant came forward and acknowledged judgment. Appeal taken by defendant to District Court." This was held to be a sufficient entry of a final judgment in a justice's court. *Wahrenberger v. Horan*, 18 Tex. 57.

Where the justice's docket specified the nature of the claim, enumerated all the jurisdictional facts, and concluded with a recital that "after hearing the evidence and law, judgment was given for plaintiff for \$20 against C. K., and costs \$13.50, making in all \$33.50," it was held to show a "final determination of the rights of the parties," within the South Dakota Comp. Laws, § 5024. *Hunter v. Karcher*, 8 S. Dak. 554.

4. Must Be Finding of Facts. — Section 297 of the code applies to justices of the peace, and where a jury is waived in a justice's court, and the cause tried before the justice, there must be a finding of facts. A judgment without a finding is not void, but voidable. *Crossley v. Steele*, 13 Neb. 219.

Finding Equivalent to Verdict of Jury. — A finding by a justice of the peace is as conclusive as the verdict of a jury upon a question of fact. *Dargan v. Harris*, 68 Ala. 144; *Central Branch R. Co. v. Phillipi*, 20 Kan. 9; *Harpell v. Curtis*, 1 E. D. Smith (N. Y.) 78.

he must render his judgment within a certain specified period¹ after the final submission of the cause.² If, at the expiration of this time, he has not rendered judgment, his judicial functions in respect to the subject-matter are at an end, and he loses jurisdiction of the case.³ In some states, however, it is held that such

1. See the statutes of the several states.

How Time Computed. — In cases tried by a justice of the peace without a jury, in which there has been no arrest or attachment, the justice may withhold judgment if he desires until the fourth day after the close of the trial (Gen. Stat., p. 799, § 115); but in the computation of time under said section both the day of trial and the day of entering judgment must be counted. *Stewart v. Waite*, 19 Kan. 218.

Taking Case under Advisement. — In some states a justice may take the case under advisement for a reasonable time, *Hall v. Reber*, 36 Ill. 483; *Clark v. Read*, 5 N. J. L. 560; *Saunders v. Pike*, 6 Oregon 312; but he cannot take the case under advisement for an indefinite time, *Harrison v. Chipp*, 25 Ill. 575; and he must give the parties notice when he will render judgment, *Clark v. Read*, 5 N. J. L. 560.

California Statute Directory Merely. The California Code Civ. Pro., § 892, providing that where the trial in a justice's court is by the court, "judgment must be rendered at the close of the trial," is directory merely, and a judgment is not void because not rendered until six weeks after submission of the cause. *Heinlen v. Phillips*, 88 Cal. 557.

2. **Time Runs from Final Hearing.** — Where a cause before a justice is submitted by the counsel at the close of the evidence, with an agreement that within the four days in which the court has to render judgment they will appear before the justice and argue the cause, the case is in fact postponed for a final hearing to the fourth day; and the justice has the right, with or without the consent of the parties, to take four days from that time for the decision of the cause. *Heidenheimer v. Wilson*, 31 Barb. (N. Y.) 636.

Decision Reserved for Filing of Briefs. — The *New York* Code Civ. Pro., § 3015, requires a justice to render judgment within four days after the submission of the cause to him. Where a justice reserved his decision in order for the parties to file briefs, it was held that the cause was not finally

submitted to him until the filing of the briefs. *Babin v. Ensley*, 14 N. Y. App. Div. 548.

Continuance for Trial on Merits. — Under the *Missouri* Rev. Stat. 1889, § 6279, providing that a justice must enter judgment within three days after the cause has been submitted to him for his final decision, it was held that where the case was tried on a plea in abatement one day and continued for a trial on its merits another day, on which day, after hearing the evidence, the justice rendered final judgment, the three days contemplated by the statute dated from the day of trial on the merits, and not from the plea in abatement. *Cella v. Schnairs*, 42 Mo. App. 316.

3. *Guthrie v. Humphrey*, 7 Iowa 25; *Harrison v. Sager*, 27 Mich. 476; *Stroeh v. Doggett Dry Goods Co.*, 2 Mo. App. Rep. 1302; *Fox v. Meacham*, 6 Neb. 530; *Catlin v. Rundell*, 1 N. Y. App. Div. 157; *Beardsley v. Pope*, 11 N. Y. Misc. Rep. (Essex County Ct.) 117; *Wiseman v. Panama R. Co.*, 1 Hilt. (N. Y.) 300; *Bloomer v. Merrill*, 1 Daly (N. Y.) 485; *Watson v. Davis*, 19 Wend. (N. Y.) 371; *Berrian v. Olmstead*, 4 E. D. Smith (N. Y.) 279; *Nicholson v. Roberts*, 6 Ohio Dec. 233.

Memorandum of Judgment Sufficient. — Where a justice of the peace made upon the papers in the suit a memorandum of his judgment within the statutory time, it was held that the judgment was regular and valid although no entry thereof was made in his docket until after the lapse of the statutory time. *Walrod v. Shuler*, 2 N. Y. 134.

Decision Reserved by Continuances. — Under the *Wisconsin* Rev. Stat., c. 120, § 96, where a cause is tried before a justice without a jury, he may reserve his decision for not more than seventy-two hours. The fact that he may thus reserve his decision by several successive continuances, without consent of parties, does not render the judgment defective if it is finally entered within the limited time. *Wheeler v. Hall*, 42 Wis. 573.

Correcting Error. — Where a justice

statutes are for the benefit of the parties, and they can by agreement extend the time in which the justice may render judgment.¹

(3) *In Trials by Jury.* — It is a general statutory requirement in most of the states, that where a jury in a justice's court renders a verdict, the justice must render judgment thereon "forthwith," or "immediately."² These provisions are construed with

fails to enter judgment within the prescribed time, but does enter it thereafter, it is an error which may be corrected by a petition in error, and being an error appearing in the final judgment, may be taken advantage of without exception. *Stewart v. Waite*, 19 Kan. 218.

Judgment Rendered "Immediately." — In an action by attachment before a justice of the peace the trial was commenced on Sept. 28, 1881, at one o'clock P. M., a jury being waived. Upon the conclusion of the trial the justice took the case under advisement until the following morning at 8.30 o'clock. It was held that the judgment was rendered "immediately" within the meaning of the statute. *Huff v. Bab-bott*, 14 Neb. 150.

Judgment Too Late. — The *New York* Code Civ. Pro., § 3015, provides that where a plaintiff in a justice's court is nonsuited, or discontinues or withdraws his action, the justice must forthwith enter the judgment. Under this section it was held that the justice had no power to enter judgment ten days after the withdrawal of the action. *Kucklo v. Kleis*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 431.

Where Sunday the Last Day. — Under *Michigan* Comp. Laws 1871, § 5380, when a cause is tried before a justice of the peace without a jury, the justice is required to "render judgment * * * within four days after the same shall have been submitted to him for his final decision," and a judgment rendered on the fifth day after the trial is void, and is not the subject of a general appeal, even though the fourth day be Sunday. (Campbell, J., dissenting.) *Harrison v. Sager*, 27 Mich. 476. See *Hemmens v. Bentley*, 32 Mich. 89.

Judgment on Holiday. — Under *Missouri* Rev. Stat., § 2848, a judgment rendered by a justice on Thanksgiving day is not void. That statute provides that a justice may hold court on any day except Sunday. *Bear v. Young-man*, 19 Mo. App. 41.

Judgment on Election Day. — In *Rice v. Mead*, 22 How. Pr. (N. Y. Supreme Ct.) 445, it was held that a justice of the peace was not prohibited by statute from rendering judgment on the day of a general election in a cause that had been tried before him and submitted on a previous day. (Parker, J., dissenting.)

1. *Keatfng v. Serrell*, 5 Daly (N. Y.) 278; *Barnes v. Badger*, 41 Barb. (N. Y.) 98. *Contra*, *Nicholson v. Roberts*, 6 Ohio Dec. 233.

Stipulation Must Be Definite. — The stipulation extending the time within which a justice may render judgment is void for indefiniteness where no time is fixed. *Flynn v. Hancock*, 46 Hun (N. Y.) 368.

Parties Estopped from Alleging Error. — Where the parties in a justice's court submit their cause to the justice, and stipulate with each other that the justice may take a longer time for rendering judgment than that allowed by statute, they will be estopped from alleging, as a ground of error, that the judgment was rendered at a later time than that allowed by statute. *Barnes v. Badger*, 41 Barb. (N. Y.) 98.

Where Last Day Sunday. — Where the time limited by statute within which a justice may render judgment has been extended by stipulation of the parties, and the last day of the extended time is Sunday, the justice may render judgment on the following day. *Keatfng v. Serre*, 5 Daly (N. Y.) 278.

2. *Iowa.* — *Knox v. Nicoli*, 97 Iowa 687; *Tomlinson v. Litze*, 82 Iowa 32; *Harper v. Albee*, 10 Iowa 389; *Guthrie v. Humphrey*, 7 Iowa 25.

Minnesota. — *Sorenson v. Swensen*, 55 Minn. 58.

Montana. — *State v. Case*, 14 Mont. 520.

Nebraska. — *Worley v. Shong*, 35 Neb. 311; *Austin v. Brock*, 16 Neb. 642; *Thompson v. Church*, 13 Neb. 287.

New York. — *Tousley v. Mowers*, 14 N. Y. Misc. Rep. (Orleans County Ct.) 125; *Sweet v. Marvin*, 2 N. Y. App. Div. 1; *Putman v. Van Allen*, 46 Hun

various degrees of strictness in the different states, but they are generally pretty strictly enforced, and any considerable lapse of time between the rendition of the verdict and the rendition of judgment thereon will invalidate the judgment.¹ Thus it has been held that it is too late to render judgment the next day

(N. Y.) 492; *Goodrich v. Sullivan*, 1 Thomp. & C. (N. Y.) 191; *Sibley v. Howard*, 3 Den. (N. Y.) 72.

North Dakota. — *Matter of Evingson*, 2 N. Dak. 184.

Ohio. — *Robinson v. Kious*, 4 Ohio St. 594; *Dunlap v. Robinson*, 12 Ohio St. 530.

Wisconsin. — *Wearne v. Smith*, 32 Wis. 412; *Perkins v. Jones*, 28 Wis. 243; *McNamara v. Spees*, 25 Wis. 539.

Waiver of Irregularity. — Where a justice of the peace rendered a judgment on a verdict of a jury five days after the verdict was entered, but in the presence of the parties, and the successful party accepted a modified judgment, and remitted the excess found by the justice, it was held that he thereby waived the irregularity and delay in rendering and entering the judgment. *Stillman v. McConnell*, 36 Kan. 398.

In *South Carolina* there is no statute requiring a trial justice to enter judgment immediately after the rendition of a verdict. *Thomson v. Dillinger*, 35 S. Car. 608, 14 S. E. Rep. 776.

In *Texas*, where a justice fails to enter such a judgment on the verdict of the jury as will dispose of the case as to all the parties, he may, at a subsequent term, enter a judgment so disposing of the case. *Young v. Pfeiffer*, (Tex. Civ. App. 1895) 30 S. W. Rep. 94.

Entry of Formal Judgment Unnecessary. — In some cases it is held that the verdict of a jury in a justice's court has the effect of a judgment as soon as it is entered on the docket, and as the justice has no discretion but to enter judgment thereon, an omission to make a formal entry of judgment on the verdict will not render the entire proceedings a nullity. *Lynch v. Kelly*, 41 Cal. 232; *Stemmons v. Carey*, 57 Mo. 222; *Munday v. Clements*, 58 Mo. 577; *Hazeltine v. Reusch*, 51 Mo. 50; *Cason v. Tate*, 8 Mo. 45. And see *Stephens v. Santee*, 49 N. Y. 35.

No Findings of Fact Necessary. — Where a judgment is based on a verdict of a jury it is unnecessary for the justice to make findings of fact. *Dye v. Russell*, 24 Neb. 829.

1. *Tomlinson v. Litze*, 82 Iowa 32; *Harper v. Albee*, 10 Iowa 389; *Dunlap v. Robinson*, 12 Ohio St. 530.

Setting Down Costs at Subsequent Day.

— Where, upon the rendition of a verdict, the justice immediately entered it in his docket, but neglected to set down the items of costs until a subsequent day, and did not foot up the amount until eight days afterwards, it was held erroneous, and the judgment was reversed. *Sibley v. Howard*, 3 Den. (N. Y.) 72.

Judgment Not Completed. — The *New York Code Civ. Pro.*, § 3015, requires that a justice shall render judgment "forthwith" on a verdict of the jury. A verdict was rendered in favor of the defendant, and immediately thereafter the justice put down upon his minutes of testimony items of cost, which amounted in all to \$7.82, and wrote in the minutes, "Verdict for defendant," and, "Judgment for costs against plaintiff was rendered." Soon after, and on the same day, upon the suggestion of the defendant's attorney that the costs could not exceed five dollars, besides fees of witnesses from other counties, the justice determined upon items of costs, amounting to five dollars, announced them to the defendant and his attorney, wrote them in his minutes of trial, and told the defendant and his attorney that the costs would include witness fees, seventy-five cents, but did not include them in the items of the minutes. He did not, at that time, add the items written in the minutes nor write "Judgment" opposite to the total; but on October 5 he put down the seventy-five cents witness fees, added up the whole costs, and opposite wrote the word "Judgment" and his signature, dating it October 1. It was held that the judgment was not rendered until October 5, and was clearly void. *Putman v. Van Allen*, 46 Hun (N. Y.) 492.

Reversible Error. — Under a statute requiring a justice to enter judgment upon a verdict "immediately," a judgment rendered upon a subsequent day, though it may not be absolutely void, is nevertheless irregular; and for such

after the rendering of the verdict;¹ but there are cases to the contrary.²

Sundays and Legal Holidays. — Under a statute requiring a justice to render judgment immediately on the verdict of a jury it has been held that the justice must render judgment on Sunday or on a legal holiday, if the verdict is returned on such day.³

irregularity, when not waived, it is reversible. *Robinson v. Kious*, 4 Ohio St. 594.

1. *Austin v. Brock*, 16 Neb. 642; *Sibley v. Howard*, 3 Den. (N. Y.) 72.

Where a Justice Received a Verdict at Eleven O'Clock at night, but did not render judgment thereon until nine o'clock the next morning, it was held that this was not a compliance with the statute requiring him to render judgment "forthwith." *Wearne v. Smith*, 32 Wis. 412.

Verdict Returned at Eight O'Clock. — In a trial to a jury before a justice of the peace a verdict was returned and filed at twenty-five minutes after eight o'clock P. M., but judgment was not entered thereon until the next day. It was held that the judgment was not entered immediately, within the meaning of section 1002 of the code, and that the justice had lost jurisdiction at the time the entry of judgment was made. *Worley v. Shong*, 35 Neb. 311.

2. **Within Twenty-four Hours.** — Under the *New York Code Civ. Pro.*, § 3015, requiring a justice to enter judgment "forthwith," it was held that an entry of judgment within twenty-four hours after verdict was sufficient. *Tousley v. Mowers*, 14 N. Y. Misc. Rep. (Orleans County Ct.) 125.

Verdict Returned at Midnight. — Where a jury in a justice's court returned their verdict about midnight, and the justice entered the verdict in his minutes, but did not enter it in his docket until daylight the next morning, it was held that the judgment was rendered in time, and was valid. *Goodrich v. Sullivan*, 1 Thomp. & C. (N. Y.) 191.

Verdict Returned After Ten O'Clock. — Under the *New York Code Civ. Pro.*, § 3015, requiring a justice to render judgment "forthwith" on the verdict of a jury, it was held that where a verdict was returned after ten o'clock at night, and the justice made a memorandum of the verdict, and on the following morning adjusted the costs, rendered the judgment, and entered it in his docket, this was a sufficient com-

pliance with the statute. *Sweet v. Marvin*, 2 N. Y. App. Div. 1.

Verdict Returned at Nine O'Clock. — Under the *Iowa Code*, § 3552, which requires a justice's judgment to be entered "forthwith," it was held that where the verdict was returned at nine o'clock at night, judgment might properly be entered thereon the next morning. *Knox v. Nicoli*, 97 Iowa 687.

3. *Thompson v. Church*, 13 Neb. 287; *McNamara v. Spees*, 25 Wis. 539. See also *Wearne v. Smith*, 32 Wis. 412. And see the article **RENDITION AND ENTRY OF JUDGMENTS**.

Verdict Returned on February 22. — Under the statute providing that no court shall transact any business on the twenty-second day of February, "unless it be for the purpose of instructing or discharging a jury, or receiving a verdict," and the statute requiring that in all cases where a verdict shall be rendered in a justice's court, the justice shall "forthwith render judgment," it was held that the two statutes must be construed together, and must be taken to authorize an immediate entry of judgment where the verdict was received on the twenty-second of February. *Perkins v. Jones*, 28 Wis. 243.

Contra. — In *New York* where the jury in a justice's court renders a verdict on Sunday, judgment entered thereon the following Monday is valid. *Allen v. Godfrey*, 44 N. Y. 433.

In Minnesota. — Where, in a justice's court, a verdict was returned between the hours of noon and one o'clock P. M., August 20, 1892, at which time the justice was engaged in hearing other cases, and therefore did not render judgment on such verdict until August 22, 1892, the intervening day being Sunday, it was held that the judgment was rendered in due time, under Gen. Stat. 1878, c. 65, § 68, requiring a judgment to be rendered by the justice forthwith upon the return of a verdict, and that the word "forthwith" as used in said statute means that such judgment shall be rendered by the jus-

c. FORM — (1) Formality Not Required. — In a judgment rendered by a justice of the peace, substance and not form is regarded, and where such judgment is intelligible it will not be rendered void by mere informalities;¹ and where the entry of

tice within a reasonable time, having due regard to the circumstances surrounding the case before him. *Sorenson v. Swensen*, 55 Minn. 58.

1. *Kennard v. Carter*, 64 Ind. 31; *Pendergast v. Peru*, 20 Ill. 52; *Kimball v. Riter*, 25 Ill. 276; *Swain v. Gilder*, 61 Miss. 667; *Hutchinson v. Fulghum*, 4 Heisk. (Tenn.) 550; *Davis v. Rankin*, 50 Tex. 279; *Davis v. Bargas*, 12 Tex. Civ. App. 59; *Davis v. Trump*, (W. Va. 1897) 27 S. E. Rep. 397.

Plaintiffs Designated by Firm Name. — A judgment of a justice will not be reversed because rendered in favor of the plaintiffs in their firm name. *Condry v. Henley*, 4 Stew. & P. (Ala.) 9.

Parties Designated "And Others." — In a case where the summons and pleadings in a justice's court showed the names of all the parties, it was held that the judgment would not be reversed merely because in entering the case in his docket the justice, after giving the name of one plaintiff, designated the others by the words "and others." *Campbell v. Babbitts*, 53 Wis. 276.

Initial Letter Instead of Christian Name. — Where a justice's judgment was rendered against the defendant, using an initial letter instead of his Christian name, it was held that the judgment was thereby rendered irregular, but not void. *Bridges v. Layman*, 31 Ind. 384.

Against Whom. — In the court for the trial of small causes, a judgment for the plaintiff, not stating against whom, is valid when it must be necessarily implied and understood to be against the defendant referred to in all the other proceedings. *Titus v. Whitney*, 16 N. J. L. 85.

Itemized Statement of Costs. — That a magistrate did not enter on his docket an itemized statement of the costs of a case, but entered judgment for a specified principal and interest, with costs of suit, did not invalidate the judgment. *Gunn v. Tackett*, 67 Ga. 725.

Clerical Defect. — Where a justice entered judgment for the defendant for damages for "\$5.05, costs 35 cents," and it was stated in the return on appeal that the amount entered as dam-

ages was in reality costs, and the items making up the amount were given, it was held that the judgment was not void for such irregularities, the entry "damages \$5.05, costs 35 cents," being merely a clerical defect. *Tousley v. Mowers*, 14 N. Y. Misc. Rep. (Orleans County Ct.) 125.

Transcribing Verdict. — Where a justice of the peace, in a case tried before him to a jury, enters judgment on the verdict actually returned for the amount therein stated, it will not be reversed because of a clerical error in transcribing the verdict in his docket. *Tuttle v. Wilson*, 29 Neb. 424.

Error in Date. — In a case submitted on the 6th of the month and taken under advisement, and decision made on the 11th, but the judgment entered on the record as of the 6th, the day on which it was submitted, it was held that the judgment was not void on account of error in date entered. *Saunders v. Pike*, 6 Oregon 312.

A General Finding of a justice for the plaintiff is sufficient to sustain judgment as against an attempt to set it aside in the District Court upon proceedings in error therein brought for that purpose. *Coad v. Read*, 48 Neb. 40.

Signature. — Where the entry of a judgment on a justice's docket is followed immediately by the entry of a stay of execution in the same case — each being dated separately, but the dates both being the same — and it is inferable from the docket that both entries were made at the same time, as one transaction, and the official signature of the justice is appended at the foot of the entry of the stay, the judgment is not void for want of signature, nor the stay for want of attestation. *Hollister v. Giddings*, 24 Mich. 501.

Signature by Initials. — In *Georgia* there is no law requiring the signature of a justice of the peace to a judgment entered by him on his docket. A signature by initials does not, therefore, avoid such judgment. *Gunn v. Tackett*, 67 Ga. 725.

Failure to Enter Verdict. — Where a justice of the peace, in a cause before him tried to a jury, recited in his

judgment on a justice's docket is of doubtful import, it should be taken in connection with any process the justice may have issued in execution of the judgment.¹ What constitutes a sufficient judgment in a justice's court is a matter dependent to some extent upon the circumstances of the particular case. In the notes are given examples of judgments which have been held sufficient.²

Parties. — In a justice's court a judgment may be given for or

docket that the jury rendered a verdict in favor of the plaintiff for a specified sum, instead of entering the verdict itself in his docket, it was held error without prejudice. *Dye v. Russell*, 24 Neb. 829.

Judgment in Figures. — In *New Jersey* it has been held that a judgment in figures instead of written words, in a justice's court, is erroneous. *Newcomb v. Davis*, 2 N. J. L. 77; *Neal v. Collins*, 2 N. J. L. 80; *M'Calla v. Wood*, 2 N. J. L. 81; *Steelman v. Ackley*, 2 N. J. L. 92; *Cole v. Petty*, 2 N. J. L. 57.

The Rendition of an Excessive Judgment by a justice of the peace is merely an error and does not go to his jurisdiction. *Simpson v. Watson*, 15 Mo. App. 425.

If judgment is rendered for a sum exceeding the amount mentioned in the state of demand, the judgment will be reversed. *Hawk v. Anderson*, 9 N. J. L. 319; *Lake v. Merrill*, 10 N. J. L. 288.

1. *Coleman v. Roberts*, 113 Ala. 323.

2. **Sufficient Judgments.** — Where a justice rendered judgment in the following form: "Gave judgment in favor of plaintiff for \$171 and costs," it was held to be a good judgment. *Hutchinson v. Fulghum*, 4 Heisk. (Tenn.) 550.

The following entry in the justice's docket was held a valid judgment in form: "The court is of the opinion that the plaintiff has no cause of action. Judgment against the plaintiff for costs of suit. Costs \$13.31." *Nett v. Serwe*, 28 Wis. 663.

A judgment rendered by a justice of the peace "for thirty-seven dollars and thirty cents, on note due 25th December, 1840, bearing interest from that date, and costs of suit," though informal, is not void for uncertainty. It is, in legal effect, a judgment for \$37.30. *Lightsey v. Harris*, 20 Ala. 409.

Where a justice entered a judgment as follows: "5th damages \$30.00,

\$4.60," and the return stated that the \$4.60 was entered for costs, it was held that the entry was sufficient in form to constitute a judgment. *Goodrich v. Sullivan*, 1 Thomp. & C. (N. Y.) 191.

An issue in a justice's court was tried by jury, and the justice entered the proceedings thereon in his docket as follows: "After hearing all the evidence, the jurors returned a verdict for plaintiff for the sum of \$48.05 and costs of suit. Damages, \$48.05; costs, \$7.63." It was held that this entry was valid and of effect as a judgment, and sufficient to authorize the issue of an execution thereon. *Overall v. Pero*, 7 Mich. 315.

Nonsuit. — Where a justice of the peace entered a judgment against a plaintiff, who failed to appear and prosecute his claim, in the words, "Judgment vs. plaintiff by default for costs," and signed the entry, it was held that the judgment was not void for want of form, but that it was to be understood as a judgment of nonsuit against the plaintiff for not appearing to prosecute his suit. *Wyatt v. Judge*, 7 Port. (Ala.) 37.

Bastardy Proceedings. — A judgment rendered by a justice of the peace in a prosecution for bastardy, that the "defendant is discharged from custody" and that "the relatrix do pay the costs of this suit," though informal, was one from which the plaintiff could appeal. *Britton v. State*, 54 Ind. 535.

Whether for Debt or Damages. — Where a justice's judgment was for \$79.62 "for his — as per the verdict," etc., it was held that neither the verdict nor judgment need specify whether it was for debt or damages. *Horton v. Critchfield*, 18 Ill. 133.

Omitting Word "Debt." — In an action of debt before a justice, the entry of judgment for the plaintiff for a specified sum, omitting the word "debt," is valid; or it might be amended at any time by adding that word. *Tindall v. Tindall*, 18 N. J. L. 437.

against one or more of several plaintiffs or for or against one or more of several defendants.¹

(2) *Certainty in Matters of Substance.* — In matters of substance a judgment of a justice of the peace should be as certain as the judgment of a court of record,² and although such judgment, to be valid, need not be in precise legal form, yet it must be entered upon paper, and the evidence of it on paper be preserved, in order to constitute a valid subsisting judgment.³

1. *Fitzgerald v. Genter*, 26 Ind. 238.
Against Part of Defendants. — In *Illinois* a judgment may be given against a part of the defendants only in an action *ex contractu* in a justice's court. *Hellman v. Schwartz*, 44 Ill. App. 84.

A Surety for Costs in justice's court may be included in the judgment rendered on appeal against his principal. *Comp. L. Mich.*, § 6133. *Boatz v. Berg*, 51 Mich. 8.

Where Three Were Sued Jointly in a justice's court, and, process being served on only two of them, judgment was rendered against those two, it was held that although the statute authorized the justice to render judgment against such as were served with process, it did not authorize him to do so unless the joint liability of all the defendants was established. *Kerr v. Boyer*, 7 Ill. 417.

Verdict Against One—Judgment Against Two. — Where the jury in a justice's court renders a verdict against only one of two defendants, if the justice enters judgment against both of the defendants it is in excess of his jurisdiction, so far as respects the other defendant, and such judgment as to him may be set aside in equity. *Dady v. Brown*, 76 Iowa 528.

Suit for Use of Another. — In a suit before a justice of the peace in the name of one for the use of another, it is irregular and erroneous to enter judgment in favor of the beneficial plaintiff alone; and if so entered, it will operate as a discontinuance of the suit as to the nominal plaintiff, and the judgment will be treated as in favor of the beneficial plaintiff alone. *Hobson v. McCambridge*, 130 Ill. 367.

2. *Rood v. School Dist. No. 7*, 1 Dougl. (Mich.) 502. As to the form of judgments in courts of record, see the article JUDGMENTS, vol. 11, p. 796.

Should Specify Injury. — A judgment for damages in a justice's court should specify the injury. *Brant v. Woodruff*, 2 N. J. L. 302.

Insufficient Judgments. — A judgment by a justice in the following words: "I give judgment with the jury," is not a proper method of rendering a judgment. *Green v. Lawrence*, 3 N. J. L. 416.

Where a justice entered on his docket the verdict of the jury, and made the following entry: "And I do give judgment also," this was held to be no judgment. *Van Houten v. Beam*, 3 N. J. L. 501.

Where a justice entered judgment in an action against two as follows: "Judgment in favor of the plaintiff for sixty-one dollars and eighty-three cents and costs," it was held to be void for uncertainty. *Parker v. Swan*, 1 Humph. (Tenn.) 80.

Parties Not Sufficiently Indicated. — Under the proper entitling of a cause with the names of the parties, a justice of the peace entered on his docket an award of judgment in the following form: "It is therefore considered that the said P. do recover of the said D. the sum," etc. In debt on this judgment it was held that the docket entry did not show with sufficient certainty in whose favor, and against whom, the judgment was rendered, and that, therefore, a transcript thereof offered in evidence was inadmissible. *Rood v. School Dist. No. 7*, 1 Dougl. (Mich.) 502.

3. *Benaway v. Bond*, 2 Chand. (Wis.) 110.

Judgment Not Entered. — Where a justice decided the matter in dispute before him, and made a memorandum on a piece of paper of the judgment upon which he had concluded, and gave such memorandum to his clerk or a friend to be made out and entered upon his docket in form, but such entry was not made, nor the memorandum preserved, it was held that there was no valid judgment. *Benaway v. Bond*, 2 Chand. (Wis.) 110.

Need Not Be Written on Warrant. — It is not essential that a judgment rendered by a justice of the peace should

d. OPENING AND VACATING. — Justices of the peace have no power to review their own judgments except in some method expressly provided by statute.¹ The statutes are very far from being uniform on this subject, but it may be stated that the rule in a majority of the states is that a justice cannot set aside a judgment on the merits and grant a new trial.² However, in many of the states a justice may set aside a judgment by default.³

e. AMENDMENT AND CORRECTION. — Although it has been sometimes held that a justice of the peace may correct his judgment,⁴ it is the general rule that he cannot alter a judgment after

be written on the warrant. It is sufficient, and the judgment is valid, if written upon the docket of the justice rendering the judgment. *Hollins v. Johnson*, 3 Head (Tenn.) 346.

1. *Weimmer v. Sutherland*, 74 Cal. 341.

Original Judgment Remaining in Force. — Where a justice made an order vacating a judgment in a case where such order was not warranted by law, it was held that the original judgment remained in full force. *Sloan v. McLean*, 12 Ired. L. (N. Car.) 260.

May Treat Judgment as Nullity. — Although a justice's court in *Georgia* has no power to set aside a judgment, still if the judgment is void that court may disregard it and treat it as a nullity whenever and wherever it comes in question. *Fontaine v. Bergen*, 55 Ga. 410; *Chapman v. Floyd*, 68 Ga. 455.

In California. — Under the California Code Civ. Pro., § 859, a justice of the peace has no power to vacate his own judgments, except in case of a judgment by default; an order attempting to vacate any other judgment, not being appealable, will be annulled. *Weimmer v. Sutherland*, 74 Cal. 341; *Heinlen v. Phillips*, 88 Cal. 557. And see *Winter v. Fitzpatrick*, 35 Cal. 269.

In *Indiana* a justice of the peace has no power to change, vacate, or in any manner interfere with a judgment he has rendered, except to grant a new trial or to enter satisfaction where judgment is subsequently paid. *Foist v. Coppin*, 35 Ind. 471.

Application Must Be Made in Time. — Where a certain time is prescribed by statute within which an application to set aside a justice's judgment must be filed, a justice has no jurisdiction to set aside a judgment on an application filed after the prescribed time. *Adams v. Casey-Swasey Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 654.

Notice. — A justice of the peace cannot vacate a judgment rendered by him in a suit between parties on the application of one party without notice to the other. *Smith v. Chandler*, 13 Ind. 513.

Striking Off Nonsuit. — The *Maine* Public Laws of 1860, c. 164, §§ 9, 10, authorizing a justice to strike off a nonsuit of default and revive an action, refer only to a nonsuit or default entered at "the time set in a writ for the trial;" and where a nonsuit was entered at a day to which the cause had been continued, it was held that the justice had no authority afterwards to strike off the nonsuit and revive the action. *Pratt v. Roberts*, 53 Me. 399.

Vacating Void Judgment. — In *Mississippi* a justice may, without issuing another summons, vacate a void judgment and enter a valid one. *Moore v. Hoskins*, 66 Miss. 496.

Judgment Without Notice to Defendant. — A judgment rendered by a justice of the peace without notice to the defendant may be set aside by a direct application to the justice. *McKee v. Angel*, 90 N. Car. 60.

2. See *infra*, II. 6. *New Trial*.

3. See *infra*, II. 5. *f. Judgment by Default*.

4. **Mistake in Name.** — Where a justice entered judgment as against Peter Mayo in a suit begun by process against Peter Mayhue, it was competent to amend the error by following the summons, and the defect was not fatal, there being no question of identity and the transcript of execution giving the name correctly. *Merrick v. Mayhue*, 40 Mich. 196. But see *Foster v. Alden*, 21 Mich. 507.

A justice may correct the entry of judgment by substituting the name of the party in whose favor the verdict was rendered and in whose name the proceedings are had, in place of another

its rendition; ¹ and if he does, the alteration is of no effect and the judgment remains in force as originally rendered. ²

f. JUDGMENT BY DEFAULT — (1) *Plaintiff Must Prove His Case*. — Under the statutes of some states there is no such thing, strictly speaking, as a judgment by default in a justice's court; for the plaintiff is required to prove his case in every instance whether the defendant appears or not. ³

name erroneously entered therein. *Hanlin v. Baxter*, 20 Kan. 134.

Erroneous Assessment. — An error in the amount of the judgment of a justice caused by an erroneous assessment may be afterwards corrected by the justice, and if done before hearing on a writ of error it will prevent a reversal of the judgment; but the costs should be taxed to the plaintiff. *Rahn v. Greer*, 37 Iowa 627.

1. *Foster v. Alden*, 21 Mich. 507; *State v. Case*, 14 Mont. 520; *Rich v. Markham*, 92 Hun (N. Y.) 78; *People v. Delaware C. Pl.*, 18 Wend. (N. Y.) 558.

Certiorari the Proper Remedy. — Where a justice rendered judgment in accordance with the verdict of the jury, and eight days afterwards changed the judgment as to costs without having jurisdiction to do so, it was held that certiorari was the proper remedy. *State v. Case*, 14 Mont. 520.

Party Estopped from Objecting. — Where, after entry, a justice's judgment was altered at the request of the party against whom it was rendered, he was held to have estopped himself from objecting to the alteration, even if the justice had no authority to make it. *Steckmesser v. Graham*, 10 Wis. 37.

2. *Rose v. Depue*, 1 Thomp. & C. (N. Y.) 16.

A justice of the peace rendered a judgment in favor of the plaintiff for ninety-eight dollars damages and four dollars and sixty-five cents costs, and duly entered it in his docket. A few days afterwards, discovering that he had by mistake made his costs sixty-nine cents less than he was entitled to, he undertook to correct the error by setting that sum underneath the original footing and adding them together without erasing or altering any part of the original docket. But afterwards, finding that it was illegal to alter a judgment, he erased the addition and thus restored the docket to its original form. It was held that these alterations did not render the judgment void;

that, being made after the time limited by statute for the justice to render judgment and enter it in his docket, they were clearly void acts, such as if they had been done by strangers, and being void they could not affect the judgment. *Dauchy v. Brown*, 41 Barb. (N. Y.) 555.

3. *Arkansas*. — *St. Louis, etc., R. Co. v. Barnes*, 35 Ark. 95.

Delaware. — *Coulter v. Layton*, 1 Harr. (Del.) 494; *Colesberry v. Stoops*, 1 Harr. (Del.) 448; *Ruth v. Lunney*, 2 Harr. (Del.) 145; *Roberts v. Rowan*, 2 Harr. (Del.) 314; *Boston v. Tennant*, 2 Harr. (Del.) 345; *Elligood v. Cannon*, 4 Harr. (Del.) 176; *Phillips v. Cannon*, 5 Harr. (Del.) 366.

Illinois. — *Steele v. Grand Trunk Junction R. Co.*, 125 Ill. 385; *Lewiston v. Proctor*, 27 Ill. 414.

Michigan. — *Gilbert v. Hanford*, 13 Mich. 40.

New Jersey. — *Snyder v. Hummel*, 2 N. J. L. 82; *Zane v. Pissant*, 2 N. J. L. 301; *Cooper v. Madara*, 3 N. J. L. 120; *White v. Crammer*, 3 N. J. L. 137; *Heritage v. Daniels*, 3 N. J. L. 138; *Pearson v. Briggs*, 3 N. J. L. 204; *Clarke v. Clarke*, 3 N. J. L. 295; *Murphy v. Davis*, 3 N. J. L. 412; *James v. Dyer*, 3 N. J. L. 552; *Torrence v. Van Emburg*, 2 N. J. L. 98; *Cooper v. Mullin*, 2 N. J. L. 98; *Hevener v. Kerr*, 4 N. J. L. 64; *Crane v. Brundage*, 14 N. J. L. 602; *Corlies v. Vannote*, 16 N. J. L. 324.

New York. — *People v. Lynde*, 8 Cow. (N. Y.) 133; *Swift v. Falconer*, 2 Sandf. (N. Y.) 640; *Burlingham v. Deyer*, 2 Johns. (N. Y.) 189; *Cudner v. Dixon*, 10 Johns. (N. Y.) 106; *Locke v. Smith*, 10 Johns. (N. Y.) 250; *Wheeler v. Lampman*, 14 Johns. (N. Y.) 481; *Ely v. O'Leary*, 2 E. D. Smith (N. Y.) 355; *Raymond v. Traffarn*, 12 Abb. Pr. (Oneida County Ct.) 52; *Oulman v. Schmidt*, 35 Hun (N. Y.) 345; *Humphrey v. Persons*, 23 Barb. (N. Y.) 313; *Perkins v. Stebbins*, 29 Barb. (N. Y.) 523; *Crown Point Iron Co. v. Fitzgerald*, (Supreme Ct.) 14 N. Y. St. Rep. 427.

(2) *When Rendered.*—It is a fundamental rule, applying as well to courts of justices of the peace as to the higher courts, that no judgment by default can be rendered unless the court has first obtained jurisdiction of the person of the defendant.¹

Waiting for Defendant's Appearance.—It is the rule in many of the states that before rendering judgment by default the justice must wait a specified time—generally one hour—after the time named in the summons for the defendant to appear.² But this

The New York Laws of 1881, c. 414, § 3, provides that in case a defendant in a justice's court fails to answer or demur to the complaint, the court may enter judgment against him without proof. Code Civ. Pro., § 2891, provides that if the defendant fails to appear and answer, the plaintiff cannot recover without proving his case. Where a defendant demurred to a complaint, and on the overruling of his demurrer failed to answer, it was held that judgment could not be rendered without proof of the plaintiff's case, as the Act of 1881 applied only where the defendant neither answered nor demurred. *Oulman v. Schmidt*, 35 Hun (N. Y.) 345.

Pennsylvania.—*Young v. Getz*, 18 Pa. Co. Ct. Rep. 580.

Wisconsin.—*Roberts v. Warren*, 3 Wis. 736.

For a general discussion of judgments by default, see the article DEFAULTS, vol. 6, p. 1.

Washington.—Under the Code of Washington Territory, § 1781 (Ballinger's Anno. Code Wash. 1897, § 6632), when a defendant in a justice's court who has been served with a true copy of the complaint and notice fails to appear and plead within the time specified, or within an hour thereafter, judgment will be given without further evidence. On the expiration of an hour from the time set for trial, no appearance had been made for the defendant; the plaintiff demanded judgment, and shortly afterwards, persons present objecting as agents for the defendant, the justice said: "I will have to render judgment," referring such agents to section 1781 of the code. It was held that this was a judgment for the plaintiff, although after the plaintiff and his attorney had departed the justice granted the defendant a continuance and entered up the judgment for the plaintiff several hours thereafter. *McCoy v. Bell*, 1 Wash. 504.

Where Plaintiff Files Affidavit of

Claim.—In *Illinois*, where the plaintiff files an affidavit of claim he is not required to prove his claim if the defendant fails to appear. *Steele v. Grand Trunk Junction R. Co.*, 125 Ill. 385.

Action on Forged Banknote.—In an action before a justice to recover the amount of a banknote paid by the defendant to the plaintiff, on the ground that it was a forgery, the justice is not authorized to give judgment for the plaintiff on his own bare inspection of the note. *Wheeler v. Lampman*, 14 Johns. (N. Y.) 481.

The Record Should Show that proof was adduced. *Colesberry v. Stoops*, 1 Harr. (Del.) 448; *Roberts v. Rowan*, 2 Harr. (Del.) 314; *Boston v. Tennant*, 2 Harr. (Del.) 345; *Elligood v. Cannon*, 4 Harr. (Del.) 176; *Phillips v. Cannon*, 5 Harr. (Del.) 366.

1. See the article DEFAULTS, vol. 6, p. 24 *et seq.*

Constructive Service.—In *Mississippi* a judgment by default rendered by a justice at the return term of the summons upon constructive service is void. *Betts v. Baxter*, 58 Miss. 329.

Attachment.—Under *New York* Code Civ. Pro., § 2918, where the summons is not personally served, a justice can render judgment by default only when the record shows an attachment lawfully issued and regularly executed. Therefore, where an attachment has been improperly issued by a justice upon return of the summons, he should try the case as if no attachment had been issued, and in such a case, where the summons has not been personally served, an entry of judgment by default is unauthorized. *Kingsford v. Butler*, 71 Hun (N. Y.) 598.

2. *Connecticut.*—*Burgess v. Tweedy*, 16 Conn. 39; *Nugent v. Wrinn*, 44 Conn. 273.

Illinois.—*Chicago First Nat. Bank v. Beresford*, 78 Ill. 391; *Brown v. People*, 24 Ill. App. 72.

Louisiana.—*State v. Coquillon*, 35 La. Ann. 1101.

rule does not prohibit a defendant from appearing and pleading after the expiration of the time allowed him to appear. Where the circumstances of the case justify it, a justice may allow the defendant to answer in a reasonable time thereafter.¹

Michigan. — *Bossence v. Jones*, 46 Mich. 492; *Noyes v. Hillier*, 65 Mich. 636.

Missouri. — *Klein v. Wielandy*, 15 Mo. App. 581.

Nebraska. — *Wells v. Turner*, 14 Neb. 445; *Searles v. Averhoff*, 28 Neb. 668; *Muller v. Plue*, 45 Neb. 701.

New York. — *Clark v. Garrison*, 3 Barb. (N. Y.) 372; *Allen v. Stone*, 9 Barb. (N. Y.) 60; *Sherwood v. Saratoga, etc., R. Co.*, 15 Barb. (N. Y.) 650; *Sagendorph v. Shult*, 41 Barb. (N. Y.) 102; *Knight v. Wilson*, 55 Hun (N. Y.) 559; *Dunn v. O'Keefe*, (Supreme Ct.) 10 N. Y. Supp. 34; *Nichols v. Place*, 1 N. Y. Misc. Rep. (Orleans County Ct.) 497; *Freeborn v. Badgley*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 173.

Vermont. — *Steel v. Bates*, 2 Vt. 320; *Peach v. Mills*, 13 Vt. 501; *Underwood v. Hart*, 23 Vt. 120.

Washington. — *McCoy v. Bell*, 1 Wash. 504.

Wisconsin. — *Brandies v. Robinson*, 45 Wis. 464; *Carter v. Wyatt*, 43 Wis. 570.

Applies to Adjournments. — The rule requiring a justice to wait a certain time after the hour specified in the summons is in some states held to apply also to an adjourned day. *Nichols v. Place*, 1 N. Y. Misc. Rep. (Orleans County Ct.) 497; *Freeborn v. Badgley*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 173; *Sherwood v. Saratoga, etc., R. Co.*, 15 Barb. (N. Y.) 650; *Clark v. Garrison*, 3 Barb. (N. Y.) 372. But see *Colescott v. Bonwill*, 4 Harr. (Del.) 364; *Steel v. Bates*, 2 Vt. 320.

Sufficient Compliance with Statute. — Under the *New York Code Civ. Pro.*, § 2893, requiring a justice to wait one hour after the time specified in the summons, unless the parties sooner appear, it was held that where the summons was returnable at nine o'clock and the justice called the case at a quarter to ten, and, in the absence of the defendant, waited until ten before proceeding, it was a compliance with the statute. *Dunn v. O'Keefe*, (Supreme Ct.) 10 N. Y. Supp. 34.

Failure to Wait Required Time. — It is held that if the justice fails to wait the

required time after the hour named in the process before rendering judgment by default, it is merely an irregularity and does not render the judgment void. *Talbot v. Kuhn*, 89 Mich. 30; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 105; *Smith v. Brown*, 34 Mich. 455; *Klein v. Wielandy*, 15 Mo. App. 581; *Wells v. Turner*, 14 Neb. 445.

Where the Docket Fails to Show that the justice waited the required time after the return hour before rendering judgment by default, it does not render the judgment liable to collateral attack. *Chaddock v. Barry*, 93 Mich. 542; *Talbot v. Kuhn*, 89 Mich. 30. See also *Green v. Tower*, 49 Kan. 302; *Knight v. Wilson*, 55 Hun (N. Y.) 559.

What Meant by Appearance. — Under the *Wisconsin* statute requiring a justice to wait one hour for the appearance of the parties, it is held that the appearance meant is not a formal appearance to the action, to be entered on the docket, but the personal appearance of the parties before the justice. *Brandies v. Robinson*, 45 Wis. 464. But see *McCoy v. Bell*, 1 Wash. 504.

Justice Need Not Remain During Whole Time. — In *Vermont* it is not necessary for a justice to remain at the particular place set for trial during the whole time allowed for the defendant to appear. *Hall v. Safford*, 25 Vt. 87; *Peach v. Mills*, 13 Vt. 501; *Underwood v. Hart*, 23 Vt. 120.

1. *Burgess v. Tweedy*, 16 Conn. 39; *Nugent v. Wrinn*, 44 Conn. 273.

Before Entering on Merits of Case. — Where a defendant who has been served with summons appears before the justice has entered upon the trial of the merits of the cause, he may plead and make his defense; and the justice has no authority in such case to enter a default for nonappearance. *Sweet v. Coon*, 15 Johns. (N. Y.) 86; *Mead v. Darragh*, 1 Hilt. (N. Y.) 395.

While Plaintiff Examining Witnesses. — Where a justice waited the required hour and then allowed the plaintiff to prove his case, and while the plaintiff was examining his witnesses the defendant appeared and asked permission to answer, it was held that the justice

(3) *Setting Aside*. — While it is the general rule that a justice of the peace cannot set aside his own judgments and grant a new trial,¹ still, under the statutes of some states, a defendant against whom a judgment by default has been rendered in a justice's court may have the judgment set aside on an application made in accordance with the terms of the statute.²

g. JUDGMENT BY CONFESSION — (1) *In General*. — In most of the states, justices of the peace may, in proper cases, render judgment on the confession of the defendant.³ This power is derived wholly from statutory regulations, which must be observed, and for questions as to the time, place, and manner of rendering such judgments the statutes should be consulted.⁴

erred in refusing the request. *Doty v. Campbell*, 1 How. Pr. N. S. (N. Y. County Ct.) 101.

After Plaintiff's Evidence Given. — Where on the return day of the summons a defendant appeared in the justice's court after the hour allowed for his appearance and after the plaintiff had given his evidence, but while the plaintiff was still present and before judgment had been entered, it was held error for the justice to refuse to allow the defendant to appear and answer. *Thompson v. Sheridan*, 80 Hun (N. Y.) 33.

1. See *infra*, II. 6. *New Trial*.

2. *Arkansas*. — *Frizzell v. Willard*, 37 Ark. 478; *Smith v. Parker*, 25 Ark. 518.

California. — *Spencer v. Branham*, 100 Cal. 336.

Iowa. — *Arts v. Rocksien*, 98 Iowa 536; *Breen v. Kuhn*, 91 Iowa 325; *Park v. Ratcliffe*, 42 Iowa 42.

Kansas. — *Covart v. Haskins*, 39 Kan. 571; *Bates v. McConnell*, 32 Kan. 1.

Missouri. — *Roach v. Montserratt Coal Co.*, 71 Mo. 398; *Reynolds v. Missouri*, etc., R. Co., 64 Mo. 70.

Montana. — *Schwabe v. Lissner*, 13 Mont. 215.

Nebraska. — *Strine v. Kingsbaker*, 12 Neb. 52; *Strine v. Kaufman*, 12 Neb. 423; *Raymond v. Strine*, 14 Neb. 236; *Dean v. Kinman*, 15 Neb. 492; *Smythe v. Kastler*, 16 Neb. 264; *Tootle v. Jones*, 19 Neb. 588; *Western Mut. Benev. Assoc. v. Pace*, 23 Neb. 494; *Smith v. Riverside Park Assoc.*, 42 Neb. 372; *Stanton v. Spence*, 22 Neb. 191.

New York. — *People v. Campbell*, 18 Abb. Pr. (N. Y. Supreme Ct.) 1; *Scranton v. Levy*, 1 Hilt. (N. Y.) 261.

Pennsylvania. — *McNamara v. McIntosh*, 17 Pa. Co. Ct. Rep. 135.

South Dakota. — *Erpenbach v. Chicago*, etc., R. Co., 8 S. Dak. 575.

Must Be Authorized by Statute. — Where a justice has rendered judgment by default after personal service of the summons upon the defendant, he cannot set the judgment aside unless authorized by statute to do so. *American Bldg., etc., Assoc. v. Fulton*, 21 Oregon 492.

For a General Discussion of relief against defaults, see the article *DEFAULTS*, vol. 6, p. 149 *et seq.*

3. *Dickinson v. Horn*, 3 Harr. (Del.) 496; *Hopkins v. Walter*, 11 Ill. 543; *Kennard v. Carter*, 64 Ind. 31; *Vandergrift v. Pierson*, 3 N. J. L. 546.

For a general discussion of judgments by confession, see the article *JUDGMENTS*, vol. 11, p. 796.

Release of Errors. — The general rule that a confession of judgment is a release of errors and that no appeal lies therefrom applies to justices' courts. *Wilson v. Collins*, 9 Ala. 127; *Murphree v. Whitley*, 70 Ala. 554; *Boettcher v. Bock*, 74 Ill. 332. See the article *JUDGMENTS*, vol. 11, p. 796.

4. **When Confession Taken.** — In *Missouri* a justice of the peace has power to take a confession of judgment on a day other than his regular law day, appointed by statute. *Huff v. Knapp*, 17 Mo. 414 [*overruling Oyster v. Shumate*, 12 Mo. 580; *Hunter v. Reinhard*, 13 Mo. 23].

Where Confession Taken. — In *New York* a justice of the peace may take confession of a judgment out of the town in which he resides, anywhere in his county. *Pollock v. Aldrich*, 17 How. Pr. (N. Y. Supreme Ct.) 109. And the presence or absence of the docket will not affect the jurisdiction of the justice. *Stone v. Williams*, 40 Barb. (N. Y.) 322.

(2) *In What Cases Rendered.* — In a justice's court, judgment by confession may be rendered only in those cases where it is allowed by statute.¹ A general acknowledgment that the defendant is indebted will not authorize a justice to enter judgment for a specific sum.² Nor is it a confession of judgment for a defendant to admit that the plaintiff's claim is correct; he may prove payment or some similar defense.³

Must Be Appearance or Service of Process. — It is the general rule that a justice can enter judgment by confession only where the defendant appears in court, in person or by attorney, or where he has been duly summoned.⁴ Where there is no process and no

Waiver of Irregularity. — Where a justice of the peace left his office and went to the defendant's residence, which was in the same township, and there the defendant waived summons, confessed judgment, and swore to the necessary affidavit therefor, and the justice then returned to his office, where he made the proper entries of the proceedings, it was held that such judgment was neither void nor voidable; that the defendant, by waiving summons, confessing judgment, etc., waived the irregularity of the justice's taking the confession of judgment at a place other than his office. *Krueger v. Beckham*, 35 Kan. 400.

Under a Statute Requiring an Affidavit to be annexed to a confession of judgment in a justice's court, a judgment rendered without such affidavit is void as to creditors only, and as to the defendant it is valid and binding. *Mavity v. Eastridge*, 67 Ind. 211; *Campbell v. Baldwin*, 6 Blackf. (Ind.) 364; *Ex p. Knight*, 4 Blackf. (Ind.) 220; *Mann v. Perkins*, 4 Blackf. (Ind.) 271; *Stone v. Williams*, 40 Barb. (N. Y.) 322; *Griffin v. Mitchell*, 2 Cow. (N. Y.) 548.

Does Not Apply Where Process Served. — The *New Jersey* act requiring affidavits in case of a judgment by confession in a justice's court does not apply to actions commenced by process duly served and returned. *Budd v. Marvin*, 4 N. J. L. 281.

Items of Confessed Demand. — Under a statute requiring the defendant to set forth the items of the demand for which he confesses judgment, an omission to do so renders the judgment void as to creditors only; it is binding upon the defendant. *Griffin v. Mitchell*, 2 Cow. (N. Y.) 548.

Under the act requiring that the defendant shall set forth the items of the demand for which he confessed judgment, so far as he may be able to do so,

a specification under a justice's judgment rendered on confession stating the indebtedness to be "for two promissory notes which were given on a balance of settlement," is not a compliance with the statute. *Case v. Redfield*, 7 Wend. (N. Y.) 398.

1. *Spear v. Carter*, 1 Mich. 19; *Paul v. Armstrong*, 1 Nev. 82.

Sufficient Confession. — Where parties appeared before a justice and confessed judgment in favor of another, on a demand arising upon contract, for a sum specified, and authorized judgment to be entered thereupon, it was held a substantial acknowledgment of their indebtedness, and sufficient under the statute. *Kinyon v. Fowler*, 10 Mich. 16.

Where the record of a justice showed that "the defendant" (naming him), "appeared and confessed the following note" (setting out the note), "and says that he is justly indebted for the same," it was held that the record showed a sufficient confession by the defendant for the justice to render judgment against him. *Barnett v. Juday*, 38 Ind. 86.

2. *Vanderveer v. Ingleton*, 7 N. J. L. 140; *Nichols v. Hewitt*, 4 Johns. (N. Y.) 423.

3. *Campbell v. Randolph*, 13 Ill. 313.

Justice Cannot Be Witness. — In an action by the payee of a promissory note against an indorser, an admission of the plaintiff's demand by the defendant before the justice on a day preceding the return of the summons is not sufficient to authorize an entry of a judgment by confession; the justice cannot be judge and witness in his own court. *Outcalt v. Rankin*, 14 N. J. L. 33.

4. *Loth v. Faconesowich*, 22 Mo. App. 68; *Bromaghin v. Throop*, 15 Johns. (N. Y.) 476; *Tenny v. Filer*, 8 Wend. (N. Y.) 569.

voluntary appearance of the parties, a mere written acknowledgment of indebtedness filed by the debtor with the justice, containing no formal confession of judgment or written authority to the justice to enter judgment, is not sufficient as the basis of judgment by confession.¹

Oral Confession. — By some statutes a justice is allowed to render

Meeting Justice on Street. — In *Tenny v. Filer*, 8 Wend. (N. Y.) 569, it was held that when a defendant met a justice on the street and authorized him to enter judgment by confession, it was not sufficient.

Long Acquiescence of Defendant. — A justice of the peace met the defendant in a replevin suit, who told him, and also the plaintiff, that he would not appear, but would pay the costs, and directed the justice to deliver the property to the plaintiff. When the case was called, neither party appeared, and the justice entered judgment on his minutes. More than a year afterwards, at the request of the defendant's attorney, the justice entered judgment on his docket, and the defendant appealed. It was held that the justice had treated the conversation as a confession of judgment, and that the judgment would not be disturbed after so long an acquiescence on the part of the defendant. *Traffarn v. Getman*, (Supreme Ct.) 3 N. Y. Supp. 867.

Where Process Issued. — A justice's judgment rendered on a confession in writing, signed by the defendant in due form, is not affected by the fact that the justice's docket does not show that no process was issued. Judgment by confession is not limited to cases where the defendant voluntarily appears. A confession that is sufficient without process is equally good with it. *Hollister v. Giddings*, 24 Mich. 501.

1. *Loth v. Faconesowich*, 22 Mo. App. 68.

In *New York* a justice of the peace can in no case enter a judgment by confession against a defendant, unless on his appearance in court, either in person or by attorney, or where he has been duly summoned, although the defendant, by writing under seal, authorize the justice to enter judgment against him, and his signature is proved before the justice by the subscribing witness. *Bromaghin v. Throop*, 15 Johns. (N. Y.) 476.

In *Illinois* it was held that a defendant could not authorize a justice to render

judgment against him by sending a letter to such justice requesting him to enter judgment against the defendant in favor of the plaintiff, for an amount named in the letter, although the defendant expressly stated that he waived service of process and authorized the judgment. *Evans v. Pierce*, 3 Ill. 468.

Request Revocable. — Where the defendant indorsed on a warrant a written request to enter up judgment against him for whatever demand the plaintiff might have against him, to the satisfaction of the justice, and the next day desired the justice not to enter the judgment, as he had since discovered that the plaintiff demanded more than was due from him, it was held that such a consent or request was revocable, and that the justice should have had a trial to ascertain the amount due, and not have entered up judgment on the demand of the plaintiff. *Gale v. Chase*, 3 Johns. (N. Y.) 147.

Proof of Handwriting. — A justice cannot enter a judgment by confession against a party on a written request, on his own knowledge that such writing was the handwriting of a party, and without any process or further proof. *Martin v. Moss*, 6 Johns. (N. Y.) 126.

Where a maker of a promissory note wrote thereon, "A. D. Witherspoon, Esquire: I confess judgment on this note;" and Witherspoon, a justice of the peace, upon this authority entered judgment for the amount of the note, it was objected that the judgment was void, because it purported to be made by confession, when the writing upon the note was no authority to confess judgment, and was no confession in fact, because not made in person to the justice. The court held the judgment not void, but voidable at the election of the principal. *Taliaferro v. Herring*, 10 Humph. (Tenn.) 272.

Where a Justice Has a Power of Attorney directed to him to confess judgment, he cannot enter up a judgment before himself. *Wright v. Wood*, 20 N. J. L. 308.

judgment on the personal confession of a defendant made orally in open court.¹

(3) *What Docket Must Show.*—Where a justice renders judgment by confession, his docket must show that the statute was complied with so as to give him jurisdiction of the case.² But formality is not required of proceedings in a justice's court, and if the docket shows substantially all that the statute requires it is sufficient.³

1. *Mercer v. James*, 6 Neb. 406.

Assent of Plaintiff Presumed.—Where a justice renders judgment upon personal confession of the defendant made orally in open court, the plaintiff's assent, although not affirmatively shown by the transcript, will be presumed from the fact that he procured a satisfaction of the judgment by an execution, levy, and sale of the defendant's property. *Mercer v. James*, 6 Neb. 406; *Fianagan v. Continental Ins. Co.*, 22 Neb. 235.

In Missouri, if an action in a justice's court is commenced by process, a confession of judgment need not be in writing. *Franse v. Owens*, 25 Mo. 329. But where there is no service of process the confession must be in writing. *Oyster v. Shumate*, 12 Mo. 580.

Judgment Valid Without Proof of Written Confession.—Where a suit in a justice's court was commenced by personal service, both parties appeared at the trial, the plaintiff declared on a promissory note, and the defendant confessed judgment for the amount of the note, it was held that the judgment was valid without proof of a confession in writing or affidavit of the amount due. *Gates v. Ward*, 17 Barb. (N. Y.) 424.

2. *Spear v. Carter*, 1 Mich. 19; *Camp v. Wood*, 10 Watts (Pa.) 118.

Failure to Show Appearance.—Under the *Arkansas* statute requiring a justice's docket to show personal appearance by the defendant on entering a judgment by confession, where the entry of judgment by confession did not show such appearance except by inference, and it was shown by parol testimony that the defendant did not in fact appear, the judgment was held void. *Smith v. Finley*, 52 Ark. 373.

Sufficient Showing of Confession.—Where the justice's docket showed that the defendant agreed that the plaintiff should have judgment for a given sum and the plaintiff accepted the judgment tendered, it was held

that this sufficiently showed a judgment by confession by the defendant, and that no appeal would lie from such judgment. *Boettcher v. Bock*, 74 Ill. 332.

3. Judgment Sufficient Without Formal Addition.—Where an entry of judgment shows an appearance by the defendant and his confession of judgment for a certain amount with costs of confession duly taxed, it is sufficient without the formal addition, "It is therefore considered," etc. *Mavity v. Eastridge*, 67 Ind. 211.

Clerical Error.—A justice's judgment reciting that the defendant had confessed judgment for a specified sum and awarding an execution therefor was held to be good although the word "note" was written instead of "notes" and the word "judgment" was omitted by clerical error. *Cowan v. Lowry*, 7 Lea (Tenn.) 620.

Showing Appearance of Parties.—Where two persons confessed judgment before a justice of the peace, and the judgment entry recited that the "parties appeared," it was held that this phrase purported that the creditor, as well as the debtors, was present and participated in the proceedings. *Kinyon v. Fowler*, 10 Mich. 16.

No Entry of Judgment on the Confession.—Where a defendant in a justice's court appeared at the return day of the process and confessed judgment, and an entry of such confession was made upon the justice's docket, it was held that an execution might lawfully issue although no entry was made upon the docket of the justice of a judgment upon the confession. *Franse v. Owens*, 25 Mo. 329.

Judgment on Application of Creditor.—Under the *Ohio* statute providing for a judgment by confession "on the application of the creditor," a judgment by confession before a justice is not void because the justice's docket does not show that it is rendered "on the application of the creditor," this fact not

k. NONSUIT. — Where a plaintiff in a justice's court fails to appear within a certain time — generally one hour — after the time specified in the summons for the return thereof, the justice's jurisdiction is usually at an end.¹ In such case, except where the justice has possession of the evidence of indebtedness on which the action is brought,² the only judgment that he can render is one of nonsuit;³ and this is true even though the defendant has appeared and pleaded a set-off or counterclaim.⁴ A general discussion of dismissals, discontinuances, and nonsuits will be found in a former volume of this work.⁵

6. New Trial — a. POWER STATUTORY. — A justice of the peace has no inherent power to set aside his own judgments. In order for him to grant a new trial he must have express statutory authority to do so;⁶ and if he attempts to grant a new trial

being required to appear on the docket. *Wilson v. Wickersham*, 2 Ohio Dec. 545.

1. *Blanchard v. Walker*, 4 Cush. (Mass.) 455; *Todd v. Doremus*, 60 Hun (N. Y.) 385, 21 Civ. Pro. Rep. (N. Y.) 74; *Sprague v. Shed*, 9 Johns. (N. Y.) 140; *Phelps v. Birge*, 11 Vt. 161.

After Plaintiff's Appearance. — In *Pennsylvania* it is held that a justice has no authority to enter judgment of nonsuit after an appearance by the plaintiff. An appeal will lie from such a judgment. *Lawver v. Walls*, 17 Pa. St. 75.

2. Where the Evidence of Indebtedness upon which the action is brought — such as a promissory note — is in the justice's possession, it is held that he may render judgment on such evidence of indebtedness in the absence of the parties. *Hitch v. Lambright*, 66 Ga. 228; *Wells v. Turner*, 14 Neb. 445; *Phoenix Ins. Co. v. Lemke*, 18 Neb. 184.

3. *Adkins v. Jester*, 1 Houst. (Del.) 353; *Cunningham v. Wright*, 27 Ill. App. 334; *State v. McCrea*, 40 La. Ann. 20; *Wilcox v. Clement*, 4 Den. (N. Y.) 160; *Vought v. Sober*, 73 Pa. St. 49; *Hartel v. Kite*, 70 Wis. 396; *Combs v. Dunlap*, 19 Wis. 591.

Requiring Defendant to Wait Longer. — Where the justice required the defendant to wait five minutes longer, which he refused to do, and the plaintiff appeared within that time and after the defendant had left, it was held to be erroneous for the justice then to proceed with the cause. *Wilcox v. Clement*, 4 Den. (N. Y.) 160.

Cannot Render Judgment for Defendant. — Where the plaintiff does not appear on the day of trial, the justice has no

authority to hear evidence by the defendant and to render a judgment for the defendant and against the plaintiff. *Bateman v. Smith Gin Co.*, 98 Ga. 219; *Cunningham v. Wright*, 27 Ill. App. 334; *State v. McCrea*, 40 La. Ann. 20; *Cavalier v. Doughty*, 6 N. J. L. 227.

Judgment for Plaintiff. — A justice has no power, in the absence of the plaintiff, to render judgment in his favor. *Semple, etc., Mfg. Co. v. Thomas*, 10 Mo. App. 457; *Sprague v. Shed*, 9 Johns. (N. Y.) 140.

4. *Adkins v. Jester*, 1 Houst. (Del.) 353; *Cunningham v. Wright*, 27 Ill. App. 334; *Hartel v. Kite*, 70 Wis. 396.

5. See article DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

6. *Dalton City Co. v. Haddock*, 54 Ga. 584; *Doughty v. Walker*, 54 Ga. 595; *Fontaine v. Bergen*, 55 Ga. 410; *Frazier v. Griffie*, 8 Md. 50; *Weeks v. Etter*, 81 Mo. 375; *Downing v. Garner*, 1 Mo. 751; *People v. Lynde*, 8 Cow. (N. Y.) 133; *Appleby v. Strang*, 1 Abb. Pr. (N. Y. C. Pl.) 143; *Doty v. Duvall*, 19 S. Car. 143.

Mistake, Surprise, or Excusable Negligence. — In *North Carolina* a new trial cannot be allowed in a justice's court; but under section 845 of the code the justice may rehear the case when mistake, surprise, or excusable negligence is shown, and the application is made in ten days after the date of the judgment. *Navassa Guano Co. v. Bridgers*, 93 N. Car. 439.

Treating Judgment as Nullity. — While a justice cannot set aside his own judgment and grant a new trial, yet where he has rendered a void judgment he may treat it as a nullity and proceed as though it had not been rendered.

where not authorized by statute, he may be restrained by a writ of prohibition.¹

Where Trial by Jury. — It is the general rule that where a jury trial is had in a justice's court, the justice cannot set aside the verdict and grant a new trial.² But in some states a verdict obtained by fraud, partiality, or undue means, may be set aside and a new trial granted.³

6. WHEN ALLOWED. — Under the statutes of some states a justice of the peace is allowed to grant a new trial in certain specified cases;⁴ and where such new trial is granted within the time allowed by law for that purpose, it operates to set aside the judgment.⁵

Application Must Be Seasonable. — The statutes allowing a new trial in a justice's court generally provide that an application therefor must be made within a specified time after the rendition of judgment, and after the expiration of such period the justice has no power to grant a new trial.⁶

Chapman v. Floyd, 68 Ga. 455; Fontaine v. Bergen, 55 Ga. 410.

1. Doughty v. Walker, 54 Ga. 595; Burroughs v. Taylor, 90 Va. 55.

2. Helmich v. Johnson, 1 Morr. (Iowa) 89; Miller v. Haley, 66 Iowa 260; Atkinson v. Chicago, etc., R. Co., 70 Iowa 68; Morris v. Shryock, 50 Miss. 590; Cason v. Tate, 8 Mo. 45; Felter v. Mulliner, 2 Johns. (N. Y.) 181; Van Valkenburgh v. Evertson, 13 Wend. (N. Y.) 76; Blumburg v. Briggs, (Buffalo Super. Ct.) 10 N. Y. St. Rep. 242; Griffin v. Pitman, 8 Oregon 342.

Verdict Against Evidence. — A justice of the peace cannot set aside the verdict of a jury, notwithstanding it be against evidence. Van Valkenburgh v. Evertson, 13 Wend. (N. Y.) 76.

Exemplary Damages — Question Raised Too Late. — Where the question as to the right of the plaintiff to recover exemplary damages was raised for the first time after a verdict granting such damages, it came too late, for the justice had then no alternative but to render judgment on the verdict. Atkinson v. Chicago, etc., R. Co., 70 Iowa 68.

Retaxing Costs. — Where there was an issue of tender and a judgment for costs based on the trial of that issue, it was held that the justice had no jurisdiction to entertain a motion to retax the costs. Miller v. Haley, 66 Iowa 260.

Where a Jury Has Disagreed and been discharged, the justice has no power to grant a new trial. Gulick v. Van Tilburgh, 16 N. J. L. 417.

Remedy by Appeal. — Where a jury in a justice's court renders a verdict, the justice has no discretion but to enter judgment on the verdict, and the only remedy an aggrieved party has is by appeal at the close of the case. Blumburg v. Briggs, (Buffalo Super. Ct.) 10 N. Y. St. Rep. 242.

3. Theilen v. Hann, 27 Kan. 778; State v. King, 23 Neb. 540; Templin v. Synder, 6 Neb. 491; Cox v. Tyler, 6 Neb. 297.

4. See Holton v. Greenwell, 4 Dana (Ky.) 634; State v. McCrea, 40 La. Ann. 20; Taylor etc., Organ Co. v. Plumb, 57 Iowa 33; Barons v. Anderson, 37 Kan. 399.

To Determine Jurisdictional Question. — In an action before a justice to foreclose a mortgage on property of a value exceeding the justice's jurisdiction, the attention of the court was called to such fact for the first time by an affidavit for a new trial. It was held that the new trial should be granted in order to determine that question. Cox v. Wright, (Tex. Civ. App. 1894) 27 S. W. Rep. 294.

Not More than One New Trial. — Under the West Virginia Code, c. 50, § 91, a justice cannot grant more than one new trial to either party. Dickey v. Smith, 42 W. Va. 805.

5. Robideau v. Ewing, 5 Blackf. (Ind.) 552.

6. Vogel v. Lawrenceburgh Tobacco Mfg. Co., 49 Ind. 218; Kerner v. Petigo, 25 Kan. 652; State v. Votaw, 16 Mont. 308; Doty v. Duvall, 19 S. Car. 143; Odle v. Davis, (Tex. Civ. App.

Notice of Motion. — A justice of the peace cannot grant a new trial in the absence of the opposite party without notice to him of the motion.¹ Where a new trial was so granted, it was held that the

1896) 35 S. W. Rep. 721; *Burroughs v. Taylor*, 90 Va. 55. See also *Hathaway v. Hathaway*, 2 Ind. 513; Texas, etc., *R. Co. v. Gill*, 9 Tex. Civ. App. 139; *Holton v. Greenwell*, 4 Dana (Ky.) 634.

Notice of Motion. — Under the *Montana* Code Civ. Pro., § 820, allowing a justice to grant a new trial in certain cases on motion made within ten days after the entry of judgment, such motion must be actually made within ten days, and it is not sufficient merely to give notice of the motion within that time. *State v. Votaw*, 16 Mont. 308.

Judgment on Unauthorized New Trial. — The *Texas* Rev. Stat. 1879, art. 1623, provides that a justice of the peace may, at any time within ten days after judgment, grant a new trial. It was held that where a justice granted a new trial more than ten days after the judgment, the judgment rendered on such new trial was void. *Odle v. Davis*, (Tex. Civ. App. 1896) 35 S. W. Rep. 721.

Waiver of Objection. — An action of replevin for a horse of the value of \$75 was tried before a justice of the peace with a jury, and a verdict and judgment were given for the plaintiff. Within two days after judgment, the defendant filed a proper motion for a new trial, which was duly heard within four days after judgment, and taken under advisement, and was allowed by the justice on the seventh day after judgment. Twice afterwards the plaintiff joined in an agreement for the continuance of the cause, and when the second trial resulted in a judgment for the defendant, the plaintiff transferred the cause to the District Court by appeal. He made no objection to the jurisdiction of the justice at any time prior to the appeal. It was held, in a proceeding to compel the issuance of an execution on the judgment first rendered, that although the motion for a new trial was not decided within five days after judgment, as it should have been, the decision on the motion was erroneous, but not void; and that the action of the plaintiff subsequent to the allowance of the motion precluded him from afterwards objecting to the jurisdiction of the justice in granting the new trial. *Scott v. Kreamer*, 37 Kan. 753.

Judgment in Absence of Defendant Without Notice. — In *Louisiana*, where a judgment in a justice's court is rendered in the absence of the defendant, and he was not notified of its rendition, he is always in time to apply for a new trial. *State v. McCrea*, 40 La. Ann. 20.

1. *Erskine v. Onyett*, 11 Ind. 335.

Sufficient Notice. — An action was continued by consent to 1 o'clock P. M. of a certain day, but, through the mistake of the justice, taken advantage of by the plaintiff, was tried, and judgment rendered against the defendant in his absence, at 10 o'clock A. M. of the same day. After judgment had been rendered, and before the hour of 1 o'clock P. M. of the same day, the attorney for the defendant told an attorney for the plaintiff that he would be at the justice's court at 1 o'clock P. M., and he did go there and make a motion to vacate the said judgment and for a new trial; and while so doing the partner of one of the attorneys for the plaintiff came to the justice's office and was notified of what was being done. It was held that these facts constituted a reasonable notice to the plaintiff of the motion for a new trial. *Barons v. Anderson*, 37 Kan. 399.

Time and Place of Hearing. — Under the *South Carolina* statute allowing the losing party at any time within five days after the entry of judgment in a justice's court to move for a new trial, the time and place of hearing must be specified in the notice of the motion to the other party. *State v. Ashe*, 41 S. Car. 92.

Waiver of Objection to Notice. — Where a party appears before a justice of the peace on the hearing of a motion for a new trial, and does not object to the sufficiency of the notice, he cannot afterwards avail himself of that objection. *Foist v. Coppin*, 35 Ind. 471.

Holding Motion under Consideration. — Where a motion for a new trial before a justice of the peace is filed the day following the rendition of a verdict, and due notice thereof is given, the holding of the motion under consideration and for decision by the justice of the peace until the ninth day after the verdict is only an irregularity which may be waived. *Woodward v. Trask Fish Co.*, 38 Kan. 283.

proceedings thereon were void and the original judgment remained in force.¹

7. Record and Docket — *a.* IN GENERAL. — The statutes governing the practice in courts of justices of the peace generally make it the duty of a justice to keep a docket in which to enter a record of the proceedings had before him.² However, it has been held that such statutes are directory only.³

Formality Not Required. — Technical precision and accuracy in the form of entries in a justice's docket are not required;⁴ the docket is entitled to a fair and reasonable interpretation, and reasonable certainty in its entries is all that is requisite.⁵

Amendment and Correction. — In some states a justice of the peace may amend or correct his docket according to the truth, even after the rendition of his judgment.⁶

1. *Ersine v. Onyett*, 11 Ind. 335.

2. *Greene v. Oliphant*, 64 Ga. 567. See the statutes of the several states.

More than One Docket. — In *Indiana* a justice may lawfully keep and use, at one and the same time, more than one docket in which to record the proceedings and judgments in suits before him. *State v. Mallory*, 65 Ind. 43.

What Is "Entering." — Writing an undertaking of replevin bail upon a separate piece of paper, and attaching it to the page of the docket of a justice on which the judgment appears, by pinning it thereto, is not "entering" it upon the docket within the meaning of 2 Ind. Rev. Stat. 1876, p. 632, § 84. *Lockwood v. Dills*, 74 Ind. 56.

Entry After Expiration of Term. — An entry made by a justice in his docket after the expiration of his term of office is a nullity. *Gage v. Vail*, 73 Mo. 454.

3. *Hickey v. Hinsdale*, 8 Mich. 267; *Carpenter v. Simmons*, 28 How. Pr. (N. Y. Super. Ct.) 12.

Justice May Prove Proceedings Before Him. — Notwithstanding the *New York* statute directing that every justice shall keep a book called a docket, and also directing what entries he shall make therein, an omission by a justice to keep such book according to the statute will not render his judgments void. Proceedings before him can still be proved by himself. *Baker v. Brintnall*, 52 Barb. (N. Y.) 188.

4. *County Ct. v. Rutz*, 63 Ill. 65; *Brennan v. Shinkle*, 89 Ill. 604; *Roach v. Montserratt Coal Co.*, 71 Mo. 398; *Johnson v. Billingsley*, 3 Humph. (Tenn.) 151.

Judgment "Against the Defendant." — Where the entry upon a justice's docket

concluded by rendering a judgment "against the defendant," without saying "in favor of the plaintiff," it was held that the record was admissible, as a judgment against the defendant must necessarily be in favor of the plaintiff. *County Ct. v. Rutz*, 63 Ill. 65.

A Clerical Error, as the writing of "August" for "September," does not constitute an error upon the face of a justice's record for which the judgment should be reversed. *Kaub v. Mitchell*, 12 Kan. 57.

Showing Trial on Adjourned Day. — In a case pending before a justice of the peace, by agreement of parties, on May 18, the trial was continued to May 25, and a jury was selected to appear on the latter date. Without any further date being noted on the docket, the entry showed that the parties and jurors appeared, the cause was tried, verdict rendered, and judgment entered thereon. This was held sufficient to show that the trial was had on the date to which the case was adjourned. *Tuttle v. Wilson*, 29 Neb. 424.

5. *Vroman v. Thompson*, 51 Mich. 452; *Mudge v. Yaples*, 58 Mich. 307. And see *supra*, II. 5. g. (3) *What Docket Must Show*.

6. *Benson v. Dyer*, 69 Ga. 190; *Backer v. Van Fleit*, 13 N. J. L. 195. But see *supra*, II. 5. c. *Amendment and Correction*.

Where a suit was brought in a justice's court against a person in his private and individual capacity, it was held that the justice, before the hearing, might so amend the entry of the proceedings on his docket as to show the action to be against the defendant as executor, especially after notice to

b. WHAT ENTRIES SHOULD BE MADE — (1) In General. — The statutes regulating the practice in courts of justices of the peace usually point out with considerable particularity what entries the justice shall make in his docket.¹ The terms of such statutes differ widely in the various states, and the practitioner should consult the statute of his own state.²

the defendant that such was the fact. *Wilson v. Wilson*, 5 Pa. L. J. 461.

Manner of Amendment. — Although a justice of the peace may amend his docket so as to make it speak the truth in a proceeding previously had before him, he must do so on proper application and after notice to the party legally interested; and where it does not affirmatively appear that notice of such application was given, the amendment is void. *Levy v. Ferguson Lumber Co.*, 51 Ark. 317.

1. Cause of Action. — The justice's docket should generally state the plaintiff's cause of action. *Crawford v. England*, 2 Houst. (Del.) 171; *Shawg v. Bruce*, 3 Iowa 324. See *Low v. Griffin*, (Tex. Civ. App. 1897) 41 S. W. Rep. 73. But an appeal will not be dismissed because the justice has not copied the plaintiff's cause of action in the docket. *Indianapolis, etc., R. Co. v. Wilsey*, 20 Ind. 229; *Indianapolis, etc., R. Co. v. Toon*, 20 Ind. 230; *Indianapolis, etc., R. Co. v. Brinkman*, 20 Ind. 230; *Reed v. Whitton*, 78 Ind. 579.

Sufficient Statement. — If the justice states in his docket that the cause of action was on an account, it is sufficient without setting out the account. *Hearn v. Ralph*, 2 Harr. (Del.) 6.

Where an entry in a justice's docket showed that the claim sued upon was for "balance due for money collected and goods received and unaccounted for; also balance on due bill," it was held to be a sufficient statement of claim to support a judgment. *Cooke v. Shoemaker*, 17 Pa. Co. Ct. Rep. 641.

Insufficient Statement. — "Action of debt on record. Demand \$5.30," is not a sufficient statement of the cause of action on the docket in a suit before a justice of the peace. *Ralph v. Pennel*, 4 Houst. (Del.) 542.

Where a justice's record stated simply that the cause of action was a "demand on contract," without showing it to be a contract of which he had jurisdiction, the record was held to be fatally defective. *Pearre v. White*, 4 Pa. Dist. Rep. 504.

Amount Claimed. — Some statutes require a justice to enter on his docket the amount claimed by the plaintiff. *Shawg v. Bruce*, 3 Iowa 324; *Young v. Robinson*, 3 Houst. (Del.) 46.

Omission to Make Entry Not Fatal. — Under the *Colorado Gen. Stat.* 1883, § 2061, requiring the justice to record in his docket the amount and nature of the debt sued for, the omission of the justice to make such record is not a fatal jurisdictional defect, where both the parties appear in the County Court and go to trial on the merits, as in such case the jurisdiction of the justice may be shown by the evidence. *Behymer v. Nordloh*, 12 Colo. 352.

Style and Nature of Action. — In *New Jersey* a justice must enter in his docket the style and nature of the action. *Stokes v. Coonis*, 4 N. J. L. 180; *Ashcroft v. Clark*, 5 N. J. L. 666.

Sufficient Entry. — An entry in the justice's transcript after the names of the parties, in the words following: "Summons in debt, \$31.29, issued February 25, 1830," is a substantial compliance with the statute which requires the justice to enter in his docket "the style and nature of the action." *Branson v. Eayre*, 12 N. J. L. 127.

Verification of Pleadings. — The justice's docket need not contain the verification of the pleadings. *Tyrrell v. Jones*, 18 Minn. 312. Verification will be presumed where the docket is silent on that point. *Burt v. Bailey*, 21 Minn. 403.

2. Delaware. — To sustain a judgment rendered by a justice of the peace, it must appear from the record that the justice heard the case and that the judgment was rendered on his hearing of it; also that he heard the allegations and proof of the parties. *Hoffecker v. Eaton*, 2 Houst. (Del.) 157.

New Jersey — Names of Parties. — It is the duty of a justice to enter in his docket the names of the parties. Stating the initials only of the complainant's name is insufficient. *Clayton v. Tonkin*, 9 N. J. L. 252.

Process. — The provisions of the statute as to what entries a justice should make regarding the issuance, service, and return of process are also various in the different states.¹ In general the docket should show due service of process,² but it has been held that a failure to show service is not a jurisdictional defect, and that fact may be proved otherwise.³

Time of Appearance. — In *Michigan* a justice's docket must show affirmatively the day and hour of the appearance of the parties, and, if the defendant was absent, that the plaintiff appeared on the return day of the summons and within one hour after the

Names of Witnesses and Jurors. — A justice must enter the names of all witnesses and jurors on his docket. *Lindsley v. Boyle*, 2 N. J. L. 193; *Steelman v. Bolton*, 2 N. J. L. 303.

Swearing of Jury. — A justice should enter on his record the fact that the jury were sworn. *Anonymous*, 3 N. J. L. 108; *Seward v. Chamberlain*, 3 N. J. L. 312.

Swearing of Referees. — On a reference from a justice, the justice's docket must state that the referees were sworn, and should contain their report. *Little v. Silverthorne*, 3 N. J. L. 255.

Ohio — Bills of Exceptions. — Bills of exceptions taken before a justice of the peace are required to be entered at length on his docket, and until so entered they constitute no grounds on which to found a petition in error. *Huston v. Huston*, 29 Ohio St. 600.

Pennsylvania — Agreement Amounting to Discontinuance. — Where a suit before a justice is terminated by any act or agreement of the parties which amounts to a discontinuance, it is the justice's duty to enter such act or agreement on his docket, and the docket is evidence thereof. *Cope v. Risk*, 21 Pa. St. 59.

1. Time of Issuance. — In *New Jersey* a justice's record should state the days and years of issuing process. *Marentille v. Oliver*, 2 N. J. L. 358.

Where under the entry of the names of the parties and style of the action the justice entered on his docket the time of issuing process as "April 3d, 1830," it was held a sufficient entry of the time of issuing process. *Day v. Hall*, 12 N. J. L. 203.

Time of Service. — The *Michigan* statute does not require the time of service of process to be entered on the justice's docket. Where the entry on the docket does not show the date of service and the files are lost the time of

service may be proven by the justice. *Van Kleeck v. Eggleston*, 7 Mich. 511.

When Returnable. — A justice of the peace must enter upon his docket the day and hour fixed in the summons for the time of trial, and the omission to do so is fatal where there is no appearance of the defendant. *Muller v. Plue*, 45 Neb. 701.

The record of a judgment rendered by default for want of appearance on a summons returnable forthwith, should state that it was made returnable forthwith because the justice was satisfied by the oath of the plaintiff or otherwise that there was danger of his losing the benefit of the process by delay. *Gray v. Vandyke*, 5 Houst. (Del.) 134.

Process and Return Need Not Be Copied in Record. — In *Indiana* the process or the return of the officer need not be copied into the record made by the justice. *Taylor v. McClure*, 28 Ind. 39; *Reed v. Whitton*, 78 Ind. 579.

Amount Not Indorsed on Writ. — Under the *Ohio* Stat., § 594, which only requires a justice to enter on his docket the date of the writ and the time of its return, the fact that the return on the docket does not show that the amount claimed was indorsed on the writ will not affect the validity of a judgment by default. *Cook v. Dinsmore*, 5 Ohio Cir. Ct. Rep. 385.

2. *Muller v. Plue*, 45 Neb. 701; *Brown v. Cady*, 19 Wend. (N. Y.) 477. See the article SUMMONS AND PROCESS.

Sufficient Showing. — An entry in a justice's docket, "Nov. 19, 1852. Summons returned, served by copy, by officer B.," sufficiently shows jurisdiction of the justice over the person. *Bidwell v. Coleman*, 11 Minn. 78.

3. *Denmark v. Liening*, 10 Cal. 94; *Gray v. McNeal*, 12 Ga. 424; *Telford v. Coggins*, 76 Ga. 683; *Jester v. Spurgeon*, 27 Mo. App. 477. See generally the article SUMMONS AND PROCESS.

time fixed therein.¹ In *Minnesota*, however, it is held that the failure of the docket to show when the parties appeared does not affect the regularity of the judgment.²

Adjournments. — Under the statutes of some states, a justice of the peace is required to enter in his docket every adjournment and the time and place to which the cause is adjourned;³ but a strict compliance with such provisions is not generally required.⁴

(2) *Statutes Directory.* — The statutes prescribing what entries a justice shall make in his docket are for the most part held to be merely directory.⁵ Thus it has been held sufficient where the

1. *Mudge v. Yaples*, 58 Mich. 307.

Insufficient Entry. — Under *Michigan* Comp. Laws 1857, § 3890, requiring that the time of appearance of the parties in a justice's court, and also the time of rendering judgment, be entered in the docket, it was held that an entry upon the justice's docket which recited the date of the return day of the summons and contained no other date except the date at the end of it, which was the same as the return day of the summons, and did not state on what date the parties were called and the plaintiff appeared and the defendant failed to appear, was not sufficient to comply with the statute; it was not the intent of the statute to leave the time of appearance to be referred to the date of the judgment in a case affording room on the face of the record for the two acts on separate days. *Redman v. White*, 25 Mich. 523.

Process Returnable Forthwith. — Under *How. Mich. Stat.*, § 7053, subd. 3, requiring a justice to enter upon his docket the time when the parties to a suit appeared before him, it is a sufficient compliance where the process is returnable "forthwith" if the day on which the parties appeared is stated. *Fruitport Tp. v. Dickerman*, 90 Mich. 20.

2. *Tyrrell v. Jones*, 18 Minn. 312.

3. *Waldron v. Palmer*, 104 Mich. 556; *Fitzhugh v. Rivard*, (Mich. 1896) 66 N. W. Rep. 947; *Brown v. Kellogg*, 17 Wis. 475. See also the article CONTINUANCES, vol. 4, p. 895.

Sufficient Showing of Time. — Under the *Wisconsin* statute requiring the justice to enter on his docket every adjournment, stating at whose request it is granted, it was held that an entry that the defendant "asked for an adjournment of one week, until the 27th day of April, 1889, at 1 o'clock P. M., at this my office," was sufficient to show

an adjournment to that time. *Johnson v. Iron Belt Min. Co.*, 78 Wis. 159.

4. **Clerical Error.** — Where a justice's docket entry stated that the cause was adjourned to a certain day "at ten o'clock A. P.," instead of "A. M.," it was held that this clerical error did not cause him to lose jurisdiction of the case. If the hour had been specified merely as ten o'clock, this would be held to mean ten o'clock A. M. *Taylor v. Wilkinson*, 22 Wis. 40.

Failure to State Year. — On an adjournment by agreement of parties, a failure of the justice, in entering such adjournment in his docket, to state the year will not deprive him of jurisdiction, for the current year will be understood to have been intended. *Stromberg v. Esterly*, 62 Wis. 632.

Failure to State Place. — A justice's neglect to record in his docket the place to which a case is adjourned is a clerical irregularity for which judgment cannot be reversed if the defendant is not misled and appears and answers. *Whelpley v. Nash*, 46 Mich. 25.

Failure to State on Whose Motion. — In an action in a justice's court there was no general appearance by the defendants. The plaintiff filed his complaint and the cause was adjourned for three days, but the justice omitted to state in his docket upon whose motion the adjournment was had. It was held that the justice did not lose jurisdiction to hear the case on the adjourned day. *Wheeler v. Paterson*, 64 Minn. 231.

5. The *West Virginia* Code 1891, c. 50, § 178, which directs that the justice shall enter in his docket the amount of money which the plaintiff demands, is merely directory, and its omission cannot be cause for reversal. *Straley v. Payne*, (W. Va. 1897) 27 S. E. Rep. 359.

The provision of the statute requiring the justice to state in his docket the fees due each person separately is di-

docket entries show that the justice had jurisdiction of the parties and of the subject-matter of the action, and also show the kind and amount of the judgment given, and that it was rendered at the proper time.⁴

Bill of Exceptions to Preserve Rulings. — In *Kansas* it is held that, as the statute prescribes what matters shall be entered on a justice's docket, if a party desires to preserve the rulings of the justice as to other matters he should take a bill of exceptions; and if the justice enters a statement of matters other than those by law

rectory; and the omission of such separate statement does not invalidate the judgment. *Meister v. Russell*, 53 Minn. 54; *Nett v. Serwe*, 28 Wis. 663; *Warner v. Hart*, 6 Wis. 464.

The *New York* statutes requiring the justice to certify in his docket that the amounts appearing to be due on the judgments therein have not been paid to his knowledge, and to deposit such docket with the clerk of the town on his removing therefrom, are directory merely, and failure to comply therewith will not invalidate the judgments in the docket. *Humphrey v. Persons*, 23 Barb. (N. Y.) 313.

1. *Humphrey v. Persons*, 23 Barb. (N. Y.) 313.

In *Missemer v. Trout*, 17 Pa. Co. Ct. Rep. 317, it was held that where a justice's record failed to show the hour of the hearing or of the entry of judgment, or that the account declared on was against the defendant, or that he had promised to pay it, or that the summons was served on the defendant, stating only that it was indorsed served, the record, although not complete, was sufficient to support a judgment.

Showing that Justice Heard Evidence. — A judgment of a justice is not irregular because of the failure of his docket entry to show that the justice heard evidence before rendering the judgment; and this is especially true in a case where by the admission of the defeated party it appears that in fact witnesses were sworn and examined. *Baker v. Baker*, 70 Mo. 134.

Jurisdiction Out of Township. — Under a statute giving justices jurisdiction out of their townships in certain cases, it was held that it need not appear from the docket of the justice that the necessity of exercising the jurisdiction existed, but that the fact might be given in evidence on the trial of the cause. *Lutes v. Perkins*, 6 Mo. 57.

Place of Holding Court. — A justice of

the peace is not required to enter on his docket the name of the county or town in which his court was held, that it was held at the time and place appointed in the summons, or at what hours the suit was called and the judgment rendered. The presumption will be that the statute was complied with in these respects. *Bacon v. Bassett*, 19 Wis. 45.

The Hour of Entering Judgment against a garnishee on an attachment affidavit need not appear on the justice's docket. *Weisman v. Weisman*, 133 Pa. St. 89.

Time of Rendering Judgment by Default. — In *Pennsylvania* it is held that a justice's record need not show at what hour of the day the hearing was had and judgment rendered in a default case. *Fronheiser v. Werner*, 3 Pa. Dist. Rep. 515; *Blessington v. Com.*, (Pa. 1888) 14 Atl. Rep. 417; *Robertson v. Clark*, 9 Pa. Co. Ct. Rep. 94.

Security for Costs. — A failure of a justice to make a docket entry showing security for costs filed was held not to be a jurisdictional defect. *Vaule v. Miller*, 64 Minn. 485; *Taylor v. Wilkinson*, 22 Wis. 40.

Need Not Show Demand. — The docket need not disclose that before the suit the plaintiff demanded the amount due him. *Shea v. Plains Tp.*, 7 Kulp (Pa.) 554.

In a Suit by an Assignee in a justice's court the record need not show affirmatively that the assignment was proved. *Shea v. Plains Tp.*, 7 Kulp (Pa.) 554.

Conversations Between the Parties or their attorneys in regard to the action pending should not be entered by the justice in his docket. *Kuhn v. Bone*, 10 Iowa 392.

Signature of Justice Not Necessary. — In *Illinois* it is not necessary for a justice's docket to be verified by his signature. *Daniels v. Thompson*, 48 Ill. App. 393.

directed to be entered, such statement does not thereby become a part of the record and available for review in a higher court upon a petition in error.¹

Evidence. — Ordinarily a justice is not required to enter the testimony in full on his docket or to copy at length the documentary evidence offered or admitted on the trial before him.²

(3) *Should Show Jurisdiction.* — Although, as has been seen above, justices are not usually held to a very strict compliance with the statutes directing what entries shall be made in the docket, still, as justices' courts are courts of inferior and limited jurisdiction, there should be sufficient entries in the docket to show that the justice had jurisdiction of the case.³

III. CRIMINAL PROCEDURE. — Criminal procedure in justices' courts will be found fully treated under the various criminal prac-

1. *Hagaman v. Neitzel*, 15 Kan. 383.
2. *Campbell v. Sutton*, 12 Neb. 522; *Ramsey v. Dumars*, 19 N. J. L. 66; *Hill v. Scouton*, 7 Kulp (Pa.) 345; *Evans v. Brobst*, 16 Pa. Co. Ct. Rep. 550.
- N. W. Rep. 247; *Mudge v. Yaples*, 58 Mich. 307; *Vroman v. Thompson*, 51 Mich. 452; *Barnes v. Holton*, 14 Minn. 357. See also *supra*, I. 3. *Must Appear Affirmatively*; II. 5. g. (3) *What Docket Must Show*.

Either Party Can Preserve Such Evidence if he chooses, in a bill of exceptions. *Campbell v. Sutton*, 12 Neb. 522.

In *Alabama* a justice of the peace need not record any evidence in a case before him except such as is objected to; that he must enter of record whether admitted or not. *Lecatt v. Stewart*, 2 Stew. (Ala.) 474; *Ward v. Lewis*, 1 Stew. (Ala.) 26; *Mead v. Daniel*, 2 Port. (Ala.) 86.

Motions to Exclude or Reject Evidence. — Subdivision 11, § 2269 Iowa Code of 1851, does not require a justice to enter on his docket motions made to exclude or reject evidence offered on the trial. *Miller v. O'Neal*, 9 Iowa 446.

Kind of Evidence. — A statement on the docket of a justice that a plaintiff's demand is founded on an account rendered for services rendered by the plaintiff to the defendant's testator in his lifetime sufficiently satisfies the statutory requirement that the kind of evidence upon which the plaintiff's demand may be founded shall be set out on the docket. *Wilson v. Wilson*, 5 Pa. L. J. 461. See *Shea v. Plains Tp.*, 7 Kulp (Pa.) 554.

Justice Cannot Supplement Testimony. — In *South Carolina* a justice cannot supplement the testimony of a witness, as taken down, by appending his statement as to the testimony thereto after it is signed by the witness. *State v. Freeman*, 43 S. Car. 105.

3. *Stolte v. Cochran*, (Mich. 1896) 69

Sufficient Showing of Jurisdiction. — If the record of proceedings before a justice sets forth generally the nature of the plaintiff's demand and that it does not exceed the jurisdictional amount, it is sufficient to show that the justice had jurisdiction. *McEntire v. McElduff*, 1 S. & R. (Pa.) 19.

Insufficient Showing. — Where a justice's docket stated the claim to be for damages for nonfulfilment of contract, without showing what kind of a contract, it was held insufficient to show jurisdiction in the justice, since the contract might have been one relating to land. *Barnett v. Fisher*, 5 Pa. Dist. Rep. 277.

Judgment Void. — Where a justice's docket failed to show the nature of the action, whether any pleas were made by the parties, or any other facts showing jurisdiction, the judgment was held void. *Jones v. Hunt*, 90 Wis. 199.

Should Show Suit Brought in Proper Township. — Where the justice's record does not show that the action was brought in the proper township, the defect is fatal. *Lowe v. Alexander*, 15 Cal. 297; *Rohland v. St. Louis, etc., R. Co.*, 89 Mo. 180.

Unlawful Detainer — Location of Premises. — The record of a justice in an action of unlawful detainer must disclose that the premises detained are in the county in which he sits, else he has no jurisdiction over the case. *Johnson v. Fischer*, 56 Mo. App. 552.

tice titles throughout this work.¹

IV. APPEALS FROM JUDGMENTS OF JUSTICES — 1. Compliance with Statute in Perfecting Removal. — What has been heretofore said in respect to the character of proceedings before a justice of the peace as finding its source and dependence in the statutes of the states applies with full force to proceedings for the review of justices' judgments on appeal. Thus it has been said that where the statute prescribes what is to be done in order to remove a cause to an appellate court, those things must be done,² sometimes to the very letter,³ though, on the other hand, a liberal construction is given to such statutes, favoring the right of appeal when such construction can be given,⁴ especially where the appellant secures a trial by jury upon his appeal, for the reason that a party should not be deprived of a jury trial upon slight grounds.⁵

Application of General Rule Referred to Various Steps. — While it is the general rule that the statutes must be complied with, a general statement of the necessity of the compliance in any one particular or of the effect of the failure to comply with the statute in any one particular cannot be made here, but must be left to the treatment of each particular statutory step provided for effecting the removal of a cause from the court of a justice of the peace to the appropriate appellate court.⁶

1. See the articles ARRAIGNMENT AND PLEA IN CRIMINAL CASES, vol. 2, p. 760; BAIL AND RECOGNIZANCE, vol. 3, p. 158; COMMITMENTS, vol. 4, p. 566; EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153; FINES AND COSTS IN CRIMINAL CASES, vol. 8, p. 953; FORMER CONVICTION OR ACQUITTAL, vol. 9, p. 630; INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344; JURY, *ante*, p. 223; PRELIMINARY EXAMINATIONS; SEARCHES AND SEIZURES; SENTENCE; WARRANTS. And for the procedure in particular cases see the specific criminal titles.

2. *Sherer v. Superior Ct.*, 94 Cal. 354; *Coker v. Superior Ct.*, 58 Cal. 177; *Dutertre v. Superior Ct.*, 84 Cal. 536; *McKeen v. Naughton*, 88 Cal. 465; *Hall v. Superior Ct.*, 68 Cal. 25; *McCracken v. Superior Ct.*, 86 Cal. 77; *Rudolph v. Herman*, 2 S. Dak. 399; *Dykeman v. Budd*, 3 Wis. 640; *Clark v. Miles*, 2 Chand. (Wis.) 94; *Pelton v. Blooming Grove*, 3 Wis. 310; *Jenkins v. Cheyenne*, 1 Wyoming 287; *Ivinson v. Pease*, 1 Wyoming 277.

3. *Jenkins v. Cheyenne*, 1 Wyoming 287; *Ivinson v. Pease*, 1 Wyoming 277.

4. *Job v. Harlan*, 13 Ohio St. 489; *Noble v. Houk*, 16 S. & R. (Pa.) 421; *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407; *Cady v. Anson*, 4 Wis. 223.

5. *Noble v. Houk*, 16 S. & R. (Pa.) 421; *Louderback v. Boyd*, 1 Ashm. (Pa.) 380.

6. **Order of Performing Conditions.** — Where certain things are prescribed by statute for perfecting an appeal, they need not be done in any particular order if neither the nature of the things to be done nor the statute requires it. *Coker v. Superior Ct.*, 58 Cal. 177; *Dutertre v. Superior Ct.*, 84 Cal. 536; *Brown v. Jessup*, 19 Oregon 288. But see *Collman v. Warne*, 9 N. J. L. 290.

Change of Law. — An appeal is properly perfected under the law as it exists when the judgment is rendered. *Roesink v. Barnett*, 8 Neb. 147; *Teall v. Van Wyck*, 10 Barb. (N. Y.) 376. See also *Danville Stove, etc., Co. v. Adsit*, 88 Mich. 244; *Briggs v. Hubbard*, 19 Vt. 86.

Special Statutes in Particular Cases may prescribe conditions peculiar to such cases, and in that event the statute covering the particular kind of case, and not the general statute governing appeals, will control. *Kennedy v. Hamer*, 19 Cal. 374.

In *Illinois* it was held that an act requiring an appeal bond in all cases should not be construed as repealing the former statute permitting counties

2. When Appeal Lies — a. RIGHT TO APPEAL IN GENERAL. —

The right of appeal from a judgment of a justice of the peace depends upon and is regulated by the existing statute law¹ or upon constitutional provisions under which an appeal may be a matter of right.² But if the constitution does not give the right, leaving the matter to be dealt with by the legislature, that body may determine and prescribe in what cases an appeal will lie.³

b. CHARACTER OF JUDGMENTS APPEALABLE — (1) Final Judgment. — A right to appeal from the judgment of a justice of the peace is generally extended and confined, as in other cases, to a final judgment or one adjudicating the merits, as distinguished from a mere interlocutory order in the course of the proceeding.⁴

to appeal without giving bond. *Kelly v. School Directors*, 66 Ill. App. 134.

1. *Holman v. Sigourney*, 11 Met. (Mass.) 438; *Mitchell v. Kennedy*, 1 Wis. 511.

2. *Townsend v. Timmons*, 44 Ark. 482.

Special and Summary Proceedings. — Where special and summary proceedings before a magistrate are provided, the right of appeal from a judgment therein does not exist unless the statute confers such a right. *Lamonte v. Montebello*, 21 Ill. App. 186; *Dilley v. McGregor*, 24 Kan. 361; *Armstrong v. Harvey*, 11 Ohio St. 527; *Neumoyer v. Andreas*, 57 Pa. St. 446; *Griffin v. Griffin*, Phil. L. (N. Car.) 167; *Field v. Anderson*, 1 Tex. 437; *Griswold v. Rutland*, 23 Vt. 324.

Waiver of Appeal by Agreement. — It has been held that by express agreement parties may waive the right to appeal. *Lyon v. Sanders*, 3 Greene (Iowa) 332; *Bocleau v. Phillips*, 1 Ashm. (Pa.) 92; *Hindman v. Doughty*, 172 Pa. St. 573.

But it has also been held that such an agreement must be in writing. *Dawson v. Condy*, 7 S. & R. (Pa.) 366. See also *Lyon v. Sanders*, 3 Greene (Iowa) 332, distinguishing *Clark v. Gibson*, 1 Morr. (Iowa) 328, in this respect.

3. *Miller v. Heard*, 6 Ark. 73; *Ex p. Anthony*, 5 Ark. 358; *People v. Fowler*, 9 Cal. 85. See also *infra*, IV. 7. **Allowance of Appeal.**

Right Confined to Particular Cases. — Sometimes it is expressly provided that appeals shall not be granted in particular cases. *Edwards v. Vandemack*, 13 Ill. 633; *Yunt v. Brown*, 2 Ill. 264.

Where there are several cases in which an appeal does not lie, and others of a similar nature in which an appeal does lie, the court will determine

whether an appeal lies in the particular case from the charge which the defendant is called upon to answer in the summons, tested by the language therein used. *Moultrie v. Dixon*, 26 S. Car. 296.

4. *Connecticut. — Denton v. Danbury*, 48 Conn. 368; *Russell v. Monson*, 33 Conn. 506.

Illinois. — Kimball v. Riter, 25 Ill. 276.

Indiana. — Brewer v. Murray, 7 Blackf. (Ind.) 567; *Creekpaum v. Templeton*, 5 Blackf. (Ind.) 583; *Tarpy v. Crutchfield*, 38 Ind. 58.

Iowa. — Hodge v. Ruggles, 36 Iowa 42; *Griffin v. Moss*, 3 Iowa 261; *Stowers v. Milledge*, 1 Iowa 150.

Kansas. — Butt v. Herndon, 36 Kan. 370; *Fultz v. Neal*, 3 Kan. App. 612; *Roll v. Murray*, 35 Kan. 171; *Reedy v. Gift*, 2 Kan. 392.

Maine. — Waterville v. Howard, 30 Me. 103.

Missouri. — Bagley v. Kelly, 38 Mo. App. 623; *Weisenecker v. Kepler*, 7 Mo. 52.

Nebraska. — Denslow v. Dodendorf, 47 Neb. 328.

Nevada. — Nevada Cent. R. Co. v. District Ct., 21 Nev. 409.

New York. — Peters v. Parsons, 18 Johns. (N. Y.) 140; *Breese v. Williams*, 20 Johns. (N. Y.) 280; *Blum v. Hartman*, 3 Daly (N. Y.) 47.

North Carolina. — Phelps v. Worthington, 92 N. Car. 270; *Bailey v. Hester*, 101 N. Car. 538.

Ohio. — Nealy v. Sexton, Wright (Ohio) 314.

Tennessee. — Gibbs v. Bourland, 6 Yerg. (Tenn.) 481.

Texas. — Figures v. Dunklin, 68 Tex. 644.

Wisconsin. — Collins v. Waggoner, 20 Wis. 48.

But these general rules must be taken in connection with the various statutory provisions relating to special proceedings, and the specific titles in this work where such proceedings are treated.¹

Judgment by Default. — Under statutes regulating appeals from justices of the peace it is held that an appeal will not lie from a judgment by default;² though there is a distinction in some cases

From Judgment on Sci. Fa. — Appeals were allowed from judgments on writ of *scire facias* in *Guilky v. Gillingham*, 3 S. & R. (Pa.) 93; *Sott v. Kelso*, 4 W. & S. (Pa.) 278; *Gilson v. Gay*, 10 Vt. 326.

From Motion to Enter Satisfaction of Judgment. — In *Indiana* it has been held that an appeal lies from the determination of a justice on an application to enter satisfaction of a judgment, under the general provisions regulating appeals, though no appeal is specially provided in such cases. *Creekpaum v. Templeton*, 5 Blackf. (Ind.) 583. See also *Bailey v. Hester*, 101 N. Car. 538.

After New Trial Granted, if the order granting the new trial is set aside on motion and another judgment rendered, the appeal should be from the last judgment, and not from the order setting aside the order for a new trial. *Tarpy v. Crutchfield*, 38 Ind. 58.

A Final Judgment Without Costs is a final judgment from which an appeal lies. *Blum v. Hartman*, 3 Daly (N. Y.) 47; *Collins v. Waggoner*, 20 Wis. 48, which was a judgment of dismissal without a judgment for costs.

Judgments by Confession. — See article JUDGMENTS, vol. II, p. 973 *et seq.*

1. For example, for appeals in garnishment proceedings, see article GARNISHMENT, vol. 9, p. 805.

Under Statutory Provisions the right to appeal in particular instances may be different in the various states. Thus, as dependent upon whether a trial before a justice is by a jury, it may be that in one state an appeal will not lie from a judgment upon a verdict of a jury. *Woodford v. Hull*, 31 W. Va. 470; *Fitzgerald v. Leisman*, 3 MacArthur (D. C.) 6; while in others the right to appeal from such a judgment may depend upon the amount in controversy, *Edwards v. Schutt*, 7 Neb. 19; *Glover v. Moses*, 13 Ohio 321.

2. *Rickey v. Superior Ct.*, 59 Cal. 661; *People v. County Ct.*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Sample v. Gilbert*, 46 Ind. 444; *Brayton*

v. Delaware County, 16 Iowa 44; *Turner v. Putnam*, 31 Me. 557; *Harris v. Hutchins*, 28 Me. 102; *Garnet v. Rodgers*, 52 Mo. 145; *Pearson v. Carson*, 69 Mo. 569; *Minneapolis Harvester Works v. Hedges*, 11 Neb. 46; *Ryan v. Harris*, 2 Oregon 175; *Trullenger v. Todd*, 5 Oregon 36. See also article DEFAULT, vol. 6, p. 1.

Motion to Set Aside Default. — The right to appeal from a judgment by default is sometimes made dependent on a prior motion to set aside the default. *Wynn v. Garland*, 11 Ark. 302; *Sample v. Gilbert*, 46 Ind. 444; *Burns v. Hutton*, 24 Mo. 337; *Hore v. Steamboat Belle*, 11 Mo. 107; *Minneapolis Harvester Works v. Hedges*, 11 Neb. 46; *Andrews v. Mullin*, 14 Neb. 248; *Clendenning v. Crawford*, 7 Neb. 474.

Where it was specially provided that judgments rendered in the absence of the party sued and served with process might be set aside upon certain conditions, it was held that this statutory provision gave the party a complete remedy, that it evinced the legislative intent that actions in justices' courts must be tried upon the merits before an appeal could be taken, and that such an intent is consistent with the object for which justices' courts were established, namely, the trial and disposal of causes with the least possible expense to the parties. *Brayton v. Delaware County*, 16 Iowa 44; *Clendenning v. Crawford*, 7 Neb. 476.

Under a statute providing that if the judgment is rendered upon process not personally served and in the absence of the defendant he shall have a certain number of days after personal service of the judgment within which to serve notice of appeal, the time within which he must appeal does not begin to run until the actual service of notice of the judgment upon him, notwithstanding he may have had information through a stranger of the rendition of the judgment. *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 409.

Premature Trial. — Where it appears that the trial was commenced before

between a default of the party by a failure to appear and a default by reason of a failure to defend after appearance.¹ Where there

the time in which the defendant was required to appear, he cannot be thus deprived of his right of appeal. *Andrews v. Mullin*, 14 Neb. 250.

1. Thus in *Oregon*, where the statute provided that "when the time for answering the complaint has expired, and defendant has failed to answer, the plaintiff shall have judgment immediately, unless," etc., there being but four ways of entering judgments, to wit, judgments in general, judgments of nonsuit, judgments on failure to answer, and judgments by confession under the code, and the code relating to appeals from courts of justices of the peace providing that either party may appeal from a judgment except when the same is given by confession or want of an answer, all cases of default which may have existed or can exist are covered by these provisions, as an appeal will not lie from a judgment by default "on failure to answer." *Ryan v. Harris*, 2 Oregon 175.

In *Nebraska*, where a party appeared in the action before a justice of the peace and entered into an agreement to continue the case, he may appeal from a judgment by default thereafter rendered against him. *Smith v. Borden*, 22 Neb. 487; *Cleghorn v. Waterman*, 16 Neb. 230; *Crippen v. Church*, 17 Neb. 306; *Carr v. Luscher*, 35 Neb. 318. Though it had formerly been held that to entitle a party to appeal he must have appeared before the justice and tried the case upon the merits. *Clen-denning v. Crawford*, 7 Neb. 474.

Waiver of Objection. — It has been held that though it is necessary to move to set aside a default judgment before an appeal can be granted, if the parties appear and litigate the matters in controversy without objection in the appellate court, that court having jurisdiction of the subject-matter and of the parties, they waive the objection that the appeal was taken from the default judgment without motion previously made to set aside. *Minneapolis Harvester Works v. Hedges*, 11 Neb. 48.

The fact that the defendant introduced no testimony will not preclude him from appealing from a judgment against him. *Baier v. Humpall*, 16 Neb. 127; *Rawalt v. Brewer*, 16 Neb. 444.

After Issue Joined. — An appeal may be prosecuted from a judgment rendered in the absence of the defendant. *People v. Madison C. Pl.*, 2 Wend. (N. Y.) 628; *Ex p. Stafford*, 6 Cow. (N. Y.) 44.

Relief Against Default. — Under statutory provision, if the appeal is taken by the defendant, who failed to appear before the justice either upon the return of the summons or at the time to which the trial of the action was adjourned, the appellate court in its discretion may set aside the judgment and order a new trial upon affidavit showing the party's excuse for his default, and that manifest injustice has been done. *Thomas v. Keeler*, 52 Hun (N. Y.) 318; *McCarthy v. Crowley*, (Supreme Ct.) 5 N. Y. Supp. 675; *Bates v. Gorman*, 8 Civ. Pro. Rep. (Orleans County Ct.) 180.

If in such a case the court is justified in assuming that there was such a failure to appear as is contemplated by the statute, it is discretionary with the court whether it will grant a new trial upon the proof before it as to manifest injustice having been done and as to the sufficiency of the excuse rendered by the defendant for his default, and such an order will not be reviewed; but if there was no failure to appear before the justice, then there is no power to set aside such a judgment under the statute; and where the defendant and his attorney are present and remain until the case is called for trial and during the trial, and refuse to answer when it is called or to take part in the trial, on the ground that it was called too late, there is no such failure of the defendant to appear as is contemplated by the statute. *Thomas v. Keeler*, 52 Hun (N. Y.) 320.

In *McCarthy v. Crowley*, (Supreme Ct.) 5 N. Y. Supp. 676, the defendant appeared at the return time and requested the justice to wait until she could obtain counsel, and while her son was absent on this errand a judgment was rendered against her. It was held that the request made for time to obtain counsel or an adjournment of the hearing was reasonable and should have been granted; that there was in contemplation of law no appearance by the defendant on the return day, and that she showed a sufficient excuse and manifest injustice under the statute.

is 'nothing to the contrary in the statutory provisions regulating appeals from justices of the peace, it has been held that the general right of appeal granted from a final judgment includes the right to appeal from a judgment by default.¹

Nonsuit and Dismissal. — A judgment of nonsuit entered by a justice of the peace is such a judgment as will support an appeal by the plaintiff.² So, also, an appeal will lie from a judgment dismissing a suit and for costs.³

(2) *Form of Judgment.* — No particular form of judgment is necessary in order to make it such a judgment as will support an appeal.⁴

1. *Leavenworth, etc., R. Co. v. Forbes*, 37 Kan. 445; *Holman v. Sigourney*, 11 Met. (Mass.) 439, wherein it is said that the judgment upon a default may be for a sum too large or too small or may be rendered for causes of action not set up, and such a judgment may be the subject of complaint by an aggrieved party and may be granted upon an appeal if seasonably taken. *Burnham v. Turner*, 14 Wis. 622; *State v. Ives*, 15 Wis. 445; *Shroudenbeck v. Phoenix F. Ins. Co.*, 15 Wis. 632. See also *Reiman v. Ater*, 88 Ill. 299; *Callahan v. Newell*, 61 Miss. 438.

2. *Gilson v. Johnson*, 4 Iowa 463; *Ball v. Burke*, 11 Cush. (Mass.) 80; *Pattidge v. Lott*, 15 Mich. 252; *Stall v. Diamond*, 37 Mich. 429; *Comstock v. Wayne Circuit Judge*, 30 Mich. 98; *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Brackenridge v. Husted, Wright* (Ohio) 70; *Smith v. Crane*, 12 Vt. 487.

Judgment upon Issues. — Under a statute providing that "in all civil actions except those by summary process, brought before a justice of the peace, an appeal from any judgment rendered therein upon any issue may be had and allowed to either party," the judgment from which an appeal is allowed must be a judgment upon some issue in the case; and where, though issue be joined, the plaintiff does not introduce evidence or contest the issues in the case, but sits by and allows the court to render judgment of nonsuit against him, an appeal will not lie. *Norton v. Petrie*, 59 Conn. 200.

Voluntary Abandonment. — Where the plaintiff failed to appear and a judgment of nonsuit was entered, it was said: "We cannot think that a judgment thus entered on the voluntary abandonment of his suit by a plaintiff before a justice is such a final judgment as is contemplated by the statute.

The remedy by appeal is given to the party 'conceiving himself injured or aggrieved by such judgment.' But how can he be injured or aggrieved who voluntarily discontinues his suit and of his own accord subjects himself to the legal consequence — a judgment against him for costs?" *Bowne v. Johnson*, 1 Dougl. (Mich.) 187.

3. *Reiman v. Ater*, 88 Ill. 299; *Cohen v. Moore*, 59 Ill. App. 396; *Lauferty v. Prickett*, 50 Ind. 24; *Hannibal, etc., Plank-road Co. v. Robinson*, 27 Mo. 396; *Nevada Cent. R. Co. v. District Ct.*, 21 Nev. 409; *Winston v. Master-son*, (Tex. Civ. App. 1894) 27 S. W. Rep. 691 [overruling in effect *Morgan v. Johnson*, 4 Tex. 117]; *Hewett v. Currier*, 63 Wis. 386; *Steinam v. Schulte*, 83 Wis. 567.

In *Collins v. Waggoner*, 20 Wis. 48, it was held that the dismissal of a complaint because not verified was appealable though no judgment for costs was rendered.

Dismissal Equivalent to Nonsuit. — *Lovell v. Everton*, 11 Johns. (N. Y.) 53; *Collins v. Waggoner*, 20 Wis. 48; *Lawler v. Fitzpatrick*, 3 Wis. 573.

Dismissal on Matters of Defense. — An appeal lies from a dismissal as from a judgment on the merits where the motion to dismiss is based upon proof of extrinsic matter available as a defense upon the merits. *Reedy v. Gift*, 2 Kan. 392.

4. *Wells v. Hogan*, 1 Ill. 337; *Kimball v. Riter*, 25 Ill. 276; *Brewer v. Murray*, 7 Blackf. (Ind.) 567; *White v. Griffey*, 32 Ind. 97; *Moore v. Manser*, 9 Iowa 47; *Workman v. Taylor*, 24 Mo. App. 550.

An indorsement by the justice upon his minutes of the trial of a memorandum rendering judgment in a specific sum and stating the amount of damages and costs separately is a valid

(3) *Finding Without Judgment.* — A mere finding of the justice without an entry of judgment thereon has been held insufficient as a final judgment to support an appeal.¹

(4) *Verdict Without Judgment.* — It is held in several cases that as no formal judgment upon a verdict of a jury is necessary, a verdict without an entry of judgment thereon may be appealed from, and the verdict in such case is in legal effect a judgment;²

judgment, notwithstanding he neglects to perform the duty enjoined upon him by statute of entering it upon his docket. *O'Reilly v. Block*, (Ulster County Ct.) 23 N. Y. Supp. 672.

Date of Entry of Judgment. — By an amended return of a justice it was certified that "the judgment was ordered at the adjournment of the court on that day," under a rule of court providing that "in actions defaulted for want of appearance at the calling of the new docket on the first day of the term, judgment shall be entered at the adjournment of the court on that day unless the court shall otherwise order." It was held that the fact of the judgment being rendered on the first day of the term was sufficiently established though not formally entered on the docket; that the rule above quoted was tantamount to an express order of the court fixing the day of entering judgment, and that the default so entered remained as the ground of judgment in the justice's court from which an appeal should have been taken within the twenty-four hours provided by statute. *Gardner v. Dudley*, 12 Gray (Mass.) 430; *Welch v. Damon*, 11 Gray (Mass.) 383.

1. *Butt v. Herndon*, 36 Kan. 370; *Denslow v. Dodendorf*, 47 Neb. 328 [citing *Nichols v. Hail*, 5 Neb. 194; *Riddle v. Yates*, 10 Neb. 510; *Daniels v. Tibbets*, 16 Neb. 666; *Stone v. Neeley*, 34 Neb. 81].

But in *Stowers v. Milledge*, 1 Iowa 150, a judgment reciting that "it is believed that the plaintiff is entitled to seventy-five dollars debt, and cost of suit, which is taxed as follows," etc., was sufficient, as irregularity and deficiency in form are viewed with liberality, though carelessness on the part of inferior courts in making their entries should not be encouraged.

2. *Montgomery v. Superior Ct.*, 68 Cal. 407; *Stemmons v. Carey*, 57 Mo. 222; *Hazeltine v. Reusch*, 51 Mo. 50; *Morse v. Brownfield*, 27 Mo. 224; *Rutherford v. Wim*, 3 Mo. 14; *Porter v.*

Parker, 4 Dakota 397, under a provision of the code that the justice must enter the verdict of the jury when received, and holding that when this is done the justice has no further judicial power or discretion in the matter; *Stephens v. Santee*, 49 N. Y. 35, wherein it is said: "The law made a judgment for this amount [the amount of the verdict] the only one that could be rendered by the justice. * * * His judicial functions in respect to the case were terminated. An entry preceding the statement of this amount, of judgment for plaintiff, would in no respect be the exercise of judicial power, but the performance of a mere ministerial act. To hold that the omission to make this entry rendered the entire proceedings in the action a nullity, would be sacrificing substance to form and giving too much weight to technicality. This entry might have been made by the justice at any time, and should, for the purpose of sustaining the proceedings, be regarded as made. In the exercise of judicial functions the case is entirely different. When the case is tried by the justice without a jury, he is judicially to determine the amount of the recovery, and he must do this and make an entry thereof, as required by law, within the time fixed by statute for that purpose. After the expiration of this time his judicial functions in respect to the matter cease and he can do nothing further in the premises." See also *Turner v. Harrison*, 43 Ark. 233; and see *Gaines v. Betts*, 2 Dougl. (Mich.) 98; *Overall v. Pero*, 7 Mich. 315; *Felter v. Mulliner*, 2 Johns. (N. Y.) 181; *Hess v. Beckman*, 11 Johns. (N. Y.) 457.

Application of the Rule. — In *Arkansas* it was held that a judgment could be entered *nunc pro tunc* in November, 1849, upon a verdict rendered in August, 1848, and an appeal prosecuted from such judgment, one of the reasons inducing the decision being, as it appears, that no appeal would lie from a verdict without the entry of a judgment.

though in other cases it has been held otherwise.¹

c. PRELIMINARY PAYMENT OF FEES. — See article APPEALS, vol. 2, p. 318.

d. IN CRIMINAL CASES. — The right to appeal from a justice's judgment in criminal cases is determinable as in other cases from the statutes in force, either expressly conferring the right² or allowing appeals generally in criminal cases,³ or under the constitutional provision guaranteeing the right of trial by jury,⁴ subject, however, to reasonable regulations as to the mode in which the appeal shall be entered and prosecuted.⁵

ment. *Adams v. Thompson*, 12 Ark. 670. In a later case, however, it was held that a verdict was equivalent to a judgment. *Turner v. Harrison*, 43 Ark. 233, which case was based upon the statute providing that an appeal should not be dismissed for failure of the justice to enter judgment. While in the latter case the former is adverted to in language which would seem to indicate that the two cases are not at variance, it is apprehended that they announce contrary principles.

In *Missouri* it was held that a verdict being equivalent to a judgment, the appeal must be taken within the time prescribed by the statute for taking the appeal, running from the entry of the verdict, and not from the entry of the judgment entered at some time after the verdict. *Rutherford v. Wim*, 3 Mo. 14.

1. *Kimble v. Riggin*, 2 Greene (Iowa) 245; *Bowler v. Palmer*, 2 Gray (Mass.) 553.

2. *Com. v. O'Neil*, 6 Gray (Mass.) 343; *State v. Crogan*, 6 R. I. 40.

3. *Banister v. Wakeman*, 64 Vt. 203; *State v. Little*, 42 Vt. 430.

Statute of General Character. — It has been held that the right to appeal in a criminal case does not exist under a statute general in character defining the duties and jurisdiction of justices in ordinary matters. *Ward v. People*, 13 Ill. 635; *Edwards v. Vandemack*, 13 Ill. 633, which were proceedings for penalties said to be criminal in their character. But under a later statute in *Illinois* it was held that an appeal could be prosecuted from a judgment in such a case, the features which were said to mark the former cases being absent from the proceedings under the later statute. *Partridge v. Snyder*, 78 Ill. 519. See further articles APPEALS, vol. 2, p. 146; PENALTIES AND FORFEITURES.

Costs Against Complaining Witness — Right of Appeal. — Where a statute gave to the justice trying the criminal cause the right to adjudge the costs against the complaining witness when it should appear to him that there was no reasonable ground for the prosecution and that it was maliciously entered, but gave no right of appeal to such witness, it was held that no such right existed, because the right of appeal from an inferior to a superior court only exists when it is expressly given by statute. *Heiderer v. People*, 2 Colo. 672, citing *Edwards v. Vandemack*, 13 Ill. 633, *supra*.

4. Constitutional Right — Trial by Jury. — In *Johnson's Case*, 1 Mc. 230, it was held that the constitutional provision that "in all criminal prosecutions the accused shall have a right * * * to have a speedy, public, and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity," places the right of appeal from judgments of justices of the peace in criminal cases upon a more durable basis than the pleasure of the legislature; that in order to give effect to this provision the accused must of necessity be entitled to an appeal from the sentence of the justice who tries without the intervention of a jury to the Circuit Court of Common Pleas, where a trial by jury may be had.

5. *Com. v. Whitney*, 108 Mass. 5.

Entry of Appeal in Criminal Cases. — Where a justice refused to furnish to a defendant in a criminal case copies for the purpose of entering his appeal unless the justice's fees were paid therefor, as provided by law, it was held that, notwithstanding the right secured to the defendant by organic law to a speedy trial by an impartial jury, the legislature may regulate the mode and manner of its enjoyment, if it does not impair the right itself, and that this

Statutes in Civil Cases Inapplicable. — Statutes regulating appeals in civil cases have been held to be inapplicable to criminal prosecutions,¹ although where the statutes applicable to civil and criminal proceedings are similar, decisions in respect to civil proceedings might be held to govern like questions arising under the criminal statute.²

3. Time for Taking an Appeal — a. IN GENERAL. — The time for taking an appeal depends entirely upon the statute. Such statutory provisions are various, but they must generally be complied with, and in order to perfect the appeal it must be taken within the time so fixed.³

was a reasonable regulation with which the defendant must comply. *In re Marron*, 60 Vt. 199.

1. *State v. Kunbert*, 14 Ind. 374; *State v. Epperson*, 4 Mo. 90; *State v. Anderson*, 84 Mo. 524; *De Soto v. Merciel*, 53 Mo. App. 57; *Cox v. State*, 9 Mo. 181; *Thomas v. State*, 10 Mo. 235; *Tyler v. State*, 63 Vt. 300.

2. *State v. White*, 41 N. H. 196.

3. *Arkansas*. — *Garrison v. Nelson*, 30 Ark. 394; *O'Bannon v. Ragan*, 30 Ark. 181.

Florida. — *State v. Walker*, 32 Fla. 431.

Georgia. — *Norrell v. Morrison*, 99 Ga. 317; *Huzza v. Clark*, (Ga. 1897) 27 S. E. Rep. 677.

Iowa. — *McBrearty v. Dyer*, 6 Iowa 528.

Massachusetts. — *Gardner v. Dudley*, 12 Gray (Mass.) 430.

Michigan. — *Franks v. Smith*, 45 Mich. 326; *Dale v. Lavigne*, 31 Mich. 149.

Mississippi. — *Pollard v. Parish*, 23 Miss. 573.

Missouri. — *Cason v. Tate*, 8 Mo. 45; *Ewing v. Donnelly*, 20 Mo. App. 6; *Moore v. Damon*, 4 Mo. App. 111; *McQuoid v. Lamb*, 19 Mo. App. 153; *Robinson v. Walker*, 45 Mo. 117.

New Jersey. — *Lear v. Budd*, 56 N. J. L. 457; *Miller v. Martin*, 8 N. J. L. 201.

New York. — *Wait v. Van Allen*, 22 N. Y. 319; *De la Figanierie v. Jackson*, 4 E. D. Smith (N. Y.) 477; *People v. Eldridge*, 7 How. Pr. (N. Y.) 112.

North Carolina. — *Council v. Monroe*, 7 Jones L. (N. Car.) 396.

South Dakota. — *Rudolph v. Herman*, 2 S. Dak. 399.

Tennessee. — *Park v. Bybee*, 1 Baxt. (Tenn.) 267; *Gilbert v. Driver*, 3 Head (Tenn.) 463.

After Final Adjournment. — In *Connecticut* it was held that no appeal could

be taken after a final adjournment of the justice's court. *Jackson v. New Milford Toll Bridge, etc., Co.*, 34 Conn. 266.

With Reference to Term of Appellate Court. — In *Rhode Island*, under one section of a statute providing that an appeal be allowed to the next term of the Court of Common Pleas provided it shall be perfected within five days after the rendition of the judgment, and another section of the statute providing that the appellant shall file his reasons of appeal in the court appealed to at least ten days before the sitting of such court, if the next term of the appellate court begins less than ten days from the rendition of the judgment the appeal is taken to the next succeeding term, these two sections being construed together. *McCaffrey v. Doyle*, 14 R. I. 313.

In *Massachusetts*, where the statute prescribed that an appeal might be taken "at any time within twenty-four hours after the entry of the judgment. * * * to the Court of Common Pleas than next to be held in the same county," it was held that the appeal must be to the court held next after the entry of the judgment, although before the taking of the appeal. *McIniffe v. Wheelock*, 1 Gray (Mass.) 600.

Evidence from Record. — As against a motion to dismiss an appeal because not entered in time it must affirmatively appear to have been so entered. *Huzza v. Clarke*, (Ga. 1897) 27 S. E. Rep. 677.

In *Park v. Bybee*, 1 Baxt. (Tenn.) 267, a motion was made to dismiss because the appeal appeared to have been taken after the time allowed by the statute, and after the motion was sustained another motion was made to reinstate the appeal on the affidavit of the justice of the peace that the appeal

Waiver of Defect by Appearance. — It has been sometimes held, however, that a delay beyond the statutory time in perfecting an appeal is an irregularity which may be waived by appearance in the appellate court without objection.¹

b. REMEDY FOR EXCUSABLE DELAY. — If a party against whom a judgment is rendered is prevented from taking an appeal within the prescribed time, he may often, under other and remedial provisions, have relief by an enlargement of the time, where the delay was occasioned by no fault of his own, as upon an application to a court designated by the statute and showing good cause for the delay,² or by

had been granted within the time allowed by law, according to the best of his information and belief, which motion was denied. In speaking of the sufficiency of this affidavit the court said: "If there had been an application to amend, it is doubtful whether this statement ought to have been held sufficient to overturn the entries made at the time of the transaction; but as no application was made to amend the justice's record, nor any facts given in support of the affidavit, explanatory of how the mistake in the date of bond and appeal occurred, we think this court cannot say the court below erred in dismissing the case."

Where the entry on the docket of the justice shows that the appeal was taken in time, an indorsement by the justice on the back of the bond of another and different date as the date of the filing of the bond, which indorsement the justice was not required by law to make, will not control in determining whether or not the appeal was taken in time, but the entry on the docket which the justice was required to make will be decisive. *Moore v. Manser*, 9 Iowa 47; *State v. Christensen*, 21 Minn. 500.

Presumption in Supreme Court. — If the record does not show when an appeal from a justice's judgment was taken, and no objection is made in the Circuit Court on such appeal that it was not taken in time, it will be presumed in the Supreme Court to have been taken in time. *Maxam v. Wood*, 4 Blackf. (Ind.) 297.

In Criminal Cases. — The rule being fixed irrespective of the provisions controlling appeals in civil cases, it was held that the appeal must be taken at once, a strict and literal construction of the statute being held necessary in view of the fact that the defendant

stood committed from the moment of the entry of judgment of conviction, and that if an appeal was to be taken it was the duty of the justice to recognize the witnesses to appear at the appellate term of the next court before they had dispersed. *De Soto v. Merciel*, 53 Mo. App. 59; *State v. Anderson*, 84 Mo. 524; *State v. Epperson*, 4 Mo. 90; *Cox v. State*, 9 Mo. 181; *Thomas v. State*, 10 Mo. 235.

1. *Kemper v. Waverly*, 81 Ill. 278; *Pearce v. Swan*, 2 Ill. 266; *Mitchell v. Jacobs*, 17 Ill. 235; *Chicago Paint, etc., Co. v. Hollahan*, 67 Ill. App. 601; *Wilgus v. Gettings*, 19 Iowa 82; *McCombs v. Johnson*, 47 Mich. 592; *Sleck v. King*, 3 Pa. St. 211.

Enlargement of Time by Stipulation. — In *Climie v. Odell*, 20 Mich. 12, it was held that "when a statute fixes absolutely the time within which an appeal must be taken, the appellate court has no power to enlarge it; and its jurisdiction to entertain the appeal depends upon a compliance with the statute. But when, as in this instance, the statute gives the appellate court power, under certain circumstances, to authorize the appeal, the parties may, by stipulation, agree to extend the time beyond the period fixed by the statute."

2. *Pruitt v. Shelbyville Lateral Branch R. Co.*, 2 Ind. 530; *Tucker v. Makepeace*, 14 Ind. 186; *Brooks v. Harris*, 42 Ind. 177; *Baragree v. Cronkhite*, 33 Ind. 192; *Welch v. Watts*, 9 Ind. 450; *McCaslin v. Camp*, 26 Mich. 390; *Hall v. Howard*, 39 Mich. 219; *Capwell v. Baxter*, 58 Mich. 571; *Draper v. Tooker*, 16 Mich. 74; *Goldhamer v. Wayne Circuit Judge*, 107 Mich. 259; *Sundet v. Steenerson*, (Minn. 1897) 72 N. W. Rep. 569; *Lacy v. Cox*, 15 N. J. L. 469; *Debert v. Smith*, 7 Kulp (Pa.) 307; *Finney v. Hill*, 11 Vt. 233; *Home Sewing*

petition for certiorari.¹

Sufficiency of Cause — Equitable Relief. — It has been held that the good cause for not taking an appeal within the time prescribed must be such as would authorize a court of equity to enjoin the judgment, if it had been rendered in a court of record, until a new trial of the case could be had; such, for instance, as fraud, accident, mistake, or surprise, or some adventitious circumstance beyond the control of the party.²

c. COMPUTATION OF TIME. — The time within which an appeal from the judgment of a justice of the peace should be taken does not begin to be computed until the judgment has received the final action of the court;³ and the day of the rendition of the

Mach. Co. v. Flöding, 27 W. Va. 540; *Powell v. Miller*, 41 W. Va. 371; *Hubbard v. Yocum*, 30 W. Va. 740.

Power Not Discretionary. — Such statute cannot be construed as giving to the court a discretionary power with respect to dilatory appeals. *Draper v. Tooker*, 16 Mich. 74; *Goldhamer v. Wayne Circuit Judge*, 107 Mich. 259; *Combs v. Wilber*, 99 Mich. 234.

Remedy Exclusive. — A party who has not sought this relief cannot enjoin proceedings upon the judgment. *Baragree v. Cronkhite*, 33 Ind. 192.

If, however, the appellate court can entertain no jurisdiction where the statutory recognizance is not entered into, but another method of review is provided for those who have lost the right of appeal, as by writ of review, such method is exclusive. *Tibbetts v. Handy*, 145 Mass. 537.

Application in Writing. — An application to the Circuit Court, or judge thereof in vacation, under the code, for an appeal after the expiration of the time for taking the appeal, must be in writing, accompanied by the proofs in writing, including the appellant's own affidavit. *Hubbard v. Yocum*, 30 W. Va. 740.

Notice. — There must be notice of the application for leave to appeal. *McCaslin v. Camp*, 26 Mich. 390.

A notice served under a statute passed after a mandamus was issued to set aside a former order granting an appeal is not good, such statute not being retroactive. *Danville Stove, etc., Co. v. Adsit*, 88 Mich. 244.

Necessity of Perfecting Appeal After Leave Granted. — After leave granted under the statute to appeal after the expiration of the time prescribed, the party must perfect his appeal promptly, and if he fails to do so until the case is

called for trial the appeal may be dismissed. *Davis v. Luark*, 34 Ind. 403.

1. Thus in *Illinois* it was said that certiorari would lie where appeal would lie, except that the former was proper only when the party accounts for his failure to take an appeal or his inability to do so, showing that injustice has been done and in what such injustice consists. *Yunt v. Brown*, 2 Ill. 264; *Edwards v. Vandemack*, 13 Ill. 634. See article CERTIORARI, vol. 4, p. 59 *et seq.*

Void Judgment — Excuse for Delay Unnecessary. — If a judgment of the justice is void as having been rendered without jurisdiction or in excess of jurisdiction, certiorari is proper without showing cause why the appeal was not taken. *Houser v. McKennon*, 1 Baxt. (Tenn.) 287; *Harris v. Hadden*, 7 Lea (Tenn.) 217.

2. *Hubbard v. Yocum*, 30 W. Va. 740. See also *Smith v. D'Lashmutt*, 4 Mo. 103, indicating the sufficiency of a bill in equity to obtain such relief.

3. *Fenton v. Russell*, 6 Mo. 143, wherein a judgment of nonsuit was set aside and a new trial granted, and in the latter trial another judgment was rendered, and it was held that the appeal would lie from the last judgment. To the same effect see *Read v. Dickinson*, 2 Ashm. (Pa.) 274; *Moore v. Jones*, 13 Ala. 301, wherein it is said that whether the justice was or was not authorized to grant a new trial, "if he entertains a motion for that purpose, or improperly sets his judgment aside and afterwards reinstates it, in either case it is competent to execute a bond for an appeal within the time prescribed by the statute, after the final determination of the justice is made known. For then and not sooner does the officer rendering the judgment consider it final."

judgment is generally excluded in the computation of the time allowed for such appeal.¹

4. Notice of Appeal — a. NECESSITY OF NOTICE — In the Absence of Statute. — Where no statute requires a notice of appeal by an unsuccessful party in a judgment before a justice of the peace, it has been held that no such notice is necessary in order to confer jurisdiction upon the appellate court.²

Under Statute. — But under the terms of statutes often controlling, it may be necessary, in order to effectuate an appeal, that a notice of appeal be given,³ sometimes unless the appeal is taken on the

1. *Swisher v. Hine*, 10 Ark. 497; *Noble v. Murphy*, 27 Ind. 502; *Ex p. Dean*, 2 Cow. (N. Y.) 605; *Browne v. Browne*, 3 S. & R. (Pa.) 496; *Carson v. Love*, 8 Verg. (Tenn.) 215.

Sunday Excluded in Computing Time. — *Monell v. Terwilliger*, 8 Neb. 360; *Gilbert v. Driver*, 3 Head (Tenn.) 463; *Buckstaff v. Hanville*, 14 Wis. 77. See also *Dorsey v. Pike*, 46 Hun (N. Y.) 112. *Contra*, *Dale v. Lavigne*, 31 Mich. 149; *Patchin v. Bonsack*, 52 Mo. 431.

2. *McBrien v. Riley*, 38 Neb. 561.

Disposition of Appeal Without Notice. — It has been said that the practice requiring the appellee to take notice of the appeal at his peril should go no further at most than where the appellant has done nothing to put the other off his guard. *Apgar v. Degraw*, 23 N. J. L. 523, in which case it appeared that the plaintiff before the justice paid the judgment rendered against him, thereby indicating his intention not to appeal, though subsequently he did appeal and recovered a judgment in the appellate court. Upon certiorari the court of last resort reversed the judgment because the defendant had had no notice or opportunity to defend, and cited with approval *Woodruff v. Carns*, 3 N. J. L. 98. In this last case it did not appear that the party had had no notice, and therefore a reversal was refused, but the court said: "For as upon the appeal the cause is to be heard upon its merits, it is essential to the administration of justice that the appellee should not only have notice, but also time to bring in his witnesses and other evidence. I do not recollect that the act expressly requires this, but it is a dictate of natural justice that a man should not be condemned without a hearing. And if the fact had been so, and had been satisfactorily brought up before this court, I should have been inclined to reverse on that account."

See also *Dooley v. Foster*, 5 Kan. 269. And see *infra*, IV. 11. b. *When Appellate Court May Proceed*; c. *Prosecution of Appeal*.

3. *California*. — *Coker v. Superior Ct.*, 58 Cal. 177; *Dutertre v. Superior Ct.*, 84 Cal. 536; *McKeen v. Naughton*, 88 Cal. 465; *McCracken v. Superior Ct.*, 86 Cal. 77.

Iowa. — *State v. Leyden*, 13 Iowa 433.

Minnesota. — *Marsile v. Milwaukee, etc., R. Co.*, 23 Minn. 4.

Missouri. — *Newberry v. Melton*, 3 Mo. 121.

New York. — *Young v. Whitcomb*, 46 Barb. (N. Y.) 615; *Dorsey v. Pike*, 46 Hun (N. Y.) 112; *O'Reilly v. Block*, (Ulster County Ct.) 23 N. Y. Supp. 670; *Kimball v. Rich*, (Buffalo Super. Ct.) 3 N. Y. Supp. 248; *Delong v. Brainerd*, 1 Thomp. & C. (N. Y.) 1; *Metcalf v. Garlinghouse*, 40 How. Pr. (N. Y. Supreme Ct.) 50.

Oregon. — *Strang v. Keith*, 1 Oregon 312; *Brown v. Jessup*, 19 Oregon 288.

Wisconsin. — *Ketchum v. Freeman*, 24 Wis. 296; *Evangelical Lutheran St. Peter's Gemeinde v. Koehler*, 59 Wis. 652.

In Particular Cases an appeal may be denied except upon application with notice, in which case such notice as is prescribed must be given. *J. P. Scranton Lumber Co. v. Donovan*, (Mich. 1897) 70 N. W. Rep. 145.

Filing of Bond Without Notice. — Where a notice is required by statute, it is not dispensed with by the mere filing of an appeal bond. *State v. Leyden*, 13 Iowa 433.

Order of Filing. — Where the statute did not in terms require that the notice of appeal should be first filed, an appeal was held to be sufficient when the undertaking was filed with the justice before the notice, but both notice and undertaking were filed with the justice within the time after the entry of the

day when the judgment is rendered.¹

Effect of Failure of Compliance. — The strictness of the requirement of notice and the effect of a failure to comply therewith depend upon the nature of the provisions and the constructions given to them. Thus sometimes such a statute creates a jurisdictional prerequisite,² while again the action of the appellate court in the absence of a notice of appeal may be of no effect unless the party upon whom the law requires such notice to be served voluntarily appears and submits himself to the jurisdiction;³ or the appellate court may acquire jurisdiction, but the failure to comply with the statute may effect some forfeiture of advantage on the part of the appellant, which may likewise be waived by an appearance by the appellee.⁴ It is also held that the appellate court may, in its

judgment allowed by the statute for taking an appeal. *Dutertre v. Superior Ct.*, 84 Cal. 535; *Brown v. Jessup*, 19 Oregon 288.

On Rendition of Judgment. — Notice of appeal may be served as soon as the judgment is rendered, and the appellant need not wait until the judgment is docketed by the clerk. *Griswold v. Van Deusen*, 2 E. D. Smith (N. Y.) 178.

1. *McCormick v. Bishop*, 3 Greene (Iowa) 100; *Wolff v. Coffin*, 46 Mo. App. 190; *Crosby v. Clary*, 43 Mo. App. 222; *Brownsville v. Rembert*, 63 Mo. 393.

Notice in Presence of Parties Before Justice — Oral Notice. — When notice of appeal in a justice's court is given, and the adverse party is present in person or by attorney, the appellant is not required to give any notice either to the justice or to the appellee. *Marion v. Tilley*, 119 N. Car. 473; *State v. Johnson*, 109 N. Car. 852; *Richardson v. Debnam*, 75 N. Car. 390. And in such a case an oral notice is sufficient. *Richardson v. Debnam*, 75 N. Car. 390.

Where it appeared that upon an adjournment of the case before a justice, the defendant, in the presence of the plaintiff, gave notice to the justice that if neither the defendant nor his attorney could be present on the adjourned day and judgment should be rendered in favor of the plaintiff, he requested the justice to enter a prayer for an appeal and the granting of the same, this was not sufficient compliance with the requirements of the statute where it did not appear that the other party heard this notice. *Green v. Hobgood*, 74 N. Car. 234.

2. *Coker v. Superior Ct.*, 58 Cal. 177; *Dutertre v. Superior Ct.*, 84 Cal. 536; *McKeen v. Naughton*, 88 Cal. 465;

Marsile v. Milwaukee, etc., R. Co., 23 Minn. 4; *Larrabee v. Morrison*, 15 Minn. 196; *Strang v. Keith*, 1 Oregon 312; *Evangelical Lutheran St. Peter's Gemeinde v. Koehler*, 59 Wis. 652.

Dismissal. — In the absence of notice of appeal, it has been held that the Circuit Court acquires no jurisdiction even for the purpose of rendering a judgment for costs on dismissal. *Ketchum v. Freeman*, 24 Wis. 296.

3. *Matthews v. Superior Ct.*, 70 Cal. 528; *McQuillan v. Windsor*, 6 Iowa 396; *McCormick v. Bishop*, 3 Greene (Iowa) 100.

4. *Martin v. Higgins*, 23 Ala. 775; *Bond v. Davis*, 37 Iowa 163; *Slater v. Steamboat Convoy*, 10 Mo. 513; *Parmerlee v. Williams*, 71 Mo. 410; *McCabe v. Lecompte*, 15 Mo. 78. See also *Wolff v. Coffin*, 46 Mo. App. 190; *Crosby v. Clary*, 43 Mo. App. 222; *Brownsville v. Rembert*, 63 Mo. 393; *Riddle v. Gillespie*, 67 Mo. 627. And see *infra*, IV. 11. b. *When Appellate Court May Proceed.*

In *Bond v. Davis*, 37 Iowa 163, it was held that if the notice is not served as prescribed by the statute, the suit may, on motion of the appellee, be continued at the cost of the appellant, but that the statute having fixed this consequence of a failure to serve the notice at a proper time, it amounts to an implied negation of other consequences, under the maxim *expressio unius est exclusio alterius*, and that it is not ground for dismissing the appeal that the notice of appeal is not filed within the time prescribed.

Special Appearance. — An appearance for the purpose of moving for an affirmation of the judgment of the justice will not waive a failure of the appellant to

discretion, dismiss an appeal for want of notice or allow further time in which notice may be given.¹

b. SUFFICIENCY OF NOTICE—(1) *In General*.—The Object of a Notice of Appeal is to advise the adverse party that the party aggrieved by the judgment intends to appeal therefrom; and this purpose is accomplished when the appellate court can ascertain from an inspection of the notice of what particular judgment the appellant complains.²

A Mere Inaccuracy which does not defeat the purpose of the notice will not invalidate it.³

Under Statute Designating Character of Notice.—The statutes not only provide for the service of notice of appeal, but also designate the character of such notice; and therefore the contents of the notice of appeal are, like the necessity for the notice, dependent upon the terms of the statute.⁴

give the notice of appeal. *Rowley v. Hinds*, 50 Mo. 403.

The Appellant Cannot Object that the notice has not been given to the appellee. *Martin v. Higgins*, 23 Ala. 775.

Acceptance of Notice to Take Depositions.—In *Gluck v. Diebold*, 1 Mo. App. 265, it was held that acknowledgment of notice to take depositions was not a waiver of notice of appeal.

1. *Marsh v. Cohen*, 68 N. Car. 283; *State v. Johnson*, 109 N. Car. 852; *Chester, etc., R. Co. v. Richardson*, 82 N. Car. 344.

But it seems that the appellate court cannot proceed unless such notice is given. *Marion v. Tilley*, 119 N. Car. 473; *State v. Johnson*, 109 N. Car. 852.

2. *Price v. Van Caneghan*, 5 Cal. 124; *Lancaster v. McDonald*, 14 Oregon 264; *Allen v. Byerley*, (Oregon 1897) 48 Pac. Rep. 474; *McKilver v. Manchester*, 1 Wash. Ter. 256.

The Notice Must Identify the Judgment from which an appeal is taken. It may not be necessary in all cases to state the amount of the judgment, but if stated, it must be stated correctly. *Chipman v. Bronson*, 3 Oregon 320.

Date.—It is not necessary that the notice should give the day of the rendition of the judgment when it otherwise correctly describes the judgment. *Allen v. Byerley*, (Oregon 1897) 48 Pac. Rep. 474 [citing *Moorhouse v. Donica*, 13 Oregon 435; *State v. Hanlon*, (Oregon 1897) 48 Pac. Rep. 353]; *Holschen Coal Co. v. Missouri Pac. R. Co.*, 48 Mo. App. 578.

3. *Hills v. Miles*, 13 Wis. 625.

4. *Identifying Cause*.—Notice of appeal is sufficient when it identifies the

party appealing and the cause in which the appeal from the judgment is taken. *Noall v. Halonen*, 84 Wis. 403; *Filer, etc., Co. v. Sohns*, 63 Wis. 118; *Schweppe v. Wellauer*, 76 Wis. 19; *Friemark v. Rosenkrans*, 81 Wis. 359; *Hender v. Ring*, 90 Wis. 358. And it may be sufficient, though inaccurate in some particular, as where the amount of costs is not correctly stated, *Noall v. Halonen*, 84 Wis. 402; or as where a judgment for \$162.02 damages and costs was described as for \$162.02 damages and \$5.50 costs; or as where, in an action of replevin, the issues were found in favor of the plaintiff, and the value of the property was found at forty-five dollars and damages at six cents, and costs were taxed at \$12.31, and the notice of appeal gave the amount of the costs and damages correctly, but did not mention the value of the property or the order for its return, *Hender v. Ring*, 90 Wis. 358. See also *Hills v. Miles*, 13 Wis. 625. But, on the other hand, it is said that these cases come far short of holding that a notice of appeal which does not give the date of the judgment, or describe it in any way other than that it is a judgment rendered in the action in a year specified, is a sufficient description. *Clune v. Wright*, (Wis. 1897) 71 N. W. Rep. 1041, holding that such a description was insufficient.

In *Holschen Coal Co. v. Missouri Pac. R. Co.*, 48 Mo. App. 581, the objection that a notice of appeal was void for insufficiency because it failed to state in whose favor the judgment was rendered, the nature of the suit, the amount of the suit, or the date when

(2) *Amendment of Notice.* — It is within the power of the appellate court to permit an amendment of the notice of appeal, and if such notice demands a new trial when the appellant is not entitled thereto, the amendment may properly be granted,¹ or the appeal may be heard as if no demand for a new trial had been made in the notice of appeal.²

the judgment was rendered, was held to be without merit.

Where the amount of the judgment is omitted, the name of the justice is not given, and nothing appears upon the face of the notice to indicate in what county or by which of the many courts of justices of the peace in the state the judgment was rendered, it is wholly defective in respect to the identification of the subject-matter of the appeal, and is ineffectual for any purpose. *Pettingill v. Donnelly*, 27 Minn. 332.

In *Hammond v. Kroff*, 36 Mo. App. 118, a notice of appeal was held to be insufficient because it described the judgment as of date June 21, 1887, whereas the judgment from which the appeal was taken was rendered June 4, 1887, and because there was an actual misdescription of the judgment.

A Misnomer of the Defendant in the title of the action in a notice of appeal will invalidate it. *Widner v. Wood*, 19 Wis. 190. See also *McGinniss, etc., Hardware Co. v. Taylor*, 22 Mo. App. 513.

Notices Served on Appellee and Justice — Variance. — Variances between the notices served upon the justice and upon the appellee will not be material, the opposite party not being misled and no injustice having been done, although it is the better practice that these notices should be exact copies of each other. *McKilver v. Manchester*, 1 Wash. Ter. 255.

Aider of Defective Notice. — Where a notice of appeal is fatally defective because it does not sufficiently identify the judgment, it cannot be aided by proof of extrinsic facts showing the intention of the party, nor can the defect be cured by amendment after the time for bringing the appeal has expired. *Pettingill v. Donnelly*, 27 Minn. 332.

The failure of the notice of appeal to specify to what court the appeal is taken is aided by an appeal bond showing the fact. *Ex p. Clarke*, 3 Cow. (N. Y.) 379.

Waiver of Insufficiency by Appearance.

— Insufficiency in a notice of appeal is held to be waived by an appearance and trial upon the merits without objection. *Matthews v. Superior Ct.*, 70 Cal. 527.

On the other hand, it is held that a motion to dismiss for mere irregularities must be made in the court to which the appeal is taken, and will not thereafter be considered on a general appeal from a judgment rendered in the intermediate appellate court. *Nye v. Ayres*, 1 E. D. Smith (N. Y.) 532; *Cole v. Bell*, 48 Barb. (N. Y.) 194; *Armstrong v. Smith*, 44 Barb. (N. Y.) 120.

Waiver by Acceptance — Formal Defects.

— It has been held that formal defects in the notice are waived by accepting service of notice. *Holschen Coal Co. v. Missouri Pac. R. Co.*, 48 Mo. App. 582.

1. *McCarthy v. Crowley*, (Supreme Ct.) 5 N. Y. Supp. 676; *O'Reilly v. Black*, (Ulster County Ct.) 23 N. Y. Supp. 670. And, on the other hand, it has been held that the omission to demand a new trial may be corrected by amendment. *Chatfield v. Reynolds*, 18 Civ. Pro. Rep. (N. Y. Supreme Ct.) 378.

2. *Kimball v. Rich*, (Buffalo Super. Ct.) 3 N. Y. Supp. 248.

Under a statute providing that when the appeal is taken upon questions of law alone, it shall be heard upon a statement of the case, and when taken upon questions of fact or upon both questions of law and fact, the action shall be tried anew in the appellate court, a notice of appeal stating that the defendant appealed from "the whole judgment" was held to be sufficient because it might be readily discovered by looking at the record whether the appeal was upon the law merely or for the purpose of a trial *de novo*. *Price v. Van Caneghan*, 5 Cal. 124.

Surplusage. — Where an appeal in a particular form of action is regulated by a special statute, as where an act respecting forcible entry and unlawful detainer provides that the appellate

(3) *Sufficiency of Form.* — A notice of appeal may be signed by the attorney of the party on whose behalf it is given;¹ it must be signed by some one, either the appellant himself or a person acting for him and under his authority.²

(4) *Sufficiency of Service.* — As stated above, a service of notice of appeal is for the purpose of apprising the party entitled thereto of the taking of the appeal;³ but under some statutory provisions the notice is to be served upon or filed with the justice of the peace in addition to service upon the party.⁴ Various decisions upon the sufficiency of the service have been made which are so entirely dependent upon the statutes under which they were rendered as to make any classification of them under general rules impracticable.⁵

court shall try the case anew on the evidence introduced before it, the fact that the notice of appeal specifies that the appeal is taken on questions of law alone will not invalidate the appeal or vitiate the notice, such words being regarded as surplusage and the law fixing the manner in which the trial must be held. *Zoller v. McDonald*, 23 Cal. 137.

1. *Burrows v. Norton*, 5 Thomp. & C. (N. Y.) 97, 2 Hun (N. Y.) 550; *Hall v. Sawyer*, 47 Barb. (N. Y.) 116; *Morris v. Brewster*, 60 Wis. 229.

2. *Larrabee v. Morrison*, 15 Minn. 196; *Kelly v. Owen*, 63 Wis. 351; *Morris v. Brewster*, 60 Wis. 229; *Evangelical Lutheran St. Peter's Gemeinde v. Koehler*, 59 Wis. 652; *Palmer v. Peterson*, 46 Wis. 402.

Place of Signature. — The signature need not be in any particular place, and it is sufficient if the notice is indorsed with the name of the person giving the notice or that of his attorney. *Burrows v. Norton*, 2 Hun (N. Y.) 550.

Designation as Attorney. — If the attorney signing the notice does not so designate himself, the notice will not be thereby rendered ineffectual. *Rutledge v. Superior Ct.*, 67 Cal. 85.

By a Person Other than Attorney. — In *Hall v. Sawyer*, 47 Barb. (N. Y.) 116, it was held that the fact that a person signing as attorney was not in fact an attorney at law would not invalidate a notice of appeal. But in *Bishop v. Van Vechten*, 10 Abb. N. Cas. (Oneida County Ct.) 220, it was held that such a notice could not be signed by an attorney in fact or agent, because under the new code the notice of appeal is a mandate of the County Court, and the party cannot appear by attorney in

fact, as was formerly the practice; *Hall v. Sawyer*, 47 Barb. (N. Y.) 116, having been decided under the Code of Procedure.

Waiver of Signature by Acceptance. — If the appellee's attorney accepts service of notice of appeal, he thereby waives the necessity of a signature to the notice. *Cella v. Schnairs*, 42 Mo. App. 316.

3. See *supra*, IV. 4. b. (1) *In General*.

4. *State v. Johnson*, 109 N. Car. 854, wherein it is said that the purpose of the service upon the justice of the peace is to notify him to send up the papers, and the purpose of the service upon the party is to notify him to bring up his witnesses for the trial; *Webster v. Hopkins*, 11 How. Pr. (N. Y. Supreme Ct.) 140, holding that the office of the notice on the justice is to require and enable the justice to make up a full and complete return of the entire proceedings and especially (by stating the grounds of appeal) to call his attention to matters which are particularly relied upon to reverse his judgment.

5. *Filing of Notice Before Service of Copy.* — Under the code provision that an appeal in a civil action from a justice of the peace shall be taken "by filing a notice of appeal with the justice and serving a copy on the adverse party or his attorney," etc., it was held that it was necessary for the party seeking to appeal to file a notice with the justice of the peace before serving a copy of it on the adverse party, and that the copy so served should contain a copy of the filing, as otherwise the party making such service could withhold the notice any length of time within the twenty days allowed for taking the appeal, and the adverse party would be compelled by continual inquiry to as-

Proof of Service.—The sufficiency of the proof of service also

certain when the notice was filed with the justice, in order to know when the ten days allowed by another section of the code for filing the transcript would commence to run, which burden is contrary to the spirit of the act. *State v. Superior Ct.*, 17 Wash. 54, *citing* *Erickson v. Erickson*, 11 Wash. 76.

Notice on Party as Adverse Party.—Where husbands are necessary parties, not to the end that they or their property shall be bound by the judgment, but solely that they may be able to aid their wives in their defense, they are not to be regarded as adverse parties to their wives, and therefore it is not necessary that they should be served with notice of appeal as "adverse parties." *Terry v. Superior Ct.*, 110 Cal. 85.

Notice upon Nonresidents.—Under a statute providing that when the appellee does not reside in the county and "has no agent in the suit therein, within the knowledge of the justice, the service may be made by leaving a copy of such notice with the justice," it was held that a notice left with the justice in a case in which the appellees had appeared before the justice by attorney was not a sufficient service, because the justice knew that the appellees were represented by attorneys in all the proceedings before him. *Southard v. Nelson*, 43 Mo. App. 210, *citing* *Bensberg v. Turk*, 40 Mo. App. 227.

In *Daniels v. Rogers*, 36 How. Pr. (Rensselaer County Ct.) 230, it was held that service upon the appellee himself, though a nonresident of the county, and though the service was made in another county than the one in which the judgment was rendered, was good. *Lake v. Kels*, 11 Abb. Pr. N. S. (Schuyler County Ct.) 37.

In *New York*, under section 354 of the Code of Procedure (old code), notice of appeal could be served on the attorney or agent of the respondent in two circumstances, viz.: where the respondent was a nonresident of the county, and where he could not after due diligence be found in the county, and in these circumstances only when such attorney or agent was a resident of the county in which the cause was tried. Section 354 of said code, allowing the service to be made by filing a notice with the clerk of the appellate

court where the respondent was a nonresident, was held to be permissive only, from which it would seem that the intention of the section was to leave it to the option of the appellant whether he would serve the notice on the respondent personally, regardless of his place of residence, or in case of non-residence accept the privilege granted by such permissive clause. *Lake v. Kels*, 11 Abb. Pr. N. S. (Schuyler County Ct.) 39. See also *Loescher v. Nordmeyer*, 3 Abb. Pr. (N. Y. Supreme Ct.) 244.

Under section 3048 of the New York Code Civ. Pro., which is in part section 354 of the old Code of Procedure, the service of notice upon an attorney is not good if the respondent is a resident of the county in which the judgment is rendered; but it was held that permission ought to be given to serve the notice upon the respondent under the second subdivision of the above section. *Andrews v. Snyder*, 6 Civ. Pro. Rep. (Onondaga County Ct.) 333. But see *Bennett v. Kenyon*, (Supreme Ct.) 5 N. Y. St. Rep. 496, where a motion to set aside a judgment on the ground that notice of appeal had not been served was denied, it appearing that at the close of the trial before the justice, the plaintiff's attorney announced that the plaintiff would appeal, and the defendant there told the attorney who represented him before the justice to attend to the matter if an appeal should be taken, and no objection was raised to any further notice of appeal until after the judgment in the appellate court.

Notice upon Attorney under General Law.—In *Welton v. Garibaldi*, 6 Cal. 245, it was held that a notice of appeal might be served upon the attorney of the appellee under the general law regulating appeals.

In *Oregon*, under the statute requiring notice to be served on the adverse party, it is held that a notice of appeal may be served either upon the adverse party or upon his attorney, if such attorney is a resident of the county in which the trial was had. *Hughes v. Clemens*, 28 Oregon 440, *citing* *Carr v. Hurd*, 3 Oregon 160; *Butler v. Smith*, 20 Oregon 126; *Lewis, etc., Printing Co. v. Reeves*, 26 Oregon 445; and further holding that if the transcript does not disclose that the attorney is not a nonresident, it will be presumed that

depends upon the character of service required by the statute.¹

5. Affidavit for Appeal — a. NECESSITY FOR. — In some states it is required by statute, or has at one time or another been required, that in order to perfect an appeal the appellant must file an affidavit, usually termed an affidavit for appeal, which is

he is a resident of the county in which he appeared as counsel.

Notice in Writing. — Where the notice is required to be in writing, it has been held that reading the notice to the appellee is not a sufficient compliance with the statute. *Tiffin v. Millington*, 3 Mo. 418; *Newberry v. Melton*, 3 Mo. 121.

Service by Unauthorized Officer. — Where the statute provides by whom the notice of appeal may be served, a service by an officer not so authorized by the statute is bad. *Tiffin v. Millington*, 3 Mo. 419.

Notice Served by Mail. — Under section 3047 of the *New York Code Civ. Pro.*, providing that service of notice of appeal upon the justice must be made by delivery to him personally or to his clerk, but that if the justice is dead, or if, after reasonable diligence, neither he nor his clerk can be found within the county, service of the notice upon the justice may be made by delivering it to the clerk of the appellate court, it was held that the notice could be sufficiently served in compliance with this act by sending it to the justice by registered letter. *Mitchell v. Watkins*, 21 N. Y. App. Div. 285.

1. Notice by Agent or Attorney. — Where the statute permits a notice to be made by the party or some one by him authorized, and does not require proof of the authority to constitute a part of the appeal papers, a notice by one professing to act as agent or attorney is sufficient on its face. *Benjamin v. Houston*, 24 Wis. 311.

The Official Return of an Officer authorized to serve a notice of appeal sufficiently establishes such service. *Thomas v. Moore*, 46 Mo. App. 22; *Hansard v. German Ins. Co.*, 62 Mo. App. 146.

Where Justice's Certificate Not Evidence. — The certificate of a justice that the notice of appeal was not signed when served on him is no part of his official return, and is therefore not evidence of the fact, it being a matter as to which a justice is not required to certify. And if a notice appears in the papers, and the opposite party wishes to set up

the fact that he was not served with notice and to move to dismiss the appeal upon that ground, he should move upon an affidavit, so as to give his adversary an opportunity to controvert it; and the extra-official certificate of the justice is not sufficient to sustain an oral motion made when the case has been regularly noticed and reached for trial. *Benjamin v. Houston*, 24 Wis. 311.

Finding in Absence of Entry. — The court may find that notice of appeal had been filed though the paper itself is not marked "filed," and there may be an absence of an entry to that effect in the justice's docket, because the marking is not the exclusively competent evidence of the filing of the paper, and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed. *Williams v. Superior Ct.*, (Cal. 1897) 47 Pac. Rep. 783.

Proof of Service by Affidavit. — Where the record of a case on appeal from a justice's court is silent as to service of notice of appeal, the fact of service may be proved by affidavit, but the affidavit must show that all the requirements of the law to effect service were complied with. *Dalzell v. Superior Ct.*, 67 Cal. 453 [citing *Mendioca v. Orr*, 16 Cal. 368; *Doll v. Smith*, 32 Cal. 476].

Amendment of Proof of Service. — Where the statute required that the original notice of appeal with the proof of service must be filed with the justice within ten days after service was made, it was held that these were jurisdictional prerequisites to the allowance of the appeal, and the proof of service could not be amended after the time prescribed for the filing of the notice with such proof. *Graham v. Conrad*, 66 Minn. 471, holding that proof of service filed with the justice, showing that the service of the notice of appeal had been made upon "Messrs. Empey and Empey, the attorneys for the plaintiff," was not sufficient proof of service on "E. E. Empey," and motion on affidavit of such service and that "E. E. Empey" was a member of the firm of "Empey and Empey" was denied.

in effect an affidavit of merits. It has often been held that such provisions must be complied with¹ within the time prescribed.²

b. BEFORE WHOM MADE. — It is generally provided by statute before whom affidavits may be made, both when the affidavit is made in the state and when it is made out of the state for use in the state;³ and it has been held that if the statute does not designate the officer before whom the affidavit for appeal should be made, it may be made before any officer authorized under the general law to administer oaths.⁴

c. SUFFICIENCY OF AFFIDAVIT — (1) *In General.* — The substance of an affidavit of appeal should conform to the purpose and provision of the statute under which the affidavit is necessary,⁵ though from the cases generally it may be gathered that a sub-

1. *Love v. McAllister*, 42 Ark. 183; *Merrill v. Manees*, 19 Ark. 647; *Hughes v. Jackson*, 48 Ind. 296; *Rawlins County v. Beals*, 2 Kan. App. 313; *Whitehead v. Cole*, 49 Mo. App. 428; *Manion v. State*, 11 Mo. 578; *Spencer v. Beasley*, 48 Mo. App. 97; *Salt Lake City v. Reed*, 1 Utah 183; *Knappe v. Seyler*, 87 Wis. 165; *Pelton v. Blooming Grove*, 3 Wis. 310; *Clark v. Miles*, 2 Chand. (Wis.) 94. See also *supra*, IV. 3. *b.* *Remedy for Excusable Delay.*

The presumption of authority on the part of an attorney signing an affidavit for appeal, to represent the party in that capacity is entirely rebutted by an affidavit of the party that he never appeared in the cause, either personally or by authorized attorney. *Palmer v. Peterson*, 46 Wis. 402.

Judgment Against Several Defendants Jointly. — In *Roberts v. Weiler*, 52 Miss. 299, a judgment was rendered against three defendants jointly. The affidavit for appeal was made by one, and the bond was executed by that one and another of the defendants. It was held that the appeal was good as to those who signed the bond, and the judgment would stand against the defendant who did not join in the appeal. See also *Jopp v. Kegel*, 83 Mich. 50.

2. *Rawlins County v. Beals*, 2 Kan. App. 313; *Parke v. Hunt*, 12 N. J. L. 82; *People v. Hayden*, 4 Wend. (N. Y.) 203. See also general citations in the last note.

Order of Filing. — In *Coleman v. Warne*, 9 N. J. L. 290, it was held that on appeal from the judgment of a justice the affidavit must be filed with the justice at the time of the filing of the appeal bond under the statute, and that

it is not sufficient to present a bond to the justice on one day and an affidavit on a subsequent day, though prior to the next court to which the appeal must be made.

Where an appellant failed to file an affidavit at the time of demanding the appeal, and several terms thereafter procured leave to file a new appeal bond, under the law authorizing the same, and upon such leave tendered the new bond with the affidavit required by law, the appeal was dismissed for want of the affidavit. Filing the affidavit with this last bond was not a compliance with the law. *Parke v. Hunt*, 12 N. J. L. 82.

3. See generally article AFFIDAVITS, vol. 1, p. 309.

4. *Love v. McAllister*, 42 Ark. 183.

Affidavit Before Attorney of Party. — In *Coleman v. Frauenthal*, 46 Ark. 302, it was held that the affidavit could be made before the appellant's attorney acting as a notary.

But where such affidavit could not be made before an attorney in the cause, it was held that a rule *nisi* should be entered and that the appeal should not be peremptorily dismissed. *Bradley v. Andrews*, 51 Mich. 100.

5. See generally *Chappee v. Thomas*, 5 Mich. 53; *Williams v. Cunningham*, 2 Sandf. (N. Y.) 632; *Brown v. Pratt*, 3 Pin. (Wis.) 305; *Brearley v. Warren*, 3 Wis. 397; *Smith v. Scott*, 86 Ind. 350; *Harding v. Mansur*, 13 Ind. 454; *Whitehead v. Cole*, 49 Mo. App. 428.

Affidavit of Merits — Facts Must Be Stated. — Where the statute requires an affidavit of merits, it has been held that the facts must be stated in the affidavit. *Harding v. Mansur*, 13 Ind. 456.

stantial compliance is sufficient rather than that a strict adherence to the letter of the statute is necessary.¹

(2) *Sufficiency in Form — Generally.* — Defects merely in the form of the affidavit are held to be immaterial.²

Signature of Affiant. — Thus, that an affidavit is signed by the affiant after instead of before the officer's jurat,³ and in some cases that it is not signed at all, has been held not to invalidate it.⁴

1. *Substantial Compliance.* — It was at an early day held in *New Jersey* that the oath must be in the terms of the statute, and a strict compliance with the statute was required. *Miller v. Martin*, 8 N. J. L. 201; *Engle v. Blair*, 11 N. J. L. 339. But the rule of strict construction was afterwards relaxed, and it was held that if the affidavit contains the substance of what the act requires it is sufficient and will entitle the plaintiff to his appeal. *Hamilton v. Pidcock*, 18 N. J. L. 435; *New Brunswick Steamboat, etc., Transp. Co. v. Baldwin*, 14 N. J. L. 440; *Snover v. Tinsman*, 38 N. J. L. 210.

In *Wisconsin* it was held that under a statute requiring an affidavit that the appeal is made in good faith, an affidavit that the application for the appeal is made in good faith is not sufficient. *Brown v. Pratt*, 3 Pin. (Wis.) 305; *Brearley v. Warren*, 3 Wis. 397.

Amendment. — The omission of the word "delay" in an affidavit for appeal ought not to be permitted to defeat the object and purpose of the appeal, and an amendment should be allowed in such a case. *White v. Shumate*, 50 Miss. 130. See also *Whitehead v. Cole*, 49 Mo. App. 428.

But in *Indiana* it was held that where under a statute requiring an affidavit of merits, the facts were not set forth, the affidavit was fatally defective and could not be amended, the holding being that in order to perfect the appeal a good affidavit must be filed and within the time prescribed. *Harding v. Mansur*, 13 Ind. 456.

Affidavit on Belief. — Where the affidavit may be made by an attorney, it is sufficient if made on belief, it being held that the legislature could not have intended that where the affidavit is made by an agent or attorney the oath should be positive; and an affidavit in such a case concluding, "as deponent believes from the facts and evidence in the cause, which are fully communicated to him," was held to be sufficient. *Austin v. Strong*, 1 Mich. 259.

2. *Title of Cause.* — If an affidavit substantially conforms to the statute, it is not a fatal objection that it is not entitled of the cause and court in which the suit is brought. *Brewer v. Koenig*, 5 Wis. 156; *Kearney v. Andrews*, 5 Wis. 23, citing *Ex p. Metzler*, 5 Cow. (N. Y.) 287.

Showing Affiant Defendant in Suit. — Technical objections will be disregarded, and an affidavit in the following language: "Augustus F. Cady, of said city and county, being duly sworn, upon oath says that in the case of William Anson v. Augustus F. Cady, tried before Thomas M. Knox, Esq., the appeal is made in good faith and not for the purpose of delay," was upheld over the objection that it did not show that the affiant was the defendant in the suit. *Cady v. Anson*, 4 Wis. 223.

Affidavit by One of Two Appellants. — If an affidavit is made by one of two appellants, it should appear which of them made it, in order that perjury might be assigned on the affidavit if false. *Gaddis v. Durashy*, 13 N. J. L. 324.

Waiver of Objection. — Where one only of two defendants makes the affidavit for appeal, it is held that by going to trial without objection the plaintiff, for whose benefit the appeal affidavit is required, waives the defect. *Elder v. Crabtree*, 59 Ark. 177.

Omission of Date — Amendment. — If the appeal is regular in other respects, the failure of the justice to insert the date of making it is of minor importance, as the justice could have inserted the date at any time before returning it, or the appellate court could permit its insertion as a matter of course. *Weddell v. Seal*, 45 Miss. 733.

3. *Launius v. Cole*, 51 Mo. 147.

4. *Gill v. Ward*, 23 Ark. 16; *Hamilton v. Jennison*, 52 Mich. 409, holding that the defect is waived by appearance. *Contra*, *Schuster v. Haight*, 53 Wis. 290; *Wright v. Fallon*, 47 Wis. 488.

Amendment. — The omission of the

Signature and Jurat of Officer. — It has been held that an appeal is not perfected unless the jurat of the officer to the affidavit for appeal is signed by the officer.¹ But an affidavit may be valid though not signed, or if defectively signed by the officer, as such omission of or defect in the signature may be supplied by amendment.²

6. Bond or Recognizance — *a.* **NECESSITY IN GENERAL.** — The necessity of a bond or recognizance for the purpose of perfecting an appeal depends upon the statute in force.³ If the statute prescribes a bond or recognizance as a condition precedent without which an appeal cannot be perfected, the appellate court will acquire no jurisdiction unless the bond or recognizance is executed,⁴ unless the appeal may be perfected *in*

signature of the affiant may be cured by amendment. *Redman v. Union Pac. R. Co.*, 3 Wyoming 678.

1. *Ladow v. Groom*, 1 Den. (N. Y.) 429. See also *Guy v. Walker*, 35 Ark. 212.

2. *Dickinson v. Simondson*, 25 Mich. 113; *Lederer v. Chicago, etc., R. Co.*, 38 Wis. 244; *Detroit, etc., Plank Road Co. v. Wayne Circuit Judge*, 27 Mich. 303; *Coleman v. Frauenthal*, 46 Ark. 306; *Young v. King*, 33 Ark. 745; *Guy v. Walker*, 35 Ark. 212; *Redman v. Union Pac. R. Co.*, 3 Wyoming 678.

In *Dickinson v. Simondson*, 25 Mich. 113, it seems to be intended that the necessity for the signature of the officer to the jurat exists only when the affidavit is made before an officer other than the justice who rendered the judgment.

Death of Justice — Effect on Omission of Signature. — In *Wisconsin* it was held that if the jurat to the affidavit is not signed, the presumption arises that it was not sworn to, that the defect is fatal and cannot be cured by parol testimony, and that while the justice might have been permitted to sign the jurat and thus perfect the affidavit, the justice having died in the meantime the party was remediless. *Kidder v. Fay*, 60 Wis. 218.

Omission of Title of Officer. — A defect in such signature, as where the title of the officer is omitted, has been held to be immaterial. *Bandy v. Chicago, etc., R. Co.*, 33 Minn. 380.

Necessity of Offer to Perfect. — The appellant, in order to entitle himself to a rule *nisi*, must offer to perfect the affidavit. *Cole v. Wayne Circuit Judge*, 106 Mich. 694. See also *Weddell v. Seal*, 45 Miss. 734.

Compelling Signature. — If the oath is in fact made, and the justice or officer administering it omits to sign the jurat, he may be compelled by a rule of court against him to sign it if the paper is otherwise sufficient as an affidavit. *Guy v. Walker*, 35 Ark. 212.

3. *Bonnett v. Townsend*, 63 Hun (N. Y.) 45.

4. *California*. — *McKeen v. Naughton*, 88 Cal. 462.

Indiana. — *State v. Delano*, 37 Ind. 249.

Iowa. — *Lynch v. Bruner*, 99 Iowa 669.

Kansas. — *Shuster v. Overturf* 42 Kan. 668.

Kentucky. — *Bledsoe v. Cassady*, 2 A. K. Marsh. (Ky.) 460.

Massachusetts. — *Tibbetts v. Handy*, 145 Mass. 537.

Missouri. — *Adams v. Wilson*, 10 Mo. 341; *Slater v. Steamboat Convoy*, 10 Mo. 513.

New Jersey. — *Stevens v. Scudder*, 5 N. J. L. 579.

New York. — *Deuel v. Rust*, 24 Barb. (N. Y.) 438.

Oklahoma. — *Brickner v. Sporleder*, 3 Okla. 561.

Oregon. — *Odell v. Gotfrey*, 13 Oregon 466.

Pennsylvania. — *Germantown, etc., Turnpike Co. v. Naglee*, 9 S. & R. (Pa.) 227.

South Dakota. — *Smith v. Coffin*, (S. Dak. 1897) 70 N. W. Rep. 636; *Rudolph v. Herman*, 2 S. Dak. 399.

Tennessee. — *Park v. Bybee*, 1 Baxt. (Tenn.) 267; *Howard v. Long*, 3 Lea (Tenn.) 207 [overruling *McCarver v. Jenkins*, 2 Heisk. (Tenn.) 629; *Polindexter v. Cannon*, 1 Leg. Rep. 205].

Vermont. — *Bass v. Gay*, 51 Vt. 581; *Webb v. Hopkinson*, 10 Vt. 544.

forma pauperis,¹ or unless a bond may be dispensed with in the case of persons of a particular class.²

Provisions for Benefit of Appellee — Waiver. — The provisions of the statute may be such that the adverse party can waive the necessity of the bond or recognizance, they being merely for the benefit of the obligee.³

In Criminal Prosecutions a bond or recognizance may⁴ or may not be required,⁵ according to the particular statutes in force.⁶

In addition to the cases cited in this section, see generally the article APPEAL BONDS AND UNDERTAKINGS, vol. 1, p. 963.

Statute Applicable to Plaintiff or Defendant Appealing. — Under a statute providing an appeal by any person aggrieved by the judgment of a justice of the peace, upon executing an appeal bond, an unsuccessful plaintiff before a justice must give such bond in order to perfect an appeal. *Quinn v. Adair*, 4 Ala. 316.

Plaintiff Ruled to Costs. — But it has been held that a successful plaintiff before the justice cannot be ruled to costs on appeal under a general statute permitting a plaintiff to be ruled to costs, because on such an appeal the plaintiff below occupies the position of a defendant. *Taylor v. American Brewing Assoc.*, (Tex. Civ. App. 1887) 41 S. W. Rep. 111 [*citing* *Foreman v. Gregory*, 17 Tex. 193; *Pierce v. Pierce*, 21 Tex. 469; *Miller v. Holtz*, 23 Tex. 138; *Texas, etc., R. Co. v. Cook*, 2 Tex. App. Civ. Cas., § 659].

So a Rule of Court providing that if the plaintiff at the commencement of a suit resides out of the county or afterwards removes therefrom the defendant may at any time before the jurors are seated in the box obtain an order to stay proceedings till security for the defendant's costs shall be given does not apply to an appellee, plaintiff before a justice of the peace, on appeal to the court in which such rule prevails. *Ex p. Thomas*, 8 Cow. (N. Y.) 110.

1. *Howard v. Long*, 3 Lea (Tenn.) 207. See the article POOR PERSONS.

2. **Executor or Administrator.** — *Koontz v. Howsare*, 100 Pa. St. 506; *Cannon v. Sheffield*, 59 Ga. 103, wherein it was held that if an appeal is perfected by one against whom a judgment has been rendered as administrator the justice of the peace cannot amend the judgment by making it run against the defendant individually so as to require the execution of an appeal bond.

Counties, School Districts, etc. — An act providing that "the state, counties, * * * school districts, * * * and all public officers, when suing or defending * * * for the benefit of the public, may, in all cases of appeal or writ of error by them from any inferior court to any higher court, prosecute the same without giving bond," etc., is construed as being upon a particular subject and includes appeals by school districts from the judgments of justices of the peace, and a general act requiring appeal bonds in all cases does not operate to repeal the former where there is nothing in the latter which indicates an intention that such a repeal should take effect. *Kelly v. School Directors*, 66 Ill. App. 134.

3. *Dillingham v. Skein*, Hempst. (U. S.) 183; *Ives v. Finch*, 22 Conn. 101; *Colby v. Sawyer*, 76 Me. 545; *Bennett v. Green*, 46 Me. 499; *McKeag v. O'Donnell*, 10 Allen (Mass.) 543; *Farnam v. Davis*, 32 N. H. 302.

Who May Object. — The appellant cannot object to a defective recognizance if the appellee waives the defect. *Jester v. Hopper*, 13 Ark. 43.

4. *Hennies v. People*, 70 Ill. 101; *State v. White*, 41 N. H. 194.

5. *In re Kennedy*, 55 Vt. 1, holding that no bail for appearance is necessary for the purpose of perfecting the appeal, but that the party is entitled to an appeal without bail, in which case he will be held in custody.

6. **Conflict of Statutory Provisions.** — Where a recognizance was required under a chapter of the Revised Statutes relating to the jurisdiction of justices, etc., and under the chapter of the Revised Statutes relating to appeals from justices no such recognizance is required, the provisions of the latter chapter will prevail under the directions of another statute that when different chapters of the Revised Statutes conflict with or contravene each other, the provisions of each chapter shall prevail as to all matters growing

b. TIME OF FILING. — For the same reason that a statute requiring an appeal bond as a condition precedent to the perfecting of an appeal must be strictly complied with, the bond must be executed within the time fixed by statute.¹

c. APPROVAL OF BOND. — Where the appeal is granted upon the execution of an appeal bond as a prerequisite to the perfection of the appeal, the justice is the proper officer to approve the bond,² though he cannot approve an undertaking which the law does not authorize.³ This, however, depends upon the statutory

out of the subject-matter of such chapter. *Schieve v. State*, 17 Wis. 253.

1. See general citations, *supra*, IV. 6. *a. Necessity in General.* See also article APPEAL BONDS AND UNDERTAKINGS, vol. 1, p. 985.

Remedial Statutes. — If there is nothing in the statute which authorizes a justice of the peace to take a bond after the expiration of the time fixed by statute, he has no right to do so, and an appeal cannot be perfected by such action. *Odell v. Gotfrey*, 13 Oregon 466.

But it has been held that where the appeal bond is not executed within the time prescribed, through no fault of the appellant, but because the justice of the peace was not at his office when the appellant presented himself for the purpose of executing the same, it is no ground for the dismissal of the appeal that the bond was executed the day after the expiration of the time limit. *Averett v. Horn*, 19 Ala. 803. See *supra*, IV. 3. *Time for Taking an Appeal.*

2. *Covert v. Shirk*, 58 Ind. 267; *Stull v. Abbott*, 15 N. J. L. 338; *Cummings v. Forsman*, 6 Pa. St. 194; *State v. Wilson*, 87 Tenn. 693. See also *Wood v. Estes*, 33 Me. 578, wherein a motion was made to dismiss a case for the alleged reason that the sureties in the appeal recognizance were insufficient, and it was held that the judgment of the justice as to the sufficiency of the sureties was final.

Unless it appears that the justice has refused a proper bond upon an appeal regularly brought, he should not be compelled to return the papers to the appellate court. *Stull v. Abbott*, 15 N. J. L. 338.

Insolvency of Sureties Pending Appeal. — In *New York* it was held that the power of a court to require other surety upon the insolvency of the surety taken before the justice must find its sanction in some statute, other-

wise the court has no such power. *Bonnett v. Townsend*, 63 Hun (N. Y.) 45, *distinguishing* *Elson v. Murray*, 27 Hun (N. Y.) 536, in that the decision in that case was placed upon the ground that the appellant, in giving an undertaking, perpetrated a fraud upon the court. She procured her husband to become the surety upon the undertaking, knowing that he was not worth a dollar, and that he had, just before signing the undertaking, testified, on proceedings supplemental to execution, that he had no property of any kind. The appeal in that case was dismissed upon the theory that the appellant had failed to give the undertaking required by the code, and hence her appeal was ineffectual, while in the case at bar the undertaking furnished by the appellant was sufficient at the time given. The appellant having complied with the provisions of the code in bringing his appeal, and the action being at issue in that court, the court had no power to require another undertaking because of the insolvency or death of the surety.

Prima Facie Evidence of Approval. — The filing of the bond by the justice with his return in the appellate court is *prima facie* evidence of his approval. *Lacy v. Fairman*, 7 Blackf. (Ind.) 558.

Failure to Mark Bond Filed and Approved will not be fatal, but the justice will be allowed to correct the omission. *Muller v. Humphreys*, (Tex. App. 1889) 14 S. W. Rep. 1068.

3. If the motion to dismiss is seasonably made for want of the sureties required by law, it will prevail, notwithstanding the justice has seen fit to grant the appeal, the appellate court having jurisdiction to determine whether or not the power of the justice in granting the appeal has been rightfully exercised. *State v. White*, 41 N. H. 194; *Gilman v. Bartlett*, 20 N. H. 168.

practice prevailing, for while the approval by the justice before perfecting the appeal might be absolutely necessary in one case,¹ under other provisions the appeal may be perfected in the appellate court by perfecting the recognizance there.²

Power of Justice After Acceptance of Appeal Bond. — Where the bond is filed and accepted, and the appeal is perfected, it has been held that the power of the justice is at an end, and he cannot recall such acceptance and require another bond.³

d. SUFFICIENCY OF BOND. — A bond is sufficient generally if it is in substantial compliance with the requirements of the

1. *Cockrill v. Owen*, 10 Mo. 287; *Clark v. Bowers*, 2 Wis. 123.

Justification of Sureties. — It may be that under a particular statutory provision the appeal is not effectual for any purpose until the sureties have justified before the justice of the peace. *McCracken v. Superior Ct.*, 86 Cal. 77. Though it was also held that the sureties themselves will not be permitted to avoid their liability by any act of their own or any failure to comply with the provision, which is intended solely for the protection of the respondent, and it is no justification to them that they do not justify. *Moffat v. Greenwalt*, 90 Cal. 371. See also *Murdock v. Brooks*, 38 Cal. 596; *People v. Shirley*, 18 Cal. 121.

It has also been held that the failure of the justice to approve ought not to prejudice the appellant where the latter has done everything required of him to perfect his appeal. *Shiff v. Brownell*, 4 Wis. 285.

Administration of Oath. — Where a statute requires the justice of the peace to take a bond with good surety, he is authorized to administer an oath to the surety, and false swearing in such a case is a good ground for the charge of perjury. *State v. Wilson*, 87 Tenn. 693.

Notice of Justification. — Where justification is required upon notice, and the appellee is entitled to notice of the time when the sureties will justify, a justification without notice to the appellee is not sufficient, and a bond so perfected will not support an appeal. *McDonald v. Paris*, (S. Dak. 1896) 68 N. W. Rep. 737.

Notice of appeal is sufficient notice for the purpose of affording an opportunity to except to sureties, that an undertaking had been or would be filed within the time limited by statute for an appeal after the rendition of the

judgment. *Dutertre v. Superior Ct.*, 84 Cal. 535.

Notice of Exception to Bail may be served upon the attorney of the appellant. *Cummings v. Forsman*, 6 Pa. St. 194.

2. *Henderson v. Plumb*, 18 Ala. 74; *Merrill v. Manes*, 19 Ark. 647; *Miller v. Head*, 7 Ark. 50; *State v. Cook*, 31 Mo. App. 57.

The Indorsement of Approval need not be made by the justice within the time allowed for appeal, but if the appeal is granted and the bond executed before the expiration of the time, the indorsement of the approval may be made thereafter. *Haas v. Lees*, 18 Kan. 454; *People v. Judges*, 7 Cow. (N. Y.) 487.

Omission Without Fault. — If the bond is not filed before the justice, through his own fault, it has been held that the appeal may be perfected by filing the bond in the appellate court. *Richardson v. Debnam*, 75 N. Car. 390.

3. *Miller v. O'Reilly*, 84 Ind. 170, wherein it is said that if the bond given before a magistrate is insufficient, the remedy is to be furnished by the court to which the appeal is taken upon a motion to dismiss the appeal. See also *infra*, IV. 11. a. *End of Justice's Jurisdiction.*

But it has been held, on the other hand, that where the justice erroneously refuses to accept a recognizance, and after the time limit expires becomes convinced of his error, he may correct his mistake and enter an appeal as of the date when the recognizance was offered. *Noble v. Houk*, 16 S. & R. (Pa.) 421, the court saying: "If the justice of the peace had persisted in his error, a court would have compelled him to permit the appeal; and shall we not allow him to do that voluntarily which the court, upon a proper application, would have compelled him to do?"

statute,¹ and it is sufficient that the appeal bond appears *prima*

1. Windham v. Coates, 8 Ala. 285; Houston, etc., R. Co. v. Lockhart, (Tex. Civ. App. 1896) 39 S. W. Rep. 320; Job v. Harlan, 13 Ohio St. 490; Endress v. Ent, 18 Kan. 236; Hennies v. People, 70 Ill. 101.

Amount of Judgment. — In Texas it is held that the omission to state the amount of the judgment or an incorrect statement of the amount will not invalidate the bond. Parsons v. Crawford, 2 Tex. App. Civ. Cas., § 669; Christian v. Crawford, 60 Tex. 45; Laird v. Frieberg, 2 Tex. App. Civ. Cas., § 110; Nelson v. Baird, 1 Tex. App. Civ. Cas., § 1236; Dillard v. Allison, (Tex. Civ. App. 1897) 40 S. W. Rep. 1023. But see *Ex p. Alvord*, 6 Cow. (N. Y.) 585; *Ex p. Weed*, 5 Cow. (N. Y.) 286.

Costs. — The bond need not state the amount of costs. People v. Chau-tauque C. Pl., 2 Wend. (N. Y.) 618.

Date of Judgment. — The bond should describe the date of the judgment appealed from. Shuster v. Overturf, 42 Kan. 671, wherein there was a variance between the bond and the justice's return. But it has also been held that the bond need not give the date of the judgment, for in such a case there is no such variance. People v. Orleans C. Pl., 2 Wend. (N. Y.) 292.

Bond Incorrectly Dated. — If by mistake or through neglect an appeal bond is dated the day after the appeal is taken, it will not be sufficient ground for dismissing the appeal, for the record shows that the appeal was taken on the day of trial. Pearce v. Myers, 3 Mo. 31.

Date No Part of Bond. — The date of an appeal bond has been held to be no material part of the bond. The day of its execution may be shown by parol, and the filing of it in the clerk's office shows its execution at that time; and if it is dated as of a day after such filing, the mistake is obvious and does not vitiate the bond. Littell v. Bradford, 8 Blackf. (Ind.) 185. To the same effect, where the date of the bond was prior to the rendition of the judgment, is Peoples v. Rodgers, 11 Tex. Civ. App. 447 [citing Carlton v. Miller, 2 Tex. Civ. App. 619; Southern Pac. R. Co. v. Stanley, 76 Tex. 418].

Where a bond is approved and filed by the justice of the peace on the day on which the case was tried, and the

date of such approval and filing appears thereon, it does not matter that the bond itself is dated in blank. Houston, etc., R. Co. v. Lockhart, (Tex. Civ. App. 1896) 39 S. W. Rep. 321.

Description of Justice — Name of Justice. — Where the judgment is sufficiently identified, a mistake in the initials of the justice in the bond will not operate to make the bond insufficient. Missouri, etc., R. Co. v. Vowell, (Tex. Civ. App. 1896) 34 S. W. Rep. 354.

County of Justice Added to Name. — An appeal bond which recites a judgment rendered before a certain justice of the peace need not add the county of which he is a justice. Anonymous, 1 Wend. (N. Y.) 85.

Parties. — An appeal bond which was regular in all respects except that it referred to the guardian *ad litem* instead of the minor as appellant was not rendered void by reason of such misdescription in an action thereon against the sureties, because the appellate court in the action in which it was given had ample authority to correct any formal defect in the bond. Freeman v. McAtee, 4 Kan. App. 695.

Bonds insufficient in amount or number of sureties may be amended, but not so when the bond is not conditioned as required by law. Nones v. McGregor, (Tex. Civ. App. 1896) 35 S. W. Rep. 1083; King v. Hopkins, 42 Tex. 49. And a bond not payable to the obligee as designated by statute is void. Nones v. McGregor, (Tex. Civ. App. 1896) 35 S. W. Rep. 1083; Pakenius v. Petri, (Tex. Civ. App. 1895) 29 S. W. Rep. 1095; Friedman v. Dockery, (Tex. Civ. App. 1896), 34 S. W. Rep. 766.

Codefendants. — If a plaintiff is secured by a bond in which a codefendant of the appellant not appealing is not named as obligee, the plaintiff cannot complain of such a defect, the codefendant appearing in the appellate court and going to trial on the merits, and thereby waiving objection on his part to the defect in the bond. Houston, etc., R. Co. v. Carroll, (Tex. Civ. App. 1896) 37 S. W. Rep. 875.

To "Adverse Party" in Express Words. — The objection that an undertaking was not in express words made to the "adverse party" was held untenable. Job v. Harlan, 13 Ohio St. 490.

facie to be given to secure an appeal from the judgment which the justice certifies, to the appellate court, and is conditioned according to the statute.¹

Failure of Justice to File Bond. — The mere failure of a justice to mark a bond filed is no cause for dismissing an appeal.²

e. FILING IN APPELLATE COURT — AMENDMENT. — But as stated hereinbefore, since the necessity of an appeal bond depends upon the statute, if the statute does not make the filing in the justice's court a jurisdictional requisite it may be filed in the appellate court, as is sometimes the practice under particular statutes;³ or even under statutes requiring the filing of the bond before a magistrate, a defective bond will not necessarily defeat the jurisdiction of the appellate court,⁴ if it is not so defective as to be void,⁵ but an amendment of the bond will be allowed,⁶ as by the filing of a new and sufficient bond.⁷ And it has been held

1. *Christian v. Crawford*, 60 Tex. 45.

Return of More than One Case. — Although the condition of the bond recited that an appeal was taken in "three different cases," and provided for their successful prosecution, it was held that it could not be inferred that the cases had been consolidated by the justice, even if it had been competent for him to do so, and that such an idea was positively negated by the papers returned to the Circuit Court, which indicated that several judgments had been rendered. The transcript contained only the papers and proceedings in one case, and it was held that the Circuit Court erred in quashing the appeal by reason of the defectiveness of the appeal bond. *Carter v. Pickard*, 11 Ala. 673.

2. *Muller v. Humphreys*, (Tex. App. 1889) 14 S. W. Rep. 1068, holding that the party had done all that could be required of him when he executed and filed with the justice a proper bond within the time prescribed, and that the justice should have been allowed to file the bond *nunc pro tunc*. See also *Kearney v. Pennock*, 2 Pa. Dist. Rep. 32.

3. See *Henderson v. Plumb*, 18 Ala. 74; *Miller v. Head*, 7 Ark. 50; *Woodhull v. Kelly*, 6 Ill. App. 323; *Camp v. Hogan*, 73 Ill. 228; *State v. Cook*, 31 Mo. App. 57.

4. *Stetson v. Corinna*, 44 Me. 44.

5. *Nones v. McGregor*, (Tex. Civ. App. 1896) 35 S. W. Rep. 1083; *Packenius v. Petri*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1095; *Friedman v. Dockery*, (Tex. Civ. App. 1896) 34 S. W. Rep. 766.

6. *Gardner v. Dunn*, 1 Colo. 1; *Lynn v. Merricle*, 1 Colo. 3; *Patty v. Winchester*, 20 Ill. 261; *School Trustees v. Starbird*, 13 Ill. 49; *Doud v. Wright*, 22 Iowa 336; *Teagarden v. Garver*, 24 Ind. 399; *Freeman v. McAtee*, 4 Kan. App. 695; *Matthews v. Gloss*, 22 Mo. 169; *Bream v. Spangler*, 1 W. & S. (Pa.) 378; *Campbell v. Illinois Cent. R. Co.*, 16 Lea (Tenn.) 273.

Waiver of Defects by Appearance. — A general appearance gives jurisdiction, and is a waiver of defects in the bond, at least to the extent that after such appearance it is not the right of the defendant to have the case dismissed. *Sherwood v. Ionia Circuit Judge*, 107 Mich. 136 [citing 1 ENCYC. OF PL. AND PR. 1000, 1001]. See also *Yocum v. Waynesville*, 39 Ill. 220; *Ezra v. Manlove*, 6 Blackf. (Ind.) 454, wherein the objection was to a formal defect in the bond, but the court said that "no objection whatever to the appeal bond could be a ground for dismissing the action." And see *McCombs v. Johnson*, 47 Mich. 592; *Shaw v. Moser*, 3 Mich. 71; *Tower v. Lamb*, 6 Mich. 362.

7. *Alabama*. — *Appleton v. Turrentine*, 19 Ala. 706.

California. — *McCracken v. Superior Ct.*, 86 Cal. 77; *Coulter v. Stark*, 7 Cal. 244; *Cunningham v. Hopkins*, 8 Cal. 33; *Rabe v. Hamilton*, 15 Cal. 31; *Gray v. Superior Ct.*, 61 Cal. 337; *Coker v. Superior Ct.*, 58 Cal. 177.

Illinois. — *Dedman v. Barber*, 2 Ill. 254; *Partridge v. Snyder*, 78 Ill. 519; *Brown v. Keirns*, 13 Ill. 206.

Missouri. — *Jones v. Davis*, 4 Mo. 28; *Williams v. Watson*, 34 Mo. 95.

that the court cannot refuse to permit the amendment of defects in a bond or the filing of a new and sufficient bond for the purpose of correcting defects in the bond already on file.¹

Proceeding Without Amendment. — On the other hand, it has been held that if the insufficiency of an undertaking is properly called to the attention of the court, it cannot proceed to try the action without a new undertaking, and if it does so it commits an error for which the judgment should be reversed.²

7. Allowance of Appeal. — When a party has a right under the law to an appeal, he cannot, of course, be deprived of that right by the court or by his adversary.³ But in order to impose upon

Nebraska. — *Galligher v. Wolf*, 47 Neb. 589; *Robare v. Kendall*, 22 Neb. 677.

Pennsylvania. — *Louderback v. Boyd*, 1 Ashm. (Pa.) 380; *Nomelsdorf v. Heifner*, 104 Pa. St. 1.

An insufficient number of sureties was regarded as a mere irregularity, *Farnam v. Davis*, 32 N. H. 302, which may be amended on appeal. *Murphy v. Steele*, 51 Ind. 81; *Nones v. McGregor*, (Tex. Civ. App. 1896) 35 S. W. Rep. 1083. *Contra*, *Brickner v. Spordeder*, 3 Okla. 561.

1. *Appleton v. Turrentine*, 19 Ala. 706; *Carter v. Pickard*, 11 Ala. 673; *Dedman v. Barber*, 2 Ill. 254; *Partridge v. Snyder*, 78 Ill. 519; *Murphy v. Steele*, 51 Ind. 81; *Miller v. O'Reilly*, 84 Ind. 171.

Rule for New Bond. — It is held to be the proper practice to rule the appellant to perfect his bond or give a new bond within the prescribed time or upon failure to dismiss. *Detroit, etc., Plank Road Co. v. Wayne Circuit Judge*, 27 Mich. 303; *Galligher v. Wolf*, 47 Neb. 589; *Bream v. Spangler*, 1 W. & S. (Pa.) 378; *Twyford v. Dyer*, 4 Pa. Dist. Rep. 714. See also *Carter v. Pickard*, 11 Ala. 673; *Keehl v. Schaller*, 6 Dakota 499; *Peoples v. Rodgers*, 11 Tex. Civ. App. 447 [citing *Davis v. Estes*, 4 Tex. Civ. App. 207; *Landa v. Heermann*, 85 Tex. 1].

In *California* it was held that the Superior Court had no jurisdiction to extend the time within which to do an act in the justice's court while the action remained in that court, and that the cause remaining in the justice's court until the sureties justified is not effectual for any purpose, in the absence of such justification. *McCracken v. Superior Ct.*, 86 Cal. 77, wherein it was further indicated that where a mere defective or informal undertak-

ing has been given, the Superior Court may allow a new undertaking to be filed. See also *Moffat v. Greenwalt*, 90 Cal. 368, holding that the statute providing that when an exception has been taken to the sufficiency of sureties, unless they justify within five days "the appeal must be regarded as if no such undertaking had been given," is to be construed not as having the effect *ipso facto* to vacate the appeal, but as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal upon the ground that since it was taken it has become ineffectual.

2. *Towle v. Bradley*, 2 S. Dak. 472.

3. *Gregor v. Slingluff*, 1 Miles (Pa.) 210; *Louderback v. Boyd*, 1 Ashm. (Pa.) 380; *Webb v. Hopkinson*, 10 Vt. 544.

Filing Judgment in Circuit Court. — Where the practice prevails of filing a judgment of a justice of the peace in the Circuit Court for the purpose of procuring a more expeditious enforcement thereof, the entry of such judgment by the clerk in the Circuit Court does not make the judgment a judgment of the latter court, and will not deprive the party against whom it was rendered of his right to appeal to the appropriate appellate court within the time prescribed by law. *Wilson v. Robinson*, 61 Iowa 357.

Right to Appeal Favored. — The right to appeal is favored. *Dickinson v. M'Guire*, 1 Ashm. (Pa.) 47; *Cady v. Anson*, 4 Wis. 223.

Failure to Enter Order of Allowance. — If the appellant does everything required of him by law to perfect his appeal, and within the time prescribed, the failure on the part of the justice to enter an order allowing the appeal, within such time, will not invalidate the appeal. *Jester v. McKinney*, 47

a justice of the peace the duty of allowing an appeal, it is incumbent upon the party wishing the appeal to do those things which the law requires of him in order effectually to take the appeal;¹ and if he complies with the law and does everything required of him, it seems that the justice cannot refuse to grant the appeal.²

8. Parties—*a.* IN GENERAL.—Where only one of several persons against whom suit is instituted is brought before the justice of the peace, and judgment is rendered against him alone, the others need not be brought before the appellate court on appeal from such judgment, but the party alone against whom the judgment was rendered may appeal therefrom.³

Mo. App. 62. This ruling was under section 6334 of Rev. Stat. Mo., providing that: "If in any case the justice shall allow an appeal, and certify in his certificate the cause of his failure to allow the same at the proper time, such appeal shall be sustained when it would have been competent for the court to have ordered the same to be allowed; and in all cases when the bond and affidavit required shall have been filed or deposited with the justice in due time, and the justice shall have returned such appeal to the appellate court, the same shall be considered as having been allowed by the justice, although no entry thereof shall appear in the record." Before that statute it was held that on such an appeal the Circuit Court could not hear evidence as to the reason why an appeal was not allowed within the time required by law, and that if the appeal was refused for an insufficient reason these facts could only be brought to the attention of the court by mandamus. *James v. Robinson*, 1 Mo. 595; *Union Sav. Assoc. v. Keisker*, 8 Mo. App. 232, which was decided after the enactment of the above statute, but the appeal had been taken prior thereto, and was governed by the old law.

Amendment to Show Allowance.—The record may be amended to show the allowance of an appeal. *Hall v. Bewley*, 11 Humph. (Tenn.) 106.

1. *Kelm v. Hunkler*, 49 Mo. App. 664; *Stull v. Abbott*, 15 N. J. L. 338; *Harriman v. Swift*, 31 Vt. 388.

Tender of Appeal Bond.—The tendering of an appeal bond, executed according to law, is a demand of an appeal. *Thompson v. Wright*, 14 N. J. L. 38; *Gregor v. Slingluff*, 1 Miles (Pa.) 210.

By What Justice.—One justice of the peace cannot grant an appeal from a

judgment on the docket of another justice, not being the successor of the latter, without previously transferring such judgment to his own docket. *Walker v. Prather*, 3 Ind. 112.

2. **Mandamus** will lie to compel the allowance of an appeal. *Levy v. English*, 4 Ark. 65; *Coats v. State*, 133 Ind. 36; *Woodford v. Hull*, 31 W. Va. 470; *Mason County v. Minturn*, 4 W. Va. 300; *Ex p. Morris*, 11 Gratt. (Va.) 292. See also *Jester v. McKinney*, 47 Mo. App. 62.

Other Methods than mandamus may be prescribed by statute, *Kelm v. Hunkler*, 49 Mo. App. 664; and may take the place of and exclude the remedy by mandamus, *Chicago, etc., R. Co. v. Franks*, 55 Mo. 325.

Action of Justice Ministerial or Judicial.—It has been held that the action of the justice in allowing an appeal is merely ministerial, and that in performing this duty he can exercise no discretion other than simply to see that the security offered is sufficient, and that the bond or recognizance is in legal form. *Levy v. English*, 4 Ark. 65; *Coats v. State*, 133 Ind. 36; *Tompkins v. Sands*, 8 Wend. (N. Y.) 462.

On the other hand, it has been held that the action of the justice in approving a bond is judicial. *Tichenor v. Hewson*, 14 N. J. L. 26. And he is not required to send up the appeal papers unless sufficient bond has been tendered, of which he is the proper judge; though even in this case it seems that if proof had been made of the demand of the appeal and of the tendering of a proper bond, it would have been a proper case for a rule upon the justice to make return of the appeal. *Stull v. Abbott*, 15 N. J. L. 338.

3. *Jackson v. Hedges*, 4 Harr. (Del.) 96; *Bell v. Bruhn*, 30 Ill. App. 300; *Clagget v. Blanchard*, 8 Dana (Ky.) 41.

b. JOINT PARTIES. — The general rules relating to the joinder of parties in appeals from judgments rendered against several defendants jointly have been discussed elsewhere,¹ and those rules are often applicable to appeals from justices' courts, being for the most part statutory provisions and constructions thereof, unless the statutes are particularly directed to appeals from justices' courts;² and on the other hand a rule has been applied to appeals from judgments of justices of the peace adapted to the

1. See article APPEALS, vol. 2, p. 182 *et seq.*

2. *Appeal by One Defendant Without Joinder of Codefendant.* — One of several joint defendants may appeal from a judgment rendered against them. *Dillingham v. Skein*, Hempst. (U. S.) 181; *Mitcheltree v. Sparks*, 2 Ill. 198; *Leggett v. Chrisman*, 3 Ill. 46; *Keal v. Wayne* Circuit Judge, 36 Mich. 331; *Claffin v. American Nat. Bank*, 46 Neb. 884; *Mattison v. Jones*, 9 How. Pr. (Oswego County Ct.) 152; *Missouri*, etc., R. Co. v. *Mosty*, 8 Tex. Civ. App. 330; *Bundy v. Bruce*, 61 Vt. 619; *Bremer v. Koenig*, 5 Wis. 156; *Edson v. Countryman*, 1 Wis. 172; *Kirkpatrick v. McCormick*, 2 Wis. 284.

Restriction—Summoning Codefendant.

— But the right of one joint defendant to appeal from a joint judgment is sometimes restricted by statute requiring the other defendants to be brought before the appellate court by process or appearance. *Fergus v. Lohman*, 27 Ill. App. 448; *Bourton v. Rathbone*, 23 Ill. App. 654; *Howard v. Costello*, 31 Ill. App. 611; *Steinborn v. Thomas*, 8 Ill. App. 515; *Humphreys v. Rodgers*, 9 Ill. App. 281; *Norton v. Coggsell*, 35 Ill. App. 566.

And by appearing in the appellate court a defendant who does not appeal waives the necessity of the service of summons upon him. *Duggan v. Smyser*, 46 Ill. App. 39. And it has also been held that the failure to bring in a defendant who does not appeal is waived if the parties go to trial without objection. *Straus v. Oltusky*, 62 Ill. App. 660.

Codefendant as Co-obligee in Appeal Bond. — In *Texas* it seems that by statute the defendant not appealing must be made a party, as by making him an obligee in the appeal bond. *Baldwin v. White*, (Tex. Civ. App. 1894) 26 S. W. Rep. 455.

Summons and Severance. — In *New Jersey* it was held that one defendant might appeal, using the names of his

codefendants, and proceed by rule on those failing to unite to show cause why he should not prosecute the appeal alone or by summons and severance. *Van Buskirk v. Hoboken*, etc., R. Co., 31 N. J. L. 367. See also *Sheppard v. Fenton*, 9 N. J. L. 8; *Pharo v. Parker*, 21 N. J. L. 332, holding that if one of two joint debtors alone is summoned, and he alone appears, and makes defense in the name of both, he may appeal for both without summons and severance if it does not appear positively that his codefendant refused to join in the appeal; *Hulick v. Casler*, 57 N. J. L. 621, holding that if one of two joint judgment debtors wishes to prosecute a writ of certiorari to reverse the judgment he may summon the other defendant, and, if the latter refuses to join in the prosecution, procure an order permitting him to prosecute the writ alone.

Effect of Appeal by One of Joint Defendants. — It has been held that where one of several defendants appeals the case should be docketed only against the appellant. *Mitcheltree v. Sparks*, 2 Ill. 198.

In *Gallagher v. Jackson*, 1 S. & R. (Pa.) 494, it was said that it is not competent for one of two defendants before a justice of the peace to compel his codefendant to appeal, thereby subjecting him to the probability of having judgment rendered against him for a greater sum than the amount of the judgment, together with an accumulation of costs, but that at the same time it appeared to be perfectly clear that one defendant, by holding back, could not frustrate the right of a rehearing, claimed by another defendant, which the law conferred upon all persons who had been impleaded.

Where one joint defendant may appeal alone, under a statute giving the right, the defendant not appealing has no status in the appellate court. *Clagget v. Blanchard*, 8 Dana (Ky.) 41; *Jopp v. Kegel*, 83 Mich. 50; *Cowan v.*

peculiar character of their courts and independently of statutory regulations.¹

c. AMENDMENT — NEW PARTIES. — In appeals from judgments of justices of the peace it has been held that there can be no change of parties so as to bring in a new party who was not proceeded against before the justice and who was not a party to the appeal.² But under the statutory practice of permitting amendments new parties plaintiff may be added on appeal,³ so

Morrison, 4 Baxt. (Tenn.) 378. See also Woolford v. Howell, 2 Ark. 1; Roberts v. Weiler, 52 Miss. 301

But it is also held that where the trial of an appeal is *de novo*, the appeal annuls the judgment of the justice, and if only one of several joint defendants appeals, the whole cause is removed to the appellate court. Missouri, etc., R. Co. v. Mosty, 8 Tex. Civ. App. 330; Bremer v. Koenig, 5 Wis. 156. See also Hooper v. Farwell, 3 Minn. 106, wherein it is held that upon such an appeal a judgment might be rendered against both of the defendants, where the judgment before the magistrate was against one of the defendants and the action was dismissed as to the other, the appeal having been taken by the defendant against whom the judgment was rendered.

Default Judgment Against One Defendant. — Where a judgment by default is rendered against one defendant, and a judgment on the merits against another, it is held that an appeal by the latter brings up the whole cause, and if the plaintiff succeeds on the appeal his judgment will be against both defendants. Bundy v. Bruce, 61 Vt. 619; Fletcher v. Blair, 20 Vt. 124.

Where the Rights of the Defendants Are Not Severable. it has been held that an appeal by one brings up the whole cause. Claflin v. American Nat. Bank, 46 Neb. 884; Polk v. Covell, 43 Neb. 884.

If an action is brought against several, and to sustain it all the defendants must be shown to be liable as upon a joint contract, and one of the defendants is permitted to prosecute the appeal, a reversal of such a judgment operates in favor of all the defendants. Wilson v. Moore, 26 N. J. L. 458.

1. In Roberts v. Weiler, 52 Miss. 299, the question was whether the Circuit Court erred in sustaining a motion to dismiss an appeal from a justice's court upon the ground that said appeal

had been prosecuted by one of three defendants against whom a joint judgment had been rendered in the magistrate's court. After stating that under the rule governing appeals from the Circuit Courts to the Supreme Court the motion was properly sustained if that rule applied to appeals from justices' courts to the Circuit Court, it was said: "Several considerations induce us to hold that this rule does not apply in the Circuit Court to appeals from justices' courts. Such proceedings are from courts where everything is conducted *ore tenus*, usually without the assistance of lawyers or clerks, and not under the supervision of magistrates learned in the law. No writ of error or citation on appeal is necessary. The dissatisfied party is only required to file an affidavit giving notice of his dissatisfaction and of his desire for a trial *de novo* in the Circuit Court, and this, accompanied by a bond, operates as an appeal without service of supersedeas or any notice whatever to the opposite party. We think that any one of several defendants desiring to do so may exercise this right without being required to formally join the names of his codefendants in his affidavit. * * * Appeals taken only by a portion of the parties litigant will not affect the rights of those who join neither in the affidavit therefor nor in the bond. The judgment in the justice's court will stand as to them."

2. Peck v. Colby, 31 Ala. 252; Wilson v. Collins, 9 Ala. 127.

3. Smith v. Martin, 28 Ill. App. 224; Zipp v. Uhland Hain No. 16, 30 Ill. App. 280; Osborn v. Osborn, 18 Ind. 373.

At Common Law, amendments adding new parties plaintiff were not allowed, nor as a general rule could such an amendment be made by striking out the names of plaintiffs, though the stringent rules of the common law have been more or less modified by statute in the United States. See article AMENDMENTS, vol. 1, p. 541.

long as the amendment does not introduce a different cause of action,¹ and the names of parties may be so transposed or changed as to adapt the legal form to the merits of the case.²

Substitution Changing Cause of Action. — But, on the other hand, the liberality indulged in permitting amendments on appeal does not go to the extent of permitting a complete substitution of one plaintiff for another, which would be an amendment of another person's cause of action rather than an amendment of the plaintiff's cause of action.³

9. Return of Justice and Entry of Appeal — a. NECESSITY OF RETURN TO PERFECT APPEAL. — The last step in perfecting the removal of a cause from a justice's court to an appellate court is the return of a transcript of the proceedings or the papers to the latter court, in pursuance of the particular statute requiring it.⁴

1. *Smith v. Martin*, 28 Ill. App. 224; *Beattie v. Hill*, 60 Mo. 75; *House v. Duncan*, 50 Mo. 453.

2. *Giffen v. St. Clair Tp.*, 4 W. & S. (Pa.) 327; *Caldwell v. Thompson*, 1 Rawle (Pa.) 370; *Lyon v. Chalker*, 2 Watts (Pa.) 14; *Graham v. Vandalore*, 2 Watts (Pa.) 131; *Gue v. Kline*, 13 Pa. St. 60.

Change of Capacity in Which Plaintiff Sues. — *Southern Express Co. v. Boullement*, 100 Ala. 275, citing *Lucas v. Pittman*, 94 Ala. 616.

Adding Necessary Parties as Partners. — *Southern Express Co. v. Boullement*, 100 Ala. 275; *McCaskey v. Pollock*, 82 Ala. 174; *Missouri Pac. R. Co. v. Smith*, (Tex. 1891) 16 S. W. Rep. 803; *Standard Carbonating, etc., Co. v. Capital City Guards*, 99 Ga. 265.

Where, upon plea in abatement for nonjoinder of a defendant jointly interested in the suit, an amendment is allowed bringing in such party as joint plaintiff, no objection can be had. *Missouri Pac. R. Co. v. Smith*, (Tex. 1891) 16 S. W. Rep. 803.

Striking Out Names of Defendants may be permitted. *Sanchez v. Luna*, 1 N. Mex. 238.

Amending Partnership Name to Individual Names. — *Beattie v. Hill*, 60 Mo. 75; *House v. Duncan*, 50 Mo. 453.

Nominal Plaintiff. — The name of a nominal plaintiff may be stricken out. *McDowell v. Town*, 90 Ill. 359.

In *Stehley v. Harp*, 5 S. & R. (Pa.) 544, it was held that where the suit before the magistrate was brought by Edward Harp for the use of Matthias Hollenbeck and Jacob Cist, a judgment in the Court of Common Pleas on appeal from the magistrate under a

declaration in the name of Hollenbeck & Cist as assignees of Edward Harp could not be supported, because the case tried was different from that in which the appeal was entered.

3. *Clements v. Greenwell*, 40 Mo. App. 594; *Thieman v. Goodnight*, 17 Mo. App. 434.

Continuance of Action in Name of Assignee. — If a judgment is assigned on the docket of the justice before an appeal is taken, it is held that the action continues in the name of the original party or the court may allow the assignee to be substituted in the action. *Peterman v. Ott*, 45 Ind. 224.

Assignee in Bankruptcy. — After bankruptcy of one partner he cannot be joined as a plaintiff with his copartner, but on appeal from a judgment of a justice of the peace the assignee in bankruptcy of the insolvent partner may be substituted for him. *Merrill v. Tamany*, 3 Pa. St. 433.

In *Moore v. Lancaster, Wright* (Ohio) 35, the action was commenced before the justice by Adams, and on appeal the declaration was filed by Lancaster for the use of Adams. It was held that the original cause had been abandoned and another and different person substituted; that upon a new case the defendant was not in court, and the appellate court had no authority to proceed to judgment in any other case than that brought before it by appeal.

4. *Poindexter v. Russell*, 11 Ark. 664; *Kellock v. Dickinson*, 5 N. Y. App. Div. 515; *Goodenow v. Stafford*, 27 Vt. 437; *Bruins v. Downey*, 45 Wis. 406. See also *Herron's Appeal*, 29 Pa. St. 240; *Cothran v. Knight*, 47 S. Car. 243.

The case not being in the appellate court until such return, no proceedings can be had in that court without it except on application for an order to compel the return or on application to dismiss the appeal where such failure is ground for dismissal.¹

Incomplete Transcript Filed in Time. — When a transcript is filed in time, although incomplete, the appellate court acquires jurisdiction. *Fulton v. Ryan*, 33 Neb. 456 [citing *Nebraska*, etc., *R. Co. v. Storer*, 22 Neb. 90; *Schuyler v. Hanna*, 28 Neb. 601].

On Allowance of Appeal from Judgment by Default. — In *Kellock v. Dickinson*, 5 N. Y. App. Div. 515, it was held that under the section of the Code of Civil Procedure conferring authority in certain cases to show by affidavit or otherwise that manifest injustice has been done to the appellant by reason of a default judgment, and to make satisfactory excuse for the default, upon which the appellate court is vested with discretion to set aside the judgment appealed from or stay the proceedings thereunder and by order direct a new trial before the same or another justice of the same county, the return of the justice must be made before the court in order to enable it to determine such a motion. The bringing of an appeal does not authorize an independent motion to vacate a judgment, any more than is authorized without any appeal. It is the review of the judgment which the code contemplates, whether rendered upon the trial of issues or taken by default, and whether the appeal be heard upon errors of law or errors of fact; therefore there can be no review of the judgment unless it is brought before the court for that purpose.

Upon Appeal Allowed After Expiration of Time. — Where an appeal is allowed upon application to the circuit judge upon good cause shown after the expiration of the time within which the appeal should have been taken before the justice, the bond and other papers taken before the judge on such an application and transmitted to the clerk of the Circuit Court should be filed in the cause. *Hubbard v. Yocum*, 30 W. Va. 740.

If Both Parties Appeal from the judgment of a justice of the peace, one transcript is sufficient and one case only should be docketed in the appellate court, as the original papers which are required to be returned with the transcript could not be on file in two

places at the same time, and further, because the docketing of two cases would result in two trials, and possibly different results in the same case, which would lead to a complication instead of a settlement of the matter. *Montgomery Gravel Road Co. v. Stockton*, 43 Ind. 331.

Loss of Original Papers After Filing. — Where it is the duty of the justice to return a transcript of his entries, together with the original papers, upon an appeal from his judgment, if the papers are lost after they are filed in the appellate court the appellant may have the lost record supplied; but if he fails to do this it is held that the appellee may have the judgment affirmed for want of prosecution of the appeal, but cannot have the appeal dismissed. *Fanning v. Voelker*, 39 Mo. 120.

In *Bender v. Lockett*, 64 Tex. 566, it was held that, the cause standing for trial *de novo* on appeal, it is the duty of the plaintiff, though he be the appellee, to supply lost papers, in the prosecution of his cause.

Papers Sent to Wrong Court. — The fact that the justice sent the papers to the Circuit Court of the wrong county will not deprive the appellant of his appeal nor of his right to have the papers filed in the proper court. *Steckmesser v. Graham*, 10 Wis. 37.

In Criminal Appeals sometimes the original complaint must be certified to the appellate court, *State v. Anderson*, 17 Kan. 89; while in other states the statute may permit the return of copies, *Com. v. Doran*, 14 Gray (Mass.) 37; *Com. v. Hogan*, 11 Gray (Mass.) 313.

Lost Complaint in Criminal Prosecution. — The appellate court may order the substitution of a copy for the original complaint which is lost. *Bays v. State*, 6 Neb. 167.

1. *Bruins v. Downey*, 45 Wis. 496; *Poindexter v. Russell*, 11 Ark. 664.

Jurisdiction to Dismiss. — It is sometimes held that the appellate court has no jurisdiction for any purpose when no return is made, and therefore cannot even dismiss the appeal, unless the party asking the dismissal is in a position to demand a trial. *Odd Fellows*

b. WHEN RETURN SHOULD BE MADE — (1) In General. — The time within which the return should be made, either with reference to the number of days elapsing after the other steps have been taken for perfecting the appeal or with reference to the term of the appellate court to which the return should be made, is generally definitely fixed by statute.¹

(2) *Effect of Failure to Comply with Statute.* — The requirement that a justice shall return the transcript at or within a certain time has been held to be mandatory, creating a jurisdictional prerequisite which cannot be obviated or modified;² but the more general construction of such statutes has been that they do not create jurisdictional prerequisites,³ in the sense that a failure

Benev. Soc. v. Alt, 12 Ill. App. 570; *Robinson v. Allen*, 11 Ill. App. 574; *Schmidt v. Skelly*, 10 Ill. App. 564; *Sheridan v. Beardsley*, 89 Ill. 477; *Van Stavern v. Sears*, 35 Ill. App. 546; *Ogden v. Danz*, 22 Ill. App. 544; *McMullen v. Graham*, 6 Ill. App. 239; *Faas v. O'Conner*, 6 Ill. App. 593. But, on the other hand, the court may dismiss the appeal for want of jurisdiction. *Poindexter v. Russell*, 11 Ark. 664; or it may have jurisdiction to dismiss the appeal or action and affirm the judgment of the justice, *Hunter v. Cole*, 49 Me. 557. See also *infra*, IV. 11. *b. When Appellate Court May Proceed.*

Sufficiency of Moving Papers. — On a motion to dismiss an appeal upon the ground that the return has not been filed, it was held under the *New York Code*, § 160, that the moving papers need not show that the return had been filed, and that the filing was a matter to be shown in opposition to the motion. *Condert v. Lias*, 11 How. Pr. (N. Y. C. Pl.) 264.

1. *Immediate Return.* — The transcript may be filed with the clerk of the appellate court immediately after the appeal has been allowed by the justice. *Hughes v. Clemens*, 28 Oregon 440; *Jacobs v. Oren*, 30 Oregon 593, in which case the objection was that by delivering the transcript to the plaintiff to be filed in the appellate court on the day the appeal is allowed, the appellee is deprived of his right to except to the sureties in the undertaking.

Under a section of the *New York Code Civ. Pro.*, providing that the justice must, after ten and within thirty days from the service of the notice of appeal, etc., make his return to the appellate court, it was held that the return was good notwithstanding it was made within ten days from the service

of the notice of appeal. *Lazarus v. Ludwig*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 342, 17 Misc. Rep. (N. Y.) 365.

Computation of Time. — Under a provision that appeals from city courts must be filed before the expiration of the tenth day after the appeal bond has been filed, the day on which the bond is filed as well as the day on which the transcript is required to be filed in the appellate court are held to be excluded in the computation of time. *State v. Ellis*, 40 La. Ann. 793.

Intervening Special Term. — Where a cause was appealed after the commencement of a regular term of the appellate court, the appeal was held to be properly returnable only to the next regular term after it was taken, and the appellate court had no authority to render a judgment of affirmance at an intervening special term. *Coon v. Matthews*, 10 Iowa 290; *Fisher v. Harber*, 10 Iowa 293. But see *Myers v. Mitchell*, 1 S. Dak. 249.

Evidence of Timely Filing. — In *Fenton v. American Jewelry Co.*, (Neb. 1897) 70 N. W. Rep. 931, it was held that the file mark of the clerk on the return of a justice was conclusive evidence of the timely filing thereof, against an affidavit of an attorney in the cause that at some time after the expiration of the time within which the return should have been made a search had been made by him of the records of the appellate court, and that no such return could be found.

2. *Carter v. Monnastes*, 19 Oregon 538; *Newton v. Haggerman*, 1 Browne (Pa.) 94. See also *Edminster v. Rathbun*, 3 S. Dak. 129.

3. Under a provision that the return must be made within thirty days from the service of the notice of appeal, it

to comply therewith will absolutely defeat the appeal. The appellant may have an opportunity to move for an order requiring the return, or, upon his failure to do this, the court may dismiss his appeal,¹ exercising a sound discretion in the premises.²

Laches of Justice. — On the other hand, it is held that the failure of the justice to return an appeal in time, being the laches of the justice and not of the party, ought not to deprive the party of his right to an appeal, and is therefore not a ground for dismissal.³

was said that a return filed after the thirty days does not deprive the court of the right of hearing the appeal or subject either party to any penalty other than that of inconvenience caused by the delay. *Lazarus v. Ludwig*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 342, 17 Misc. Rep. (N. Y.) 365.

1. *Sherman v. Rolberg*, 9 Cal. 17; *Burgess v. Superior Ct.*, (Cal. 1887) 13 Pac. Rep. 166; *Little v. Smith*, 5 Ill. 400; *Holloway v. Baker*, 6 Iowa 52; *Stevenson v. Cadwell*, 14 Mont. 311; *Bruins v. Downey*, 45 Wis. 496.

In *Goodman v. Allen*, 72 Iowa 616, an action against a justice of the peace for failure to return the appeal, it was held that the appellant by failing to see that his appeal had been returned in time must be taken to have abandoned it so far as the liability of the justice of the peace was concerned.

When Mandamus Not Proper. — Where a justice refuses to send up the transcript, and the appellate court refuses to make an order requiring him to do so, it has been held that mandamus is not the proper remedy, because the party by his application to the appellate court has a plain, speedy, and adequate remedy in the ordinary course of law by an appeal from the order denying the application. *Meyberry v. Bowker*, 14 Nev. 339.

Return Without Order. — If upon a failure of the justice to return the papers at the proper time the appellant must take a rule against him to make his return at the next term, a return by the justice at the next term without a rule is good. *Ferguson v. Kays*, 21 N. J. L. 431.

2. *Hughes v. Wheat*, 32 Ark. 292; *Smith v. Allen*, 31 Ark. 268; *Garrison v. Nelson*, 30 Ark. 394; *People v. Elkins*, 40 Cal. 642; *McKay v. Superior Ct.*, 86 Cal. 431; *Drake v. Camp*, 45 N. J. L. 293; *State v. Campbell*, 5 Wash. 517; *Bruins v. Downey*, 45 Wis. 496. See also *Edminster v. Rathbun*, 3 S. Dak. 129.

3. *Alabama*. — *Larcher v. Scott*, 2 Ala. 40.

Georgia. — *Robison v. Medlock*, 59 Ga. 599.

Illinois. — *McMullen v. Graham*, 6 Ill. App. 239.

Indiana. — *Lacy v. Fairman*, 7 Blackf. (Ind.) 558; *Gumberts v. Adams Express Co.*, 28 Ind. 181.

Iowa. — *Fisher v. Harber*, 10 Iowa 293; *Whitcomb v. Holloway*, 4 Greene (Iowa) 311.

New Jersey. — *State v. Judges*, 3 N. J. L. 308.

New York. — *Ex p. Kellogg*, 3 Cow. (N. Y.) 372; *Lazarus v. Ludwig*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 342, 17 Misc. Rep. (N. Y.) 365.

North Carolina. — *Lamon v. Gilchrist*, 1 Dev. L. (N. Car.) 176.

Tennessee. — *Humphrey v. Humphrey*, 1 Swan (Tenn.) 154, under a statute providing that the appeal may be prosecuted if the return is made at any time during the term, notwithstanding another section of the act requires the justice to make the return at a time fixed.

Texas. — *Campbell v. Bechsenschutz*, (Tex. Civ. App. 1894) 25 S. W. Rep. 971; *Muller v. Humphreys*, (Tex. App. 1889) 14 S. W. Rep. 1068; *Patty v. Miller*, 5 Tex. Civ. App. 308.

Wisconsin. — *Norden v. Jones*, 33 Wis. 600; *Demming v. Weston*, 15 Wis. 236.

The Failure to Apply for a Mandamus will not afford a good ground for dismissing an appeal because the return was made at a delayed term. *Campbell v. Bechsenschutz*, (Tex. Civ. App. 1894) 25 S. W. Rep. 971, where the court said: The appellant, by obtaining the filing of the transcript during the term, did all that he could have done through a writ of mandamus, and we can see no reason for dismissing the case. We do not feel disposed to aid in defeating the right of appeal where the delay in filing the record from the justice's court is occasioned by no neglect on the part of

Nor will the fact that the court did not send up certain original papers in the cause be a ground for dismissing the appeal where the appellate court has full power to correct and supply such omissions.¹

C. ENTRY OF APPEAL AND RETURN OF PAPERS BY APPELLANT. — The absolute right of the appellant to enter his appeal terminates with the expiration of the time limited by statute for such an entry.² When the duty of returning the papers on an appeal rests with the appellant and not with the justice, less indulgence is extended to a failure to comply with the law.³

the appellant, but is occasioned solely through the failure of the officer to perform his statutory duty." See also *Citizens' R. Co. v. Madden*, (Tex. Civ. App. 1897) 39 S. W. Rep. 323.

1. *Rahilly v. Lane*, 15 Minn. 447.

It Is Too Late After the Jury Is Sworn to object that the warrant and account were not sent up by the justice. *Grimes v. Dearborn*, 3 J. J. Marsh. (Ky.) 60. See also *Dougherty v. Mason*, 4 Blackf. (Ind.) 432.

Lost Papers. — Where the original papers as well as a copy of the docket entries were required to be filed, it was held to be error to dismiss an appeal because such original papers were not on file, having been lost after they were returned. *Fanning v. Voelker*, 39 Mo. 120.

In *Smith v. Van Brunt*, 2 E. D. Smith (N. Y.) 534, it was held that if the return is lost the parties may consent that the justice sign a copy, but the necessary facts must be placed before the court in some regular way, or the appeal should be dismissed.

Lost Before Filing. — Where the declaration filed with the justice was lost before the papers were returned on appeal, it was held proper to permit the plaintiff to file a copy thereof upon proof of such loss. *Bauer v. Wasson*, 60 Mich. 194.

2. *Sundet v. Steenerson*, (Minn. 1897) 72 N. W. Rep. 569.

Dismissal Under Discretion. — If the court exercises a discretion in dismissing an appeal because it had not been entered in time, the exercise of such discretion will not be reviewed. *Bush v. Doy*, 1 Kan. 86; *Price v. Orange*, *Wright* (Ohio) 568. See also *Sundet v. Steenerson*, (Minn. 1897) 72 N. W. Rep. 569.

But the omission of the appellant to cause an entry of the appeal on the calendar of actions within the time pro-

vided by the statute is held not to affect the jurisdiction of the appellate court over the action, but that court has the power to relieve the appellant from the consequences of his omission and to try the cause on its merits. *Christian v. Dorsey*, (Minn. 1897) 72 N. W. Rep. 568.

Entry on Docket — Duty of Clerk. — It is the duty of the clerk to enter appeals from justices' courts upon the proper docket, and if this duty be omitted at the proper time he may perform it at any time thereafter without any leave or direction from the court or without any notice to the appellant. So long as an appeal is pending, the appellant is bound to take notice that it has been or will be entered upon the docket. Failure to keep sight of the case and to ascertain when it stands for trial is negligence against which equity will not grant relief after the case has been tried *ex parte* and a judgment rendered in favor of the respondent on the appeal. *Combs v. Choven*, 89 Ga. 779.

In *North Carolina*, under the statute requiring the appellant to docket his appeal within a certain time, the court may dismiss the appeal if it is not so docketed. This statute was for the purpose of expediting the trial of small causes. *Ballard v. Gay*, 108 N. Car. 544.

Entry in Absence of Justice's Return. — An appellant may enter his appeal although the justice has not filed his return; otherwise the appellant might lose his appeal from the negligence of the justice. Having entered his appeal and placed it on the calendar, the appellant may proceed to compel a return. *Marcotte v. Fitzgerald*, 45 Minn. 51.

3. *Swope v. Smith*, 1 Okla. 283; *Talbert v. Williams*, 1 Browne (Pa.) 160; *Converse Cattle Co. v. Campbell*, 25 Neb. 37; *Hunter v. Cole*, 49 Me. 557.

d. ENTRY OF APPEAL BY APPELLEE. — It is sometimes provided that upon the failure of the appellant to see that the transcript or appeal is entered in the appellate court within the time prescribed the appellee may do so and have the judgment affirmed.¹

e. SUFFICIENCY OF TRANSCRIPT — (1) *Jurisdiction of Justice.* — It is often held in general terms, on account of the character of a justice's court, that the return of the justice should show that he had jurisdiction to render the judgment appealed from.²

In such a case it is said that if the justice files a transcript he acts as the appellant's agent. *Bush v. Doy*, 1 Kan. 86.

Effect of Agreement between Justice and Attorney. — An agreement between the justice and the attorney for the appellant that the justice will file the transcript will not relieve the appellant of the consequences of a failure on the part of the justice to perform his agreement. *Union Pac. R. Co. v. Marston*, 22 Neb. 721; *Gifford v. Republican Valley, etc., R. Co.*, 20 Neb. 538; *Sherwood v. McKinney*, 5 Whart. (Pa.) 435.

Waiver of Objection. — Where the transcript was filed after the time prescribed, it was held that by a general appearance the appellee conferred jurisdiction upon the appellate court. *Steven v. Nebraska, etc., Ins. Co.*, 29 Neb. 187.

1. *Bernicker v. Miller*, 37 Mo. 498; *Wilson v. Wilson*, 23 Neb. 455; *Slaven v. Hellman*, 24 Neb. 646; *Wilde v. Preuss*, 33 Neb. 790; *Spaulding v. Woodworth*, 42 Vt. 570; *Carruth v. Tighe*, 32 Vt. 626.

Authority of Court under Statute. — In *Vermont* it was held that where the appellee entered the appeal for affirmance, the appellate court had no authority beyond the express terms of the statute, which required an affirmance. *Spaulding v. Woodworth*, 42 Vt. 570.

Filing Amended Copies. — Where the copies first filed by the appellee for an affirmance of his judgment are defective, the appellee may be allowed to file amended copies, and it was held that the appellant could not appear and demand as of right a trial upon the merits upon the filing of such amended copies, though he might show cause against the affirmance of the judgment. *Carruth v. Tighe*, 32 Vt. 626.

In the Absence of a Statute providing for such a course, it was held that an appellee had no power to enter a cause in the appellate court, and that his ac-

tion in filing a transcript therein being without authority of law and void, any action of the appellate court upon such filing was a nullity. *Steel v. Rees*, 13 Oregon 428.

Affirmance in Absence of State's Attorney. — In *State v. Wooley*, 44 Vt. 363, it was insisted that the town grand juror on whose complaint the case was prosecuted before the justice had no authority to represent the state in the County Court in procuring the affirmance of the judgment of the justice against the defendant on the neglect of the latter to enter his appeal; but it was held that whether the authority of the state's attorney was paramount to that of the grand juror or not, in the absence of proof to the contrary the acquiescence of the state's attorney would be presumed.

2. *Heflin v. Owens*, 10 Ark. 265; *Barr v. Logan*, 5 Harr. (Del.) 52; *Moore v. Hansen*, 75 Mich. 564; *Gadsby v. Stimer*, 79 Mich. 262; *Gideon v. Hughes*, 21 Mo. App. 528; *Vaughn v. Missouri Pac. R. Co.*, 17 Mo. App. 4; *Matson v. Hannibal, etc., R. Co.*, 80 Mo. 229; *State v. Ivie*, 118 N. Car. 1227; *State v. Johnson*, 64 N. Car. 581; *Allen v. Jackson*, 86 N. Car. 321; *Wood v. Bronson*, 2 Pa. Dist. Rep. 746; *Pelton v. Blooming Grove*, 3 Wis. 310; *Hale v. Thayer*, 2 Chand. (Wis.) 68. See *supra*, I. 3. *Must Appear Affirmatively*; II. 7. *b.* (3) *Should Show Jurisdiction.*

The rule that the jurisdiction of an inferior court must affirmatively appear, has been said to relate chiefly to the case where the record is brought before a superior court for review or is questioned in some collateral proceeding. *Clyde, etc., Plank Road Co. v. Parker*, 22 Barb. (N. Y.) 323. But see *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Dickinson v. Smith*, 25 Barb. (N. Y.) 102.

Where the Jurisdiction May Be Extended by Consent, under a statute, such con-

(2) *Jurisdiction of Appellate Court* — (a) *In General*. — It has also been held that certain conditions prerequisite to the jurisdiction of the appellate court should be shown by the justice's return,¹

sent will be presumed on appeal if it does not appear that there was an objection to the exercise of the extended jurisdiction before a justice. *Chesmore v. Barker*, 101 Iowa 576.

Jurisdiction Appearing from Whole Record. — If the jurisdiction of the justice does not appear from the statement of the cause of action, it may nevertheless appear in the transcript of the justice. *Fields v. Wabash*, etc., R. Co., 80 Mo. 203; *Barnett v. Atlantic*, etc., R. Co., 68 Mo. 56; *Iba v. Hannibal*, etc., R. Co., 45 Mo. 469.

Where it is averred in the statement and established by evidence that the place where certain stock was killed was in a certain township and within a certain county, and the transcript shows that the person before whom the suit was brought was a justice of the peace for said township, the official character of the justice is *prima facie* established. *Burger v. St. Louis*, etc., R. Co., 52 Mo. App. 119.

Where all the papers sent up showed that the case had been tried in a certain county before a justice of the peace for that county, it was held that the transcript of the proceedings need not set forth the county in which the cause was tried nor the official character of the officer before whom it was tried. *Case v. Rowland*, 17 N. J. L. 76.

1. *Merrill v. Manees*, 19 Ark. 647; *Devore v. Staeckler*, 49 Mo. App. 547.

Notice of Appeal. — Thus it has been held that the notice of appeal required by statute is a jurisdictional prerequisite to the allowance of the appeal, and that the return of the justice must show this fact. *Looney v. Drometer*, (Minn. 1897) 72 N. W. Rep. 797 [*citing* *McFarland v. Butler*, 11 Minn. 72; *Marsile v. Milwaukee*, etc., R. Co., 23 Minn. 4].

But where all the statutory requirements relating to the taking of an appeal have been complied with in fact, it has been held that the mere failure of the certified justice's docket to show the receipt of the notice of appeal and the filing of the undertaking will not divest the appellate court of its jurisdiction. *Warder v. Raymond*, 7 S. Dak. 451.

Affidavit for Appeal. — In *Anony-*

mous, 6 N. J. L. 230, it was held to be necessary that the transcript of the justice's docket should show that the affidavit required was made and filed at the time of the filing of the appeal bond.

Though the filing of the affidavit is not noted in the justice's docket, if an affidavit appears by the papers sent up to be indorsed on the back of the appeal bond and sworn to on the same day the bond was filed and before the same justice who rendered the judgment, the presumption is that the affidavit was made and filed with the justice at the time of the filing of the bond and demanding the appeal, as to reject the affidavit it is necessary to presume a fraud committed by the justice in antedating the affidavit or suffering it to be indorsed on the bond after the complaint was filed and the appeal demanded, which is inadmissible, the presumption being that the justice did right. *Carman v. Smick*, 14 N. J. L. 119.

Conviction in Criminal Prosecution. — In *Com. v. Burns*, 8 Gray (Mass.) 483, on appeal from a conviction before a justice, a motion in arrest of judgment was sustained upon the ground that the jurisdiction to which the appeal was taken was wholly appellate and must appear upon the papers filed in the case, and that among the necessary papers there must be a copy of the conviction duly certified.

In *Com. v. Hersey*, (Mass. 1887) 9 N. E. Rep. 838, on appeal from a conviction before a justice, a motion to quash the complaint was overruled, and it was held that the following record of the trial justice sufficiently showed that the defendant was convicted and the time when he was tried and convicted. "By virtue of the within warrant, the respondent is brought into court this twenty-fifth day of June, A. D. 1886, and the within complaint is read to him; and, being asked whether he is guilty or not guilty of the offense within charged upon him, says that he is not guilty, but, after due and full examination, it was considered by me that he is guilty of the offense charged against him. It is therefore ordered by said court that he pay a fine," etc.

but in some cases a presumption is indulged until the contrary appears that a case appearing to be in the appellate court was properly brought there.¹

(b) **Right to Appeal.** — It has been held that the transcript or papers returned to the appellate court should show the right of appeal.²

(c) **Allowance of Appeal.** — It has sometimes been held that the allowance of an appeal where required must be certified by the justice in his return;³ but, on the other hand, where a compliance by the defendant with the requirements of the statute for perfecting an appeal appears, this has been held to be sufficient without the formal certification by the justice that the appeal was granted.⁴ The appeal exists when the appeal bond is accepted and approved, and the further action of the justice in sending up the transcript and papers is held to be only ministerial.⁵

f. **CONCLUSIVE EFFECT OF RETURN.** — The justice's return

1. *Wolf v. State*, 11 Ind. 231; *Sholts v. Judges*, 2 Cow. (N. Y.) 506.

2. **Appeal from Judgment Rendered in Defendant's Absence.** — Where an appeal cannot be prosecuted by a defendant from a judgment rendered in his absence, the appeal papers should show that the judgment was rendered in the presence of the defendant, *Vandoren v. Vandoren*, 10 N. J. L. 286; though this need not appear in express terms, *Reeves v. Wilson*, 14 N. J. L. 116.

Appeal Not Allowed from Default Judgment. — Where an appeal could not be taken from a judgment by default, the record sufficiently showed that the judgment was not by default when it stated that the parties appeared by their attorneys. *Pryor v. Williams*, 7 Ark. 295.

Judgment upon Verdict. — The record must show the entry of a judgment upon the verdict of a jury. *Griswold v. Burroughs*, 60 Hun (N. Y.) 558. See *supra*, IV. 2. b. (4) *Verdict Without Judgment*.

Right to Appeal Arising Out of Oral Plea. — In *Johnson v. Williams*, 48 Vt. 565, it was held that a motion to dismiss an appeal only reaches such defects as are apparent on the face of the appeal copies, and where the right to appeal arises out of the character of the defendant's plea, which is oral, the copies of the appeal ordinarily setting forth only so much of the pleadings as were reduced to writing, the appeal will not be dismissed because the appeal copies do not disclose the right of appeal.

3. *Moulder v. Anderson*, 63 Mo.

App. 34; *Tarwater v. Long*, 36 Mo. App. 182; *Rogers v. Hill*, 1 Yerg. (Tenn.) 400; *Hall v. Bewley*, 11 Humph. (Tenn.) 106.

The Recital in the Appeal Bond that the appeal has been granted has been held to be insufficient. *Rogers v. Hill*, 1 Yerg. (Tenn.) 400; *Hall v. Bewley*, 11 Humph. (Tenn.) 106.

Discrepancy in Names. — Where it was certified that "H. H. Free appeared and filed bond with Frank Burt as security, and asks that an appeal be granted," etc., and the appeal bond recited that the appeal was asked by Bert Free, it was held that the appeal should be regarded as taken by Bert Free and not by H. H. Free. *York v. Free*, 38 W. Va. 336.

4. *Rapley v. Brown*, 12 Ark. 80; *Hanna v. Kankakee*, 34 Ill. App. 186; *Littell v. Bradford*, 8 Blackf. (Ind.) 185; *Wolf v. State*, 11 Ind. 231; *Humble v. Williams*, 4 Blackf. (Ind.) 473; *Rodenbough v. Rosebury*, 24 N. J. L. 491.

Sufficient Showing. — Where the record shows "appeal prayed and granted, affidavit and bond filed, June 4th, 1842," this is sufficient showing that the appeal was prayed and granted though the entry appears upon the margin of the record, justices of the peace not being held to strict rules of technical formality. *Pryor v. Williams*, 7 Ark. 295. See also *Bennett v. Kite*, 9 N. J. L. 106.

The Appellant May Show by Affidavit that the appeal was prayed. *Frazer v. Smith*, 6 Blackf. (Ind.) 210.

5. *York v. Free*, 38 W. Va. 336.

is conclusive of the statements therein contained, and cannot generally be aided or contradicted by parol testimony.¹

Improper Matter Inserted in Transcript. — Entries in the transcript which the justice has no authority to make are of no effect, and will be rejected.²

g. AMENDMENT OF RETURN. — The return of the justice of the peace being conclusive, if there is any omission or inaccuracy in material parts thereof the party may suggest a diminution of the record and have a further or amended return,³ which is very

1. *Arkansas*. — *Moehring v. Kayser*, 21 Ark. 457.

Kansas. — *Struber v. Rohlf*, 36 Kan. 202.

Michigan. — *Barker v. Wheeler*, 44 Mich. 176.

Minnesota. — *Plymat v. Brush*, 46 Minn. 23.

New York. — *Suiter v. Kent*, 12 N. Y. App. Div. 599; *Young v. Conklin*, 3 N. Y. Misc. Rep. (Rockland County Ct.) 122; *Peck v. Richmond*, 2 E. D. Smith (N. Y.) 380; *McCafferty v. Kelly*, 2 Sandf. (N. Y.) 637; *Spence v. Beck*, 1 Hilt. (N. Y.) 276; *Kilpatrick v. Carr*, 3 Abb. Pr. (N. Y. C. Pl.) 117.

Pennsylvania. — *Hindman v. Doughty*, 172 Pa. St. 573; *Foss v. Bogan*, 92 Pa. St. 296; *Evans v. Brobst*, 5 Pa. Dist. Rep. 30; *Delaware, etc., Canal Co. v. Loftus*, 71 Pa. St. 419.

South Dakota. — *Mouser v. Palmer*, 2 S. Dak. 466.

Wisconsin. — *Hewett v. Currier*, 63 Wis. 386.

Contra. — On the other hand, it is held that the record of a justice is not such a record as cannot be supplemented by proof *aliunde*. *Behymer v. Nordloh*, 12 Colo. 352; *Brown v. Beesett*, 13 Iowa 185.

"It cannot be held that because a general denial was filed before the justice it will be conclusively presumed, in the absence of the required entries on his docket, that there was no other pleading there. We agree with the view expressed in the opinion in *Gholston v. Ramey*, (Tex. Civ. App. 1895) 30 S. W. Rep. 713, to the effect that, with the justice's transcript in the state above indicated, it may be shown in the County Court by parol testimony what the pleadings actually had been in the justice's court. From the testimony on the record, the court did not err in not striking out the matter pleaded." *Howard v. Faggard*, (Tex. Civ. App. 1895) 32 S. W. Rep. 188.

In *Missouri* the statute provided that "in all cases where property or effects shall be attached, the defendant may put in issue, by a verbal plea, in the nature of a plea in abatement, on oath, the substance of which shall be noted by the justice on his docket, the existence of the facts alleged in the affidavit on which the attachment was sued out." It was held that this did not negative the conclusion that the defendant may file a formal plea in abatement before the justice, verified by affidavit, that the justice might transmit such a plea to the Circuit Court with the other papers in the case, and that the Circuit Court might treat it as putting in issue the existence of the facts alleged in the affidavit for the attachment, although the justice did not see fit to note it on his docket. *Meyers v. Boyd*, 37 Mo. App. 532.

Irregular Amendment by Consent. — In *Hills v. Miles*, 13 Wis. 625, it was said that where there was no attempt to dispense with an actual appeal the parties might consent to irregular proof showing that the appeal was taken.

Where There Is an Obvious Clerical Error, it has been held that such error may be altogether disregarded. *Caughy v. Vance*, 3 Pin. (Wis.) 275. See also *Lindsay v. Tansley*, (Supreme Ct.) 18 N. Y. Supp. 317.

And it has been said that it would be a too rigid rule to refuse to allow parol testimony to explain such an error as the mistake of a justice in entering the Christian name of a witness. *Crane v. Ward*, 3 N. J. L. 230.

2. *Kimpson v. Hunt*, 4 Iowa 340; *Savner v. Chipman*, 1 Mich. 116; *Rawson v. Adams*, 17 Johns. (N. Y.) 130; *Swartwout v. Roddis*, 5 Hill (N. Y.) 118.

3. *Weddell v. Seal*, 45 Miss. 726; *Elsanger v. Grovjohn*, 29 Neb. 139; *Kearney v. Pennock*, 2 Pa. Dist. Rep. 32; *Cochran v. Parker*, 6 S. & R. (Pa.) 549; *Hewett v. Currier*, 63 Wis. 386.

often held to be his only remedy; ¹ but for such a defect or omission the court should not dismiss the appeal, but an amendment of the return should be awarded, ² although a motion to dismiss is

In a Criminal Case the appellee objected to the justice's docket on the ground that there was error therein in stating the time of service of the notice of appeal, and it was held that the justice might be required by an order of court for an amended return to answer specifically as to such alleged error. *State v. Christensen*, 21 Minn. 500.

Irregularity or Fraud in Obtaining Return. — Whatever irregularity or fraud there may be in obtaining an order for an amended return, it cannot affect the return itself, and the remedy of the party aggrieved is to move for a further amended return. *Thomas v. Whitelegge*, (C. Pl.) 14 N. Y. Supp. 779.

1. *Iowa*. — *Brown v. Beesett*, 13 Iowa 185; *Lord v. Ellis*, 9 Iowa 301.

Kansas. — *Struber v. Rohlf*, 36 Kan. 202; *Reedy v. Gift*, 2 Kan. 392.

Minnesota. — *Plymat v. Brush*, 46 Minn. 23; *Smith v. Victorin*, 54 Minn. 338.

New York. — *Capewell v. Ormsby*, 2 E. D. Smith (N. Y.) 180; *Peck v. Richmond*, 2 E. D. Smith (N. Y.) 380; *Young v. Conklin*, 3 N. Y. Misc. Rep. (Rockland County Ct.) 122; *Suiter v. Kent*, 12 N. Y. App. Div. 599.

Oregon. — *Jacobs v. Oren*, 30 Oregon 593.

South Dakota. — *Mouser v. Palmer*, 2 S. Dak. 466.

Wisconsin. — *Hewett v. Currier*, 63 Wis. 386.

Falsified Record. — In *Landa v. Harris*, (Tex. Civ. App. 1897) 40 S. W. Rep. 551, it was held that there was no duty on the appellate court to try an appeal upon a record which had been materially falsified; and where it appeared that the record had been altered to affect the costs in case of judgment in the appellate court for the same amount as was had in the justice's court, and the party chargeable with the alteration was given an opportunity to correct the record by certiorari and refused to do so, the cause should be dismissed.

Acquiescence in Truth of Return. — If a party does not procure an amended return he is deemed to have acquiesced in the truth of what the return states. *Peck v. Richmond*, 2 E. D. Smith (N. Y.) 383; *Lord v. Ellis*, 9 Iowa 301;

Smith v. Victorin, 54 Minn. 338; *Plymat v. Brush*, 46 Minn. 23.

Relief in Equity. — Where an appeal was dismissed for no other reason than that the justice failed to insert in the affidavit for appeal the date of its execution, and no opposition to the motion to dismiss nor request to amend was made, it was held that a court of equity would not relieve a party against a wrong produced by his own negligence, and that therefore the appellant from the judgment of the justice could have no relief by reason of the dismissal of his appeal. *Weddell v. Seal*, 45 Miss. 734.

Facts Not Within Justice's Knowledge.

— Under N. Y. Code Civ. Pro., § 3057, upon appeal errors in fact not affecting the merits and not within the knowledge of the justice may be determined upon affidavits. *Larocque v. Harvey*, 57 Hun (N. Y.) 366, 19 Civ. Pro. Rep. (N. Y.) 109; *Griffin v. Norton*, (Buffalo Super. Ct.) 5 N. Y. St. Rep. 812. But the provision does not apply to matters which are within the justice's knowledge. *Jourdan v. Healey*, 22 Civ. Pro. Rep. (N. Y. C. Pl.) 157; *Vallen v. McGuire*, 49 Hun (N. Y.) 594.

2. *Boiles v. Barnes*, 4 Blackf. (Ind.) 176; *Cook v. U. S.*, 1 Greene (Iowa) 39; *Allen v. Joice*, 8 N. J. L. 135; *Sherman v. Green*, 90 Hun (N. Y.) 462; *Demming v. Weston*, 15 Wis. 236.

Conclusiveness of Amended Return. — Where a party asks for a further return, he is bound by it when it is made. Thus where an action was commenced against two defendants, and the justice's docket showed that the judgment was rendered against "the defendant," upon a further return showing that the judgment was rendered against both the defendants and that objection appeared in the action, both defendants are bound by the return as to the jurisdiction of their persons. *Hinkle v. Collins*, (Mich. 1897) 71 N. W. Rep. 481. See also *Prall v. Waldron*, 2 N. J. L. 135.

Amendment Contradicting Original Return. — In *Bennett v. Taylor*, 70 Hun (N. Y.) 51, it was held that an amended return cannot be made which will absolutely contradict what is stated in the original return. See also *Barber v.*

made before the motion for the rule on the justice.¹

Necessity of Order of Court. — On the other hand, the return of the justice should be correct in the first instance,² and it is often held that when he has once made his return his original authority is gone, and he cannot of his own motion make an amendment thereof, but any amendment which he might make must be under the authority and by the order of the appellate court,³ or with the consent of the parties.⁴ It has, however, been held that receiving and acting upon an amended return is equivalent to a previous order requiring the justice to make it.⁵

h. CERTIFICATION OF RETURN. — The return contemplated by a statute requiring it is such as to give credence to the transcript, process, or papers, and without the certificate of the justice before whom the proceedings were had or some form of authentication by him the appeal will not be recognized by the appellate court.⁶

Stettheimer, 13 Hun (N. Y.) 198; Fitzgerald v. Fitzgerald, 25 Hun (N. Y.) 319; Thompson v. Sheridan, 80 Hun (N. Y.) 34.

Amended Return by Successor in Office. — A successor in office to the justice of the peace who made the original return has power under the direction of the appellate court to supply from the official records of his predecessor any omissions in the transcript. St. Louis, etc., R. Co. v. Hurst, 52 Kan. 612.

The Opposite Party Is Entitled to Notice so that he may resist a motion for an amended return. Moore v. Hansen, 75 Mich. 564; Beville v. Cox, 109 N. Car. 265, wherein it is said: "Doubtless the judge, if the parties consented, or without their consent, might permit the supplementary returns to be filed, but he did not do so. If a recordari had been applied for, the adverse party would have had notice and been put on inquiry, of which benefit he was deprived by the volunteered action of the justice."

1. Boiles v. Barnes, 4 Blackf. (Ind.) 176, holding further that if no motion for an amended return is made the appeal might be dismissed.

2. **Record Altered After Appeal Perfected.** — In Stuttle v. Bowers, 31 Kan. 434, it was held that after the appeal is perfected by the filing and approval of an appeal bond, it is the duty of the justice to make out a transcript of the record as it stood at that time, and if the justice attempts to alter the record after the appeal is perfected the appellant is entitled to have an order requiring him to send up an amended

transcript of the record as it stood when the appeal was perfected.

3. Moore v. Hansen, 75 Mich. 564; Norton v. Porter, 63 Mo. 345; Smith v. Chapman, 71 Mo. 217; Thomas v. Moore, 46 Mo. App. 22; Zabriskie v. Wilder, 12 Daly (N. Y.) 527; Beville v. Cox, 109 N. Car. 265.

4. Beville v. Cox, 109 N. Car. 268.

5. Norden v. Jones, 33 Wis. 603. See also People v. Linzey, 79 Hun (N. Y.) 23; Smith v. Snodgrass, 4 Greene (Iowa) 282, wherein the amended return was sent up within the time prescribed for making the return.

Return Before Showing Cause. — Where a party obtains an order to show cause requiring a justice to amend his return in certain particulars or show cause to the contrary, the justice is authorized immediately to file a return so amended, without waiting for a final order upon the motion, if the facts in his judgment require such amendment. Thomas v. Whitledge, (C. Pl.) 14 N. Y. Supp. 779.

Filing Within Time Without Order. — Where the transcript is filed by either party within the time prescribed by law, the appellate court acquires jurisdiction though the transcript be an imperfect one, and has authority to order a perfect transcript sent up; but the same purpose is accomplished if the perfected transcript is voluntarily furnished by the party without an order of the court. Fulton v. Ryan, 33 Neb. 456.

6. Watts v. Hill, 7 Ark. 203; Weaver v. Russell, 16 Pa. Co. Ct. Rep. 428.

Sufficiency. — *Technical Accuracy* need

But if there is a defect in the certificate, the appellant may have a rule on the justice to correct the defect; the jurisdiction of the appellate court would not be affected by such defect, and it would not be proper for the court to strike out the transcript on file on that account.¹ It has also been held that the entire omission of the justice to certify his transcript is amendable, and that the

not be adhered to. *Nevells v. Sisson*, 10 Ark. 249; *Turner v. Harrison*, 43 Ark. 233.

The following certificate was held sufficient: "I hereby certify that the foregoing is a true transcript of the proceedings had before me in the above cause, as appears from my docket. Given under my hand and seal," etc. *Whitney v. Mills*, 6 Blackf. (Ind.) 545; *Wiley v. Forsee*, 6 Blackf. (Ind.) 247.

The justice need not certify that the certificate is made under his hand and seal, but his signature and seal appearing, they will be presumed to be the signature and seal of the justice, and if the appellee has any doubt about the fact he should take a rule upon the justice to certify whether the seal is his or not. *Henry v. Campbell*, 24 N. J. L. 141.

Signature. — Where a justice describes himself by name in the caption of his return, it has been held to be unnecessary that his signature should be added at the end of his certificate. *Smart v. Howe*, 3 Mich. 590.

So the addition of the title of his office has been held to be unnecessary to a proper authentication by a justice of the peace. *People v. Rensselaer C. Pl.*, 6 Wend. (N. Y.) 543. And a description as "justice" has been held sufficient without adding the words "of the peace." *Com. v. Downing*, 4 Gray (Mass.) 29.

A signature as "justice" instead of "trial justice" has been held to be sufficient. *Com. v. McParland*, 145 Mass. 378. See also *Com. v. Jeffs*, 14 Gray (Mass.) 19.

Seal. — The omission in the record of the justice's seal to his certificate is a mere misprision of the clerk and is amendable. *Wiley v. Forsee*, 6 Blackf. (Ind.) 247.

The seal has been held to be unnecessary. *Com. v. Downing*, 4 Gray (Mass.) 29.

On the other hand, it has been held that the seal is necessary, but if omitted the transcript in that particular could be amended by calling upon the

justice at any time before the trial to put his seal to it. *Henry v. Campbell*, 24 N. J. L. 141, citing *Thompson v. Sutton*, 6 N. J. L. 220.

And again, while it is held that the seal is necessary to the regularity of a transcript, it is not necessary to the jurisdiction of the appellate court, and may be waived by failure to take advantage of the defect at the earliest period. *Lewis v. Hazel*, 4 Harr. (Del.) 470, wherein it is said that the transcript is not certified under a seal such as is recognized by the common law, but by a scroll, which, in point of fact, although called a seal, does not give any authenticity whatever to the transcript.

1. *Waters v. Kirby*, 1 Houst. (Del.) 364; *McNichols v. Hunt*, 43 Ill. App. 451; *Coates v. Bryan*, (Tex. Civ. App. 1897) 40 S. W. Rep. 748, wherein there was a failure by the justice to certify his transcript as the law directed, and a motion was made by the appellee in the appellate court at the time the case was called for trial to dismiss the appeal on account of such omission, which motion was granted, the trial court refusing leave to the appellant for sufficient time to have the justice file a transcript in accordance with the requirements of the law or to attach his certificate *nunc pro tunc* to the transcript on file. This action of the trial court was held to be error, the court saying: "If there had been no attempt on the part of the justice of the peace to comply with the law, and said transcript had not been filed on or before the second term, as required by the provisions of the statute, the court would have been authorized to dismiss said appeal; but the original papers in the cause having been sent up, together with the transcript (though defective), we think the appellants should have been allowed a reasonable time to have the transcript perfected, or, if necessary, the court should have extended to appellants its aid in having said transcript perfected." Citing *Shepard v. Duke*, (Tex. Civ. App. 1894) 28 S. W. Rep. 567.

appellant is entitled to a rule for that purpose.¹

10. Jurisdiction on Appeal — a. IN GENERAL. — Jurisdiction on appeal is acquired under the statutory provisions, as hereinbefore shown,² and cannot be exercised unless the case is removed in the manner provided.³

b. DEPENDENCY UPON JURISDICTION OF JUSTICE. — Upon the question of the effect of failure of jurisdiction over the subject-matter in the justice of the peace, or of excessive exercise of jurisdiction by him, there is some conflict of authority. The better and general rule, however, seems to be that the jurisdiction of the appellate court depends upon that of the justice, and that if the latter had no jurisdiction the former can acquire none by an appeal;⁴ and this, even though the matter involved before the

1. *Hockenbury v. Alpaugh*, 34 N. J. L. 342, holding that if the appellant is prevented from obtaining such a rule through surprise and without any fault on his part, in consequence of which his appeal is dismissed, a mandamus will issue directing the appeal to be reinstated.

2. See the sections treating of the particular steps in perfecting an appeal.

3. *Arroyo Ditch, etc., Co. v. Superior Ct.*, 92 Cal. 47; *Newman v. State*, 97 Ga. 367; *Moulder v. Andersen*, 63 Mo. App. 34; *Woodruff v. Harrell*, 67 Tex. 298.

4. *Alabama*. — *Lykes v. Schwarz*, 91 Ala. 461.

Arkansas. — *Collins v. Woodruff*, 9 Ark. 463; *Latham v. Jones*, 6 Ark. 371; *Pendleton v. Fowler*, 6 Ark. 41.

Delaware. — *Barr v. Logan*, 5 Harr. (Del.) 52.

Illinois. — *Taylor v. Smith*, 64 Ill. 445.

Indiana. — *Mays v. Dooley*, 59 Ind. 287; *Pritchard v. Bartholomew*, 45 Ind. 219.

Iowa. — *McMeans v. Cameron*, 51 Iowa 691.

Kansas. — *Ball v. Biggam*, 43 Kan. 327.

Kentucky. — *Mitchell v. Warden*, 5 T. B. Mon. (Ky.) 263; *Lane v. Young*, 1 Litt. (Ky.) 40; *Stephens v. Boswell*, 2 J. J. Marsh. (Ky.) 29; *Burbage v. Squires*, 3 Metc. (Ky.) 77; *Kirk v. Williams*, 4 T. B. Mon. (Ky.) 413.

Massachusetts. — *Ladd v. Kimball*, 12 Gray (Mass.) 139.

Michigan. — *Sheldon v. Sullivan*, 45 Mich. 324.

Mississippi. — *Stier v. Surget*, 10 Smed. & M. (Miss.) 154; *Crapoo v. Grand Gulf*, 9 Smed. & M. (Miss.) 205.

Missouri. — *Robinett v. Nunn*, 9 Mo. 246; *Webb v. Tweedie*, 30 Mo. 488; *Mitchell Planing Mill Co. v. Short*, 58 Mo. App. 320; *Cooper v. Barker*, 33 Mo. App. 181; *Dillard v. St. Louis, etc., R. Co.*, 58 Mo. 69.

Nevada. — *Peacock v. Leonard*, 8 Nev. 84.

South Dakota. — *Plunket v. Evans*, 2 S. Dak. 434.

Tennessee. — *Harris v. Hadden*, 7 Lea (Tenn.) 216; *Wallen v. Lane*, 1 Overt, (Tenn.) 74; *Houser v. McKennon*, 1 Baxt. (Tenn.) 287.

Texas. — *Waters v. Walker*, (Tex. App. 1891) 17 S. W. Rep. 1085; *Horan v. Wahrenberger*, 9 Tex. 313; *Boudon v. Gilbert*, 67 Tex. 689.

Utah. — *People v. House*, 4 Utah 369.

Wisconsin. — *Cooban v. Bryant*, 36 Wis. 605; *Felt v. Felt*, 19 Wis. 193.

Amendment. — Jurisdiction in such a case cannot be conferred by an amendment in the appellate court. *Ladd v. Kimball*, 12 Gray (Mass.) 139; *Webb v. Tweedie*, 30 Mo. 488; *Rankin v. Fairley*, 29 Mo. App. 587.

Restitution of Property in Appellate Court. — In *Dulin v. Howard*, 66 N. Car. 433, the plaintiff before the justice of the peace commenced proceedings for the possession of real estate and succeeded. Upon appeal to the Superior Court the defendant moved to quash the proceedings and for a writ of restitution, which motion was granted. The plaintiff appealed to the Supreme Court, where, upon the contention that the proceedings were void, it was held: "We agree that the defendant may treat them so, but it does not follow that the plaintiff who initiated and has taken the benefit of them can. He cannot take advantage of his own wrong. If the rule were absolute, as

justice is of a class which also belongs to the general original jurisdiction of the appellate court.¹ So, also, where a justice of the peace renders a judgment in a matter within his jurisdiction, upon appeal the claim cannot be enlarged beyond the jurisdiction of the justice, nor can a judgment in excess of such jurisdiction be rendered.²

contended for, no appeal could be had from the justice's judgment, and the Superior Court should have dismissed the defendant's appeal at his costs. The defendant has been deprived of the possession of his land by color of judicial proceedings, and we think on general principles the Superior Court has the right, which it would have been an injustice not to have exercised, to give him restitution. In addition, this duty is expressly prescribed by section 27 of the Landlord and Tenant Act, 1868-69, c. 156, p. 335."

Jurisdiction in Part. — In *Bunce v. Stanford*, 27 Pa. St. 265, it was held that the appellate court had jurisdiction on an appeal from the judgment of a justice of the peace where part of the demand passed upon by the justice was without his jurisdiction. A part of the claim being within the jurisdiction, the plaintiff was entitled to recover such part, and although the justice gave judgment for the whole claim on appeal, the part of the claim without the jurisdiction of the justice was properly rejected, and the judgment properly rendered for that which was within the justice's jurisdiction.

One of Several Counts Disregarded. — So a count not within the jurisdiction of the justice was disregarded on appeal, there being other counts in the declaration within the justice's jurisdiction. *Lyon v. Alvord*, 18 Conn. 66.

Complaint in Several Paragraphs. — In *Mays v. Dooley*, 59 Ind. 287, it was held that where an amended complaint of several paragraphs is filed with the justice, and the aggregate amount of the sums demanded exceeds the amount of which the justice had jurisdiction, his jurisdiction is thereby ousted, and the Circuit Court on appeal can acquire no jurisdiction though the amount demanded by each paragraph of the amended complaint be less than the maximum limit of the justice's jurisdiction.

Remission of Claim on One Count. — It was held in *North Carolina* that where a suit was brought before a justice claiming a debt of \$50 and also pos-

session of a horse and wagon, the appellate court could permit the plaintiff to remit his claim to the personal property and declare for the debt alone, the court holding that it did not follow that because the magistrate had no jurisdiction of one count he therefore had none of the other. *Jones v. Palmer*, 83 N. Car. 303.

Void or Voidable — Collateral Attack. — In *Pennsylvania* it was held that if the recovery in the appellate court was beyond the jurisdiction of the justice of the peace, the judgment was not absolutely void, but erroneous merely, and therefore could not be collaterally attacked. *Hinds v. Willis*, 13 S. & R. (Pa.) 213.

1. *McMeans v. Cameron*, 51 Iowa 691; *Plunket v. Evans*, 2 S. Dak. 434. See also *Colvin v. Peck*, 62 Conn. 155.

For Exceptions and Objections in this regard and the conflict of authority upon this question see article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 173.

2. *Alabama*. — *Giddens v. Bolling*, 92 Ala. 586.

Colorado. — *Thornily v. Pierce*, 10 Colo. 250.

Connecticut. — *Colvin v. Peck*, 62 Conn. 155.

Kansas. — *Wagstaff v. Challiss*, 31 Kan. 212.

Kentucky. — *Kirk v. Williams*, 4 T. B. Mon. (Ky.) 413.

Massachusetts. — *Kelley v. Taylor*, 17 Pick. (Mass.) 218.

Michigan. — *Evers v. Sager*, 28 Mich. 47.

Missouri. — *Shields v. Stillman*, 48 Mo. 82.

Ohio. — *Van Dyke v. Rule*, 49 Ohio St. 530.

Pennsylvania. — *Deihm v. Snell*, 119 Pa. St. 316.

Tennessee. — *Crow v. Cunningham*, 5 Coldw. (Tenn.) 255; *Gray v. Jones*, 1 Head (Tenn.) 542.

Amendment Beyond Justice's Jurisdiction Not Allowed. — *Colvin v. Peck*, 62 Conn. 155; *Van Dyke v. Rule*, 49 Ohio St. 530; *Kelley v. Taylor*, 17 Pick. (Mass.) 218; *Evers v. Sager*, 28 Mich. 47. Where such an amendment was

On the Part of the Defendant a defense which the justice could not entertain cannot be interposed on appeal.¹

Recovery Within Justice's Jurisdiction. — On the other hand, it has also been held that if the recovery on appeal is for an amount within the jurisdiction of the justice, it will not matter that the declaration filed in the appellate court demanded an amount beyond such jurisdiction.²

Jurisdiction Beyond That of Justice. — In not a few cases the doctrine is maintained that upon appeal the trial is *de novo* and the jurisdiction is not confined to that of the justice,³ that an amendment reaching beyond the jurisdiction of the justice's court may be made in the appellate court,⁴ or that if the appellate court has original jurisdiction, and an appearance is entered, the case becomes an original one in the appellate court.⁵

In Criminal Cases. — On an appeal in a criminal case the jurisdiction of the appellate court is restricted to that of the justice.⁶

made, a second amendment reducing the claim to its original amount was permitted and held to be proper. *Whitney v. Sears*, 16 Vt. 587.

Consent. — In *Vermont* it was held that if the justice could not have jurisdiction of the subject-matter, and the parties on appeal agreed to a trial before a referee, they created a tribunal of their own selection, and thereby waived objection to the jurisdiction. *Reed v. Stockwell*, 34 Vt. 206.

1. *State v. Moor*, 9 Nev. 355.

Set-off. — *Deihm v. Snell*, 119 Pa. St. 316; *Crow v. Cunningham*, 5 Coldw. (Tenn.) 255. At least against the plaintiff's consent. *Smith v. Fleming*, 9 Ala. 768. See also *O'Ferrall v. Moore*, 127 Pa. St. 234.

In *Robinett v. Nunn*, 9 Mo. 246, it was held that if a set-off filed in a justice's court exceeds the jurisdiction of the justice, he should treat it as a nullity, and that on appeal to the Circuit Court such a set-off cannot be reduced by a credit so as to bring it within the jurisdiction of the justice.

Excess as to Cross-bill. — Where the justice has no jurisdiction of a cross-bill the County Court can acquire no jurisdiction thereof on appeal, but the justice might have had jurisdiction of the plaintiff's suit and of the defense thereto of a failure of consideration, and the County Court would have jurisdiction to this extent on appeal. *Hall v. McGill*, (Tex. Civ. App. 1896) 38 S. W. Rep. 828.

2. *Hoffman v. Dawson*, 11 Pa. St. 280; *Greenawalt v. Shannon*, 8 Pa. St. 466.

3. *Palmer v. Wylie*, 19 Johns. (N. Y.) 276; *Jackson v. Covert*, 5 Wend. (N. Y.) 139.

Verdict of Jury in Excess of Justice's Jurisdiction. — *Palmer v. Wylie*, 19 Johns. (N. Y.) 276; *M'Kinley v. M'Calla*, 5 Binn. (Pa.) 600; *McEntire v. McEiduff*, 1 S. & R. (Pa.) 19.

4. *Boggs v. Near*, 20 Ind. 395; *McOmber v. Balow*, 40 Minn. 388; *Jacob v. Watkins*, 10 N. Y. App. Div. 475; *Gould v. Patterson*, 87 Hun (N. Y.) 533; *Simpson v. Rome*, etc., R. Co., 48 Hun (N. Y.) 113; *Dressler v. Davis*, 12 Wis. 58; *Heath v. Heath*, 31 Wis. 223; *Sellers v. Lampman*, 63 Wis. 256; *Zitske v. Goldberg*, 38 Wis. 216.

Necessity of Leave. — In *Zitske v. Goldberg*, 38 Wis. 230, it was held that the general rule of law was that on appeal from a judgment of a justice of the peace the jurisdiction of the Circuit Court was limited to that of the justice. The court said that although an increase of the claim for damages had been made by leave of the court in some cases, by which the plaintiff had claimed and recovered damages beyond the jurisdiction of the justice, without such leave the general rule would govern.

5. *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132; *Behymer v. Nordloh*, 12 Colo. 353; *Place v. Welch*, 2 Ohio Dec. 542, holding further that the appellate court has no jurisdiction over the costs made before the justice.

6. *Feeley's Case*, 12 Cush. (Mass.) 598; *Matter of Irvin*, 29 Mich. 43.

If the Justice of the Peace Has No Jurisdiction of the offense, the appellate

11. Proceedings After Appeal — *a.* **END OF JUSTICE'S JURISDICTION.** — When an appeal is taken from the judgment of a justice of the peace the cause is pending in the appellate court,¹ and the jurisdiction of the justice is at an end.²

b. **WHEN APPELLATE COURT MAY PROCEED.** — But notwithstanding the jurisdiction of the justice is at an end, the time or term at which the cause stands for trial or disposition in the appellate court is generally controlled by express statutory provisions,³ as that an appealed case shall stand for trial at the term following the perfection of the appeal and the filing of the papers when these acts are done a certain number of days before the commencement of such term,⁴ or making the right to proceed

court can acquire none by an appeal. *Neil v. State*, 43 Tex. 91.

But where, on the trial before a justice, the facts disclose that the case is not cognizable before a justice, and it becomes the duty of the justice to send the case to the court having jurisdiction thereof, it has been held that if the justice fails in this regard and tries the case and renders a judgment against the defendant on appeal, the prosecution should not be dismissed for want of jurisdiction in the justice, but the jury should be discharged and the case sent before the grand jury, or, if the proceeding in the particular court is by information, either a new information should be filed or the case should proceed on the original information before the justice as an original case. *State v. Barada*, 49 Mo. 504.

Remand to Justice Having Jurisdiction. — If at the instance of the defendant a criminal cause is removed for trial before a justice who has no jurisdiction, on appeal the defendant ought not to be allowed to escape, but the court should direct the justice who issued the warrant to proceed, "not to try the indictment, but to provide by order for its removal to some justice living in the same township," the latter having jurisdiction in such a case. *State v. Ivie*, 118 N. Car. 1227.

1. *Goodman v. Allen*, 72 Iowa 616; *St. Louis, etc., R. Co. v. Hurst*, 52 Kan. 609; *Christian v. Dorsey*, (Minn. 1897) 72 N. W. Rep. 568; *Sullivan v. Sanders*, 9 Mo. App. 75; *York v. Free*, 38 W. Va. 338.

2. *Miller v. O'Reilly*, 84 Ind. 168; *Dean v. Kinman*, 15 Neb. 492; *Forbes v. McGuire*, 116 N. Car. 449; *Robinson v. Shrouds*, 1 Ashm. (Pa.) 168.

3. **Motion to Strike Off an Appeal Before Return Day.** — A motion to strike off an

appeal cannot be made until the first day of the term to which the appeal is entered. *Calvert v. Row. & Browne* (Pa.) 256. But where the appeal was taken to the October term, and before the beginning of said term the court ordered the appellant to have the surety on his replevin bond justify or to file a new bond by a certain date, and the appellant appeared at such date and procured an extension of time within which to comply with said order, it was held that a dismissal of the suit upon the final failure of the appellant to comply with the order, though made before the beginning of the term to which the appeal was returnable, was not error, because the court had jurisdiction of the subject-matter, and the appellant by appearing and procuring an extension of time waived all questions of jurisdiction over his person. *Crews v. Chase*, 66 Ill. App. 344.

Dismissal Not Trial. — The court may dismiss an appeal before the term at which the cause should be tried. Such action is not in any sense a trial of the cause, but a refusal to permit it to remain on the docket for trial. *Bell v. Brown*, 11 Tex. Civ. App. 526.

4. See generally *Ogden v. Danz*, 22 Ill. App. 544; *Vallens v. Hopkins*, 157 Ill. 267; *Hayward v. Ramsey*, 74 Ill. 372; *Bessey v. Ruhland*, 33 Ill. App. 73; *Seeberger v. Miller*, 20 Iowa 428; *Knapp v. Skeele*, 31 Mo. 434; *Matthews v. Rankin*, 58 N. J. L. 584.

Illustration. — Under a statute providing that appeals from justices shall be put on the list for trial at the first term to which the same shall be appealed, provided that if the appeal is taken within five days prior to the beginning of such term and if the papers are not filed with the clerk of said court three days prior to the beginning of such

dependent upon the docketing of the case at a certain time with reference to the beginning of the term to which the appeal is taken,¹ or upon the service of notice upon the appellee at a certain time.²

term the appeal shall be put on the list for trial at the next term thereafter, where the appeal is taken within five days prior to the beginning of the next term and the papers are not filed with the clerk three days prior to the beginning of such term the appeal cannot be placed on the list for trial at such term, but must go over to the next succeeding term. *Matthews v Rankin*, 58 N. J. L. 584.

But where the appeal is taken within the prescribed number of days before the beginning of the next term, it is held that trial can be required at the term of the court to which the appeal is taken, under the general rule of practice, although the papers are not filed until the second day of the term. *Rogers v. Hollingsworth*, 95 Tenn. 358.

Waiver of Objection by Voluntary Trial. — By appearing and specially objecting that sufficient time had not elapsed since the trial of the cause before the justice to allow the hearing of the appeal, and then arguing the questions raised upon the appeal and submitting the same, the party voluntarily consents to the trial of the appeal upon the merits. *Minneapolis Harvester Works v. Hally*, 27 Minn. 498.

1. *State v. Edwards*, 110 N. Car. 511. See also *Watts v. Naylor*, 5 Kan. App. 146.

2. *Holloman v. St. Louis, etc., R. Co.*, 92 Mo. 287; *Parks v. Igo*, (Tex. App. 1889) 14 S. W. Rep. 1069. See also *Marcotte v. Fitzgerald*, 45 Minn. 51.

Notice After Continuance. — Under N. Y. Code Pro., § 364, providing that an appeal may be brought to a hearing upon motion by either party of not less than eight days, whereupon the cause is to be placed upon the calendar and continued thereon without further notice until finally disposed of, but if neither party brings it to a hearing before the end of the second term, the appeal shall be dismissed, unless it is continued by special order for cause, it was held that an appeal upon questions of law only, noticed and placed upon the calendar as above provided at one term, cannot be tried at any subsequent term unless the notice of eight days is given as required by the above

provision. *Matthews v. Arnold*, 14 Hun (N. Y.) 378, *overruling Townsend v. Keenan*, 2 Hilt. (N. Y.) 544.

Notice Dependent on Character of Appeal. — In *Illinois*, where an appeal from a judgment of a justice of the peace is taken by filing bond in the Circuit Court, the summons to the appellee is issued and served upon him, or two *nihils* have been returned, or the appearance of the appellee has been entered, which service, return, or appearance has been ten days before the term of court at which proceedings are taken, the appeal may be dismissed, and not otherwise without the consent of the appellant. *Rosenthal v. Craig*, 66 Ill. App. 541; *Chicago Dredging, etc., Co. v. McCarty*, 11 Ill. App. 552; *Camp v. Hogan*, 73 Ill. 228; *Sheridan v. Beardsley*, 89 Ill. 477; *Schmidt v. Skelly*, 10 Ill. App. 564; *Wollman v. Greshetti*, 37 Ill. App. 366; *Sutherland v. Lawrence*, 60 Ill. App. 331; *Pratt v. Bryant*, 2 Ill. App. 314. The court has no jurisdiction to hear the case or do anything except continue it in the absence of such summons, return, or appearance. *Reed v. Driscoll*, 84 Ill. 96; *Rosenberg v. Barrett*, 2 Ill. App. 386; *Norton v. Coggsell*, 35 Ill. App. 566; except when both parties voluntarily appear and go to trial, *Rosenberg v. Barrett*, 2 Ill. App. 386.

The Mere Filing of a Trial Notice with the clerk, who neither marks it filed nor places it among the papers in the case, is not a compliance with the statute. *Norton v. Allen*, 12 Ill. App. 592; *McVey v. Huott*, 11 Ill. App. 203, wherein it was said: "The design of these provisions is quite obvious. It is not merely to bring the appellee within the jurisdiction of the court by a voluntary appearance, but also to place the evidence of such appearance on file, where it will be seen and known by the other party, so that he for at least ten days before the term may have notice of the fact that the cause is in a condition to be forced to trial."

But Where the Appeal Is Perfected Before the Justice no further notice is necessary; the appeal is perfected by the filing of the bond with the justice and the filing of the papers and tran-

c. PROSECUTION OF APPEAL. — In the absence of a statute or rule of court regulating appeals from justices of the peace, such an appeal should not be dismissed for want of prosecution until it is reached on the regular call of the docket for trial.¹ But when there is a failure to prosecute the appeal, the appellee is entitled under the statutory conditions in force either to a dismissal of the appeal² or an affirmance of the judgment.

Various Statutory Provisions Are Also Made for the purpose of expediting the hearing of causes appealed from justices' courts, with a view to disposing of such causes within a limited time and charging the parties with the duty to bring about this result.³

script of judgment ten days before the commencement of the term, and under the statute the transcript and papers on file ten days before the commencement of the term afford an opportunity to each party to prepare for trial. *Valens v. Hopkins*, 157 Ill. 267. See also *Bessey v. Rubland*, 33 Ill. App. 73; *Boyd v. Kocher*, 31 Ill. 295; *Fink v. Disbrow*, 69 Ill. 76.

1. *Harty v. Des Moines, etc.*, R. Co., 54 Iowa 327.

Rule of Court Inconsistent with Statute. — Where, under the statute, the parties are considered in court, a rule of court cannot be made for the purpose of requiring any other kind of appearance. *Jones v. Brown*, 1 Pa. Dist. Rep. 675.

2. *Cronin v. Sullivan*, 61 Ill. App. 338; *Fergus v. Haupt*, 54 Ill. App. 190; *Lum v. Price*, 16 N. J. L. 195; *Holloman v. St. Louis, etc.*, R. Co., 92 Mo. 287. See also the cases in the last preceding subdivision.

The Appellant, as Actor, is regarded as constantly in court, though he was the defendant before the justice. *Martin v. Higgins*, 23 Ala. 775.

Presence of Attorney — Necessity of Proof. — If the appellant's attorney is present in court when the cause is called for trial, the court cannot dismiss the appeal over his objection, but the plaintiff must be required to prove his case. *Brown v. Cook*, 37 Ill. App. 608 [citing *Langenham v. Stickney*, 90 Ill. 361; *Lawler v. Gordon*, 91 Ill. 602; *Eichelberger v. Garvin*, 7 Ill. App. 129].

In a Criminal Case, the defendant, after perfecting an appeal, need not enter an appearance in the appellate court. *State v. Buhs*, 18 Mo. 318.

Notice of Motion. — Notice of the motion to dismiss may be necessary, as in *South Dakota*, and where the statute requires such a notice to support a motion to dismiss for want of prosecution

the motion cannot be sustained without it. *Myers v. Mitchell*, 1 S. Dak. 249.

3. **Noticing for Trial.** — See generally *Willis v. Gimbert*, 27 Mich. 91; *Howe v. Elliott*, 24 Wis. 677; *Webster v. School Dist. No. 4*, 16 Wis. 316; *Vibbert v. Shepard*, 15 Wis. 106; *Fred. Miller Brewing Co. v. Quirk*, 82 Wis. 197; *Platto v. Western Union Tel. Co.*, 64 Wis. 341.

Notice of Trial Before Certain Number of Terms. — Where an appeal is taken on a day subsequent to the rendition of the judgment, and the appellant fails to give notice the required number of days before the first day of the term at which the appeal is triable, if notice is not given before the second term thereafter such failure will authorize an affirmance of the justice's judgment. *Brownsville v. Rembert*, 63 Mo. 393; *Page v. Atlantic, etc.*, R. Co., 61 Mo. 78; *Crosby v. Clary*, 43 Mo. App. 222; *Wolff v. Coffin*, 46 Mo. App. 190; *Riddle v. Gillespie*, 67 Mo. 627.

Appearance and Continuance by Appellant. — Where the appellant does not fail to appear, but does in fact appear and file an affidavit for a continuance on which the cause is continued, the appellee cannot take an affirmance of the justice's judgment at the continued term. *Meitz v. Koetter*, 51 Mo. App. 374.

Continuance. — Where a case was not noticed for trial in time as a result of a miscarriage in a *bona fide* attempt to serve a notice of trial, the court may grant a continuance. *Sutton v. Wegner*, 72 Wis. 294 [citing *Holt v. Coleman*, 61 Wis. 426; *Platto v. Western Union Tel. Co.*, 64 Wis. 341; *Comdohr v. Coleman*, 64 Wis. 413; *Whereatt v. Ellis*, 68 Wis. 72].

If no notice is given and no appearance is entered, as required, the appel-

d. WITHDRAWAL, DISMISSAL, AND NONSUIT. — It has been held that an appeal may be withdrawn before it is entered upon the docket of the appellate court, and that such withdrawal will operate to restore the judgment of the justice of the peace to its original force.¹ On appeal the plaintiff may suffer a nonsuit,² or he may dismiss his suit,³ though it is not always held to be com-

lee may at his instance continue at the appellant's cost, and if the appellee says nothing the cause will be continued generally as a matter of law. *Talbot v. Hore*, 17 Mo. App. 175.

Excusable Laches. — The laches which may be excused in not bringing a cause to trial within two terms must relate to the second term. It is immaterial what was done with the cause at the first term so long as it remains in the court to which the appeal was taken. *Bates v. Steele*, 65 Wis. 355.

Dismissal on General Call of Calendar. — Where the case stands for trial it may be dismissed on a general call of cases pursuant to a published notice; but this practice has been depreciated as involving hardship upon a party whose case may be thrown out of court when he is in fact not informed that it will be called, and such time elapses that the court cannot reinstate. *Gottschalk v. Lembke*, 61 Ill. App. 236, wherein equitable relief was granted from such a judgment; *Chicago Title, etc., Co. v. Chicago, etc., R. Co.*, 58 Ill. App. 388, in which case the court suggested that the object of such general calls could be attained by simply striking the cause from the docket instead of dismissing it.

1. *Sturgill v. Thompson*, Busb. L. (N. Car.) 392; *Mathis v. Bryson*, 4 Jones L. (N. Car.) 508; *McKeever v. Horine*, 12 Iowa 229; *Park v. Ratcliffe*, 42 Iowa 45. See also *Missoula Electric Light Co. v. Morgan*, 13 Mont. 394.

Dismissal of Appeal. — An appellant may dismiss his appeal. *Goodenow v. Perry*, 12 Iowa 350; *Harper v. Albee*, 10 Iowa 389. *Contra*, *Peterson v. Frey*, (Mich. 1896) 67 N. W. Rep. 974, decided under the statute in that state.

Appeal by Both Parties — Withdrawal of Transcript. — In *Indiana* it was said that an appeal might be withdrawn, but where both parties had appealed and only one transcript was filed it was held that the party withdrawing his appeal could not withdraw the transcript. *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328.

Right of Appellee to Affirmance. — In

McKeever v. Horine, 12 Iowa 227, it was held that when an appeal bond is filed according to law, the appeal is perfected and the action of the justice over the cause should be suspended except to send up a transcript of the proceedings; but that if "before he does this the appellant withdraws his appeal, and the appellee so far acquiesces in such withdrawal as to sue out an execution against the goods and chattels of the appellant, and also permits one term of the District Court to pass without insisting upon his rights under the appeal, * * * he is estopped from having, upon his own motion, a transcript of the judgment sent up at the second term of the District Court after the appeal, and insisting upon said judgment being affirmed."

Right to Move to Set Aside Default Judgment. — A party may, within the time provided by law for such a motion, withdraw his appeal and move to set aside a judgment by default. *Park v. Ratcliffe*, 42 Iowa 45.

2. *Shadrack v. Milan*, 6 J. J. Marsh. (Ky.) 608; *People v. Judges*, 8 Cow. (N. Y.) 131.

In *Borden Min. Co. v. Barry*, 17 Md. 419, it was held that plaintiff might abandon his suit or suffer a *non pros.* as in an original action, and that the appellate court had only authority to reverse the action without prejudice, which left the plaintiff *in statu quo*, with a right to bring a new suit.

In *Michigan* it was held under a statute controlling that in the case of an appeal by a plaintiff where a set-off had been established against him, the appellate court had authority only to enter a nonsuit or discontinuance if the plaintiff did not appear in that court. *Stange v. Wayne Circuit Judge*, 22 Mich. 408.

3. *Shaffer v. Currier*, 13 Ill. 667; *Reeves v. Andrews*, 7 Ind. 207; *Harris v. Laird*, 25 Iowa 143; *French v. Weise*, (Mich. 1897) 70 N. W. Rep. 1101; *Fallman v. Gilman*, 1 Minn. 179.

Abandonment of Judgment. — If the plaintiff moves for a dismissal of the cause in the appellate court on the de-

petent for a plaintiff to take a nonsuit at his pleasure.¹

c. PLEADINGS ON APPEAL — (1) *In General*. — When the trial on appeal is *de novo* it has often been held that the rules which govern pleadings before the justice of the peace control in the appellate court,² that the trial in the appellate court may be had on the pleadings before the justice,³ and that where the pleadings are sufficient for the purpose of presenting issues before the justice of the peace, they are sufficient on appeal, and no more certainty nor formality will be required in the appellate court than was necessary in the justice's court.⁴ When no other pleadings are required than those had before the justice it may be presumed that such averments or allegations were made as were necessary to set up a cause of action⁵ or defense.⁶

defendant's appeal, he abandons his judgment. *Bender v. Lockett*, 64 Tex. 566.

Recovery by Defendant Before Justice. — The right of the plaintiff to dismiss an appeal has been recognized even when the judgment before the justice was for the defendant, *Harris v. Laird*, 25 Iowa 143; *French v. Weise*, (Mich. 1897) 70 N. W. Rep. 1101; and even when the defendant recovered judgment on a set-off before the justice, *Shaffer v. Currier*, 13 Ill. 667; *Reeves v. Andrews*, 7 Ind. 207.

Dismissal in Whole or in Part. — It has been held that on appeal a plaintiff may dismiss his suit in whole or in part. *Gerber v. McCoy*, 23 Mo. App. 295.

Costs. — Where the plaintiff dismisses his cause on appeal, the defendant is entitled to costs. *Fallman v. Gilman*, 1 Minn. 179.

1. Nonsuit by Plaintiff as Appellant. — It has been held that where the judgment before the magistrate goes against the plaintiff, he cannot, upon appeal, escape the judgment by a nonsuit. *Reed v. Rocap*, 9 N. J. L. 347; *Williamson v. Brown*, 10 N. J. L. 296.

Nonsuit to Defeat Set-off. — A nonsuit will not be permitted where the effect is to defeat the defendant in his counter demand against the plaintiff. *Prettyman v. Waples*, 4 Harr. (Del.) 299.

2. Texas, etc., R. Co. v. Hall, 44 Ark. 375; *Howell v. Glover*, 59 Ga. 774; *Carter v. Edwards*, 16 Ind. 238; *Heifer v. Jelly*, 10 Ind. 382; *Davis v. Young*, 3 T. B. Mon. (Ky.) 382; *Barth v. Horejs*, 45 Minn. 184; *Kane v. Dauernheim*, 51 Mo. App. 635; *Brewer v. Black*, 5 Okla. 57; *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444.

3. State v. Forner, 32 Kan. 281; *Hunter v. Cole*, 49 Me. 557; *Hairston v. Francher*, 7 Smed. & M. (Miss.) 249; *Proctor v. Wiley*, 53 Vt. 406.

Pleadings Independent of Proceedings Before Justice. — Sometimes where a particular proceeding on appeal is independent of the proceedings pertaining to the trial of the cause *de novo*, it is held that the pleadings must be such as are required in the appellate court. Thus it was held that a motion to dismiss an appeal is a pleading in the appellate court and should be in writing. *Tadlock v. Walden*, (Tex. App. 1892) 19 S. W. Rep. 330.

4. Heartman v. Franks, 36 Ark. 501; *Terre Haute, etc., R. Co. v. Jarvis*, 9 Ind. App. 438; *Kinch v. Weatherall*, 2 Ind. 226; *Forgey v. Tucker*, 11 Ind. 320; *Stanley v. Farmers' Bank*, 17 Kan. 592; *Zeigler v. Osborn*, 23 Kan. 464; *Lew v. Lowell*, 6 Allen (Mass.) 25; *Brewer v. Black*, 5 Okla. 57; *Whittaker v. Perry*, 37 Vt. 631.

But in *Mississippi* it was held that if the parties chose to plead in the appellate court when they could have proceeded upon the oral pleadings before the magistrate they would be held to the strict rules of pleading. *Atkinson v. Fortinberry*, 7 Smed. & M. (Miss.) 302.

5. Griswold v. Peoria University, 26 Ill. 41; *Davis v. Sorrenson*, (Tex. Civ. App. 1894) 27 S. W. Rep. 209.

6. Statute of Frauds. — *Williams v. Corbet*, 28 Ill. 262; *Comstock v. Ward*, 22 Ill. 248.

Presumption of General Denial. — *Chapman v. Clevinger*, 10 Ind. 23; *Hall v. Denise*, 6 Iowa 534; *Heath v. Coltenback*, 5 Iowa 490; *Richman v. Brown*, 25 Iowa 33; *McCormick Harvesting Mach. Co. v. Slover*, (Tex. Civ. App. 1894) 34 S. W. Rep. 1054.

(2) *New Pleadings on Appeal.* — But this matter is generally regulated by statute, and under the practice in some states new pleadings are filed on appeal,¹ sometimes under express restrictions to certain cases.² The appellate court may also permit the filing of pleadings on appeal, when such a course may be deemed proper in furtherance of justice,³ or may require the filing of new pleadings.⁴ But the plaintiff must prosecute the same cause of

In *Nebraska*, where the trial before the justice was had in the absence of the defendant, it was held that on appeal by the defendant he was restricted to the general denial. *Carr v. Luscher*, 35 Neb. 318.

Effect of Presumption as to Proof. — The general issue being taken as an admission of the corporate capacity of a plaintiff corporation, on appeal from a justice's court, the corporation need not prove its corporate existence where the presumption of a general denial on behalf of the defendant is indulged. *Farmers', etc., Bank v. Williamson*, 61 Mo. 259.

1. *Freeman v. Speegle*, 83 Ala. 191; *Phelps v. Hurd*, 31 Conn. 444; *Curtiss v. Beardsley*, 15 Conn. 522; *Horner v. Horner*, 145 Pa. St. 258; *Burnham v. Turner*, 14 Wis. 622.

Where the court on appeal may order new pleadings, the pleadings filed before the justice are sufficient in the absence of an order for new pleadings. *Lew v. Lowell*, 6 Allen (Mass.) 25.

Appeal from Judgment by Default. — On appeal from a judgment by default a general denial may be pleaded. *Webb v. Paxton*, 36 Minn. 532; *St. Louis Southwestern R. Co. v. Denson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 265; *Texas, etc., R. Co. v. Jones*, (Tex. Civ. App. 1893) 23 S. W. Rep. 424; *Burnham v. Turner*, 14 Wis. 622. Though the right to file an answer on appeal from a judgment by default may depend upon the permission of the appellate court upon a satisfactory showing for not answering before the justice and for not applying to the justice to set aside the default, as in *Iowa* before the code. *Leftwick v. Thornton*, 18 Iowa 56; *Ruddick v. Vale*, 7 Iowa 44; *Brayton v. Delaware County*, 16 Iowa 44. See also *Webb v. Paxton*, 36 Minn. 532. But after the adoption of the code in Iowa it was held that the defendant might plead an appeal from such a judgment as a matter of right and at any time before the case was called for trial, subject to the condition

imposed as to the payment of costs. *Harty v. Des Moines, etc., R. Co.*, 54 Iowa 330.

Harmless Error in Striking Out Answer.

— No error can be predicated upon the striking out of an answer on appeal from a judgment by default where the defendant is permitted to introduce all evidence that could have been introduced under the answer. *Galveston, etc., R. Co. v. Dromgoole*, (Tex. Civ. App. 1893) 24 S. W. Rep. 372.

Trial Without Pleadings. — Where pleadings are filed in the appellate court, the parties may nevertheless go to trial without such pleadings. *Denver, etc., R. Co. v. Cowgill*, 44 Kan. 325; *Cunningham v. McCue*, 31 Pa. St. 469. See also *Leiferman v. Osten*, 64 Ill. App. 578, 167 Ill. 93; *Stephens v. Baird*, 9 Cow. (N. Y.) 274.

2. *Governed by Amount in Controversy.*

— *Simmons v. Titcher*, 102 Ala. 317; *Lehman v. Hudmon*, 79 Ala. 532; *Steelman v. Owen*, 8 Port. (Ala.) 562.

3. *St. Louis, etc., R. Co. v. Curtis*, 48 Kan. 179; *Zeigler v. Osborn*, 23 Kan. 464; *Condict v. Stevens*, 1 T. B. Mon. (Ky.) 74; *Zeigler v. Henry*, 77 Mich. 480; *Chicago, etc., R. Co. v. Gustin*, 35 Neb. 86; *Moore v. Garner*, 109 N. Car. 157; *Hinton v. Deans*, 75 N. Car. 18; *Caughey v. Vance*, 3 Pin. (Wis.) 275.

4. *Tarleston v. Briley*, 3 Kan. 433.

Compelling Filing of New Pleadings. —

It has also been held that where the oral complaint before the justice was vague and uncertain the court might compel a more definite complaint on appeal. *Swineford v. Pomeroy*, 16 Wis. 553; *Burnham v. Turner*, 14 Wis. 622.

Where the District Court may, in furtherance of justice, "allow" new or amended pleadings to be filed, "the filing of a new or amended pleading by the plaintiff will not place the defendant in absolute default. *Kuhuke v. Wright*, 22 Kan. 464. Every portion of the plaintiff's cause of action which was previously in issue will remain in

action as in the court of original jurisdiction, though in drafting his pleading he is not confined to the allegations contained in the pleading in the court below, so long as the identity of the original cause of action is preserved.¹ Even where the appeal takes the case to the higher court as an original case, unaffected by the pleadings below, with the right in the parties to plead anew as if there had been no pleadings before the justice,² the right is subject to the exception that preliminary pleas which may have been waived before the justice cannot be pleaded on the appeal.³

(3) *Formality in Pleading—Form of Action.*—A want of nicety in pleading before a justice should not prevent a trial on the merits on appeal,⁴ and technicalities in pleading with reference to particular forms of action, either where the pleadings before the justice are used on appeal or new pleadings are filed, are not strictly regarded.⁵

issue, although the defendant may not file any new or amended pleading. It is only the new matter set up in the new or amended pleading of the plaintiff that needs an answer; and it is only as to such new matter that the defendant could be in default by not filing an answer. If the new or amended pleading contains nothing more than the original pleading did, then no answer thereto is necessary." *Zeigler v. Osborn*, 23 Kan. 464.

1. *Levi v. Fred*, 38 Neb. 564; *Baldwin v. Rhea*, 33 Neb. 319; *Moore v. Powers*, (Tex. Civ. App. 1897) 41 S. W. Rep. 707.

Time of Accrual of Action.—The declaration must lay the cause of action to have accrued on a day before the commencement of the suit before the justice. *Langer v. Parish*, 8 S. & R. (Pa.) 134; *McLaughlin v. Parker*, 3 S. & R. (Pa.) 144; *Miller v. Ralston*, 1 S. & R. (Pa.) 309.

Departure in Pleading.—In *Vermont* it was held that the filing of a new declaration on appeal was a mere matter in amendment allowed by a standing rule for the purpose of putting the matter into legal and technical form, but not required by a justice of the peace and that if the new declaration was variant and presented new matter the defendant should object to its being received, though if rejected the plaintiff would not be out of court or subject to abatement of his suit, but might still proceed on the former declaration. *Way v. Wakefield*, 7 Vt. 227, citing *Barber v. Ripley*, 1 Aik. (Vt.) 80.

Objection.—Where the rule prevails that an appeal must be tried on the

same issues as those presented before the justice, the objection that the petition filed on appeal introduced a new cause of action will not be considered if no objection was made or exception taken on that ground until after the trial in the appellate court. *Levi v. Fred*, 38 Neb. 564; *Robertson v. Buffalo County Nat. Bank*, 40 Neb. 235.

The objection for a departure in pleading in the appellate court should be raised by motion to reject the complaint filed in the latter court or to strike it from the files, and cannot be raised by demurrer, *Freeman v. Speegle*, 83 Ala. 191; or by plea in abatement, *Louisville, etc., R. Co. v. Barker*, 96 Ala. 435. See also *Tuthill v. Clark*, 11 Wend. (N. Y.) 642.

2. *Curtiss v. Beardsley*, 15 Conn. 522.

Denials under Oath.—It is not error for the court to refuse to allow the defendant to file an affidavit denying the correctness of an account when the case is called for trial in the appellate court. *Gray v. Bryant*, 46 Kan. 43.

Where there are no pleadings before the justice, the appellate court may permit the filing of an affidavit denying the genuineness of a writing sued upon. *Assig v. Pearsons*, 9 Colo. 587; *Davis v. Fitchett*, 5 Fla. 261.

3. *Phelps v. Hurd*, 31 Conn. 446.

4. *Dunsworth v. Walter A. Wood Mach. Co.*, 29 Ill. App. 23; *Hall v. Monahan*, 1 Iowa 554; *Van Alstyne v. Dearborn*, 2 Wend. (N. Y.) 586; *Clay v. Clay*, 7 Tex. 250; *Jones v. Browne*, 32 W. Va. 444. See *supra*, II. 3. *Pleadings*

5. *Weiler v. Kershner*, 109 Pa. St. 219; *Levan v. Graver*, 1 Ashm. (Pa.)

f. HEARING ON APPEAL — (1) *Trial De Novo* — (a) *In General*. — On appeal from a judgment of a justice of the peace, in many of the states, the cause stands like an original one in the appellate court, and is tried *de novo* upon the merits.¹

Judgment of Affirmance or Reversal. — In such case the judgment rendered by the appellate court should not be of affirmance nor of reversal of the judgment of the justice, but a new, independent judgment, founded on the merits of the case as disclosed in that court.²

(b) **Errors and Irregularities Disregarded.** — Under this practice the cause is brought up unembarrassed by any proceedings in the

30; Kraft v. Gilchrist, 31 Pa. St. 470. See also Freeman v. Speegle, 83 Ala. 191; Cross v. Worrall, 11 Ala. 108.

1. *Alabama.* — McConnell v. Worns, 102 Ala. 587; Lehman v. Hudmon, 79 Ala. 533; White v. Blount, 22 Ala. 697; McCrory v. Smith, 1 Ala. 157; Brooks v. Carter, 36 Ala. 682; Harrison v. Danelly, 5 Port. (Ala.) 213; Murfs v. Harding, 6 Port. (Ala.) 121; Goss v. Davis, 21 Ala. 479.

Arkansas. — Hall v. Doyle, 35 Ark. 445; Touhy v. Rector, 26 Ark. 315; Hopkins v. Harper, 46 Ark. 251; St. Louis, etc., R. Co. v. Lindsay, 55 Ark. 281.

Colorado. — Brown v. Landon, 11 Colo. 162; Hurtgen v. Kantrowitz, 15 Colo. 442.

Connecticut. — Curtiss v. Beardsley, 15 Conn. 522.

Georgia. — Justices v. Haygood, 15 Ga. 309.

Illinois. — Tindall v. Meeker, 2 Ill. 137; Waterman v. Bristol, 6 Ill. 593; Ballard v. M'Carty, 11 Ill. 501; Minard v. Lawler, 26 Ill. 301; Shook v. Thomas, 21 Ill. 87.

Maryland. — Borden Min. Co. v. Barry, 17 Md. 419.

Michigan. — Ockenfells v. Moeller, 79 Mich. 314.

Missouri. — Briggs v. St. Louis, etc., R. Co., 111 Mo. 168.

Montana. — Missoula Electric Light Co. v. Morgan, 13 Mont. 394.

New Hampshire. — Bixby v. Harris, 26 N. H. 128; Wallace v. Brown, 25 N. H. 216.

Pennsylvania. — Koenig v. Bauer, 57 Pa. St. 168.

Tennessee. — Allen v. Wood, 1 Head (Tenn.) 436.

Vermont. — Fletcher v. Blair, 20 Vt. 124.

2. Burns v. Howard, 68 Ala. 353; Lehman v. Hudmon, 79 Ala. 534;

Bonesteel v. Gardner, 1 Dakota 356; Shook v. Thomas, 21 Ill. 87; Bennett v. Thompson, 10 Bush (Ky.) 365; Cates v. Akerd, 5 Mo. 124.

Evidence of Transcript. — The return of the justice is not evidence of the plaintiff's claim. Ockenfells v. Moeller, 79 Mich. 314; Hudson v. Pettijohn, 4 Harr. (Del.) 356. And the only office of the transcript is to certify to the appellate court where the trial *de novo* is had that a certain case had originated in the justice's court, how it was decided, and that the appeal had been regularly prayed and taken. Archibeque v. Miera, 1 N. Mex. 163. But if it is read without objection, it is not sufficient ground to set aside the verdict, and for a new trial. Hudson v. Pettijohn, 4 Harr. (Del.) 356.

Judgment by Default. — It has been held that there cannot be a judgment by default on appeal from a justice, but that the matter must be determined upon proofs, as where the plaintiff appeals from a judgment for less than the amount claimed before the justice, Williams v. Beasley, 13 Ired. L. (N. Car.) 112; or where the defendant before the justice appeals from a judgment rendered against him, Abraham v. Alford, 64 Ala. 281; Pirani v. Allhime, 4 Ark. 440; Hamilton v. Humphries, 5 Ark. 640; Barnett v. Craig, 38 Ill. App. 96; Eichelberger v. Garvin, 7 Ill. App. 129; Suter v. Cardwell, 6 T. B. Mon. (Ky.) 34; Hartsfield v. Jones, 4 Jones L. (N. Car.) 309. See also *supra*, IV. 11. c. *Prosecution of Appeal*.

On the other hand, it is held that a judgment may be affirmed where the appellant fails to prosecute his appeal, but only upon a complete failure. Taylor v. Barber, 2 Greene (Iowa) 350; Harty v. Des Moines, etc., R. Co., 54 Iowa 327; Wright v. Clark, 2 Greene (Iowa) 86; Martin v. White, 11 Mo.

justice's court, and the trial is had without regard to errors or irregularities which may have characterized the proceedings in that court,¹ if the justice had jurisdiction of the cause.²

(e) *Necessity of Proving Cause of Action.* — When a case is in the appellate court for a trial *de novo*, the plaintiff is under the same obligation of proving his cause of action as if the suit had been originally instituted in that court.³

(d) *Issues on Appeal* — *aa. RELATION TO CASE BEFORE JUSTICE.* — *Cause of Action.* — When an appeal is taken for a new trial the case on appeal is said to be a continuation of that before the justice,⁴ and while the trial may be *de novo* as to the pleadings and mode of procedure, the cause of action must remain the same.⁵

214; *Starr v. Stewart*, 18 Mo. 410; *McDowell v. Strong*, 35 Mo. 505; *Musgrove v. Mott*, 90 Mo. 107, holding that on appeal in an attachment suit the failure of the defendant to plead in abatement to the amended affidavit on appeal was a confession of the matter stated therein, and the subsequent withdrawal of his attorney from the case and default by the defendant constituted a complete abandonment of the defense and a failure to prosecute the appeal, authorizing the appellate court to enter a judgment of affirmance; *Ray v. St. Louis, etc., R. Co.*, 25 Mo. App. 104, holding that where a defendant stands on his motion to compel the plaintiff to elect on which cause of action he will proceed after the overruling of such motion, it is not a failure to prosecute the appeal.

1. *Alabama.* — *Reynolds v. Harris*, 62 Ala. 415; *Burns v. Howard*, 68 Ala. 352; *White v. Blount*, 22 Ala. 697.

Arkansas. — *Touhy v. Rector*, 26 Ark. 315; *Hall v. Doyle*, 35 Ark. 445; *Hopkins v. Harper*, 46 Ark. 251; *Ball v. Kuykendall*, 2 Ark. 195.

Colorado. — *Lee v. Ralston*, 1 Colo. 5; *Kurtze v. McCord*, 1 Colo. 164.

Connecticut. — *Curtiss v. Beardsley*, 15 Conn. 522.

Dakota. — *Bonesteel v. Gardner*, 1 Dakota 356.

Illinois. — *Vaughan v. Thompson*, 15 Ill. 39; *Frye v. Tucker*, 24 Ill. 180; *Stephens v. Cross*, 27 Ill. 35.

Indiana. — *Britton v. Fox*, 39 Ind. 369; *State v. Brewer*, 64 Ind. 131; *Baker v. Chambers*, 18 Ind. 222.

Iowa. — *Leftwick v. Thornton*, 18 Iowa 56; *Hall v. Monahan*, 1 Iowa 554.

Massachusetts. — *Leyden v. Sweeney*, 118 Mass. 420; *Washburn v. Washburn*, 10 Pick. (Mass.) 374.

Michigan. — *Ockenfels v. Moeller*, 79 Mich. 314; *People v. Foote*, 1 Dougl. (Mich.) 102.

Mississippi. — *Porter v. Fooshee*, 41 Miss. 337.

Missouri. — *Harper v. Baker*, 9 Mo. 116; *Myers v. Woolfolk*, 3 Mo. 348.

Montana. — *Missoula Electric Light Co. v. Morgan*, 13 Mont. 394.

New Hampshire. — *Wallace v. Brown*, 25 N. H. 216.

New Jersey. — *Martin v. Thompson*, 10 N. J. L. 142; *Vannoy v. Givens*, 23 N. J. L. 201; *Robins v. Martin*, 44 N. J. L. 368.

New Mexico. — *Archibeque v. Miera*, 1 N. Mex. 160.

Pennsylvania. — *Kuhn v. Warren Sav. Bank*, (Pa. 1887) 11 Atl. Rep. 440.

Tennessee. — *Allen v. Wood*, 1 Head (Tenn.) 436.

On appeal from the judgment of a justice of the peace, the rendition of judgment by default on one day against some of the defendants, and on another day against the others who made defense, is a mere irregularity for which the proceedings should not be quashed. *White v. Blount*, 22 Ala. 697.

2. *Vaughan v. Thompson*, 15 Ill. 39.

3. *Stout v. St. Louis Tribune Co.*, 52 Mo. 342; *Suter v. Cardwell*, 6 T. B. Mon. (Ky.) 34; *Heath v. Coltenback*, 5 Iowa 490; *Hall v. Denise*, 6 Iowa 534; *Miner v. Reed*, 25 Ill. App. 179.

Appeal from Judgment by Default. — Where an appeal is allowed from a judgment by default, the plaintiff must prove his case. *White v. Johnson*, 5 Tex. Civ. App. 480.

4. *Bratt v. Marum*, 24 W. Va. 652.

5. *Chowning v. Barnett*, 30 Ark. 560; *Burbage v. Squires*, 3 Metc. (Ky.) 77; *Reitze v. Meadville, etc., R. Co.*, 126 Pa. St. 437; *Owen v. Shelhamer*, 3

Accrual of Cause of Action. — To enable the plaintiff to recover in the appellate court, the cause of action must have accrued prior to the institution of proceedings before the justice.¹

Defenses on Appeal. — Upon a trial *de novo* in the appellate court it is generally held that the defendant may show any matter in defense which might have been available to him before the jus-

Binn. (Pa.) 45; McLaughlin *v.* Parker, 3 S. & R. (Pa.) 144; Bechtol *v.* Cobaugh, 10 S. & R. (Pa.) 121; Caldwell *v.* Thompson, 1 Rawle (Pa.) 370; Ripple *v.* Keast, 5 Pa. Dist. Rep. 31; Maass *v.* Solinsky, 67 Tex. 290.

In *Medart v. Baker's Eureka Hot Air, etc., Mfg. Co.*, 51 Mo. App. 19, the petition contained a statement of three separate causes of action stated in as many different counts. The defendant filed an answer before the justice, which was also returned to the Circuit Court, in which liability on all the causes of action stated in the petition was denied and a counterclaim and a statement of a set-off to the alleged cause of action in the third count of the petition set up. The judgment of the justice was for the amount of the demand stated in the third count, and there was a finding against the defendant on the set-off, but no mention was made of the other counts of the petition or of the defendant's counterclaim. On the trial in the Circuit Court the defendant objected to any testimony under the first and second counts of the petition, because the transcript of the petition conclusively showed, as it was claimed, that the last count only was tried before the justice. The objection was overruled, the court saying: "This point is predicated on a misconception of what the record, in appeals from a justice, consists. If we can look only to the transcript of the docket entries, the point would be well taken. But the statute requires the original papers to be sent to the Circuit Court, and such papers and the transcript of the proceedings before the justice make up the record, which must be read as a whole in determining the nature of the action, and what was really tried before the justice." *Citing* *Kinion v. Kansas City, etc., R. Co.*, 39 Mo. App. 382; *Hansberger v. Pacific R. Co.*, 43 Mo. 196; *Fields v. Wabash, etc., R. Co.*, 80 Mo. 203; *Barnett v. Atlantic, etc., R. Co.*, 68 Mo. 56; *Hill v. St. Louis Ore. Co.*, 90 Mo. 103.

Same Issues. — It is also held that the issues must be substantially the same,

Graham v. Langston, 65 Mich. 45; *Utter v. Nelligan*, 92 Hun (N. Y.) 185; *Reno v. Millsbaugh*, 14 Hun (N. Y.) 229; *Waggy v. Scott*, 29 Oregon 386; *Forbes v. Inman*, 23 Oregon 68; *Strom v. Edwards*, (Oregon 1897) 48 Pac. Rep. 696; unless some matter had arisen since the trial before the justice, such as payment, release, etc. *Lee v. Walker*, 35 Neb. 689; *Clarke v. Walker*, 35 Neb. 693; *Utter v. Nelligan*, 92 Hun (N. Y.) 185. See also article AMENDMENTS, vol. 1, p. 611.

Immaterial Variance Between Transcript and Proof. — Where the cause of action was obviously the same as that tried by the justice, it was held to be an immaterial variance that the transcript stated the suit to be on a promissory note and on the appeal the evidence was of a sealed instrument or bill obligatory for the sum stated in the transcript. *Bechtol v. Cobaugh*, 10 S. & R. (Pa.) 121.

Intervention on Appeal. — A statute providing that "the same cause of action, and no other, that was tried before the justice, shall be tried before the appellate court upon the appeal," has reference only to the cause of action and to the parties, who were such before the justice, and not to independent causes of action existing in favor of third persons, strangers to the suit, and expressly authorized by statute to intervene for the protection of their rights. *Wolff v. Vette*, 17 Mo. App. 36.

1. *Norton v. Janvier*, 5 Harr. (Del.) 346; *Salmons v. Collins*, 2 Harr. (Del.) 45.

In Attachment. — Where by statute suits by attachment were allowed in certain cases upon demands not due, the judgment in such suits not to be rendered until the maturity of the demand, it was held that if the justice rendered judgment in such a suit upon a demand not due, upon appeal it became the duty of the appellate court to proceed with the cause *de novo* without regard to the error of the justice, the demand being due when the judgment was entered in the appellate court. *Musgrove v. Mott*, 90 Mo. 107.

tice, although not there made,¹ except a set-off or counterclaim which was not relied upon before the justice and is set up for the first time in the appellate court.²

bb. AMOUNT OF JUDGMENT RECOVERABLE. — When the trial is *de novo*, it is upon the facts as adduced, and not upon errors in the record, and the amount of recovery on the appeal is not limited by the judgment rendered by the justice, although the defendant is the appellant.³

The Penalty of the Appeal Bond does not fix the limit of the recovery against the appellant or preclude a recovery for a greater sum.⁴

1. *Alabama.* — *McCary v. Mabe*, 7 Ala. 356.

Arkansas. — *Hall v. Doyle*, 35 Ark. 445.

Kansas. — *Denver, etc., R. Co. v. Cowgill*, 44 Kan. 325; *Stanley v. Farmers' Bank*, 17 Kan. 592.

Mississippi. — *Callahan v. Newell*, 61 Miss. 438.

Missouri. — *Hall v. Mills*, 11 Mo. 215.

Texas. — *Houston, etc., R. Co. v. Lefevre*, (Tex. Civ. App. 1897) 40 S. W. Rep. 340; *Gulf, etc., R. Co. v. Crossman*, 11 Tex. Civ. App. 622; *Texas, etc., R. Co. v. Klepper*, (Tex. Civ. App. 1893) 24 S. W. Rep. 567; *Swinborn v. Johnson*, (Tex. Civ. App. 1893) 24 S. W. Rep. 567; *Bennett v. Paine*, (Tex. Civ. App. 1896) 38 S. W. Rep. 398; *Slover v. McCormick Harvesting Mach. Co.*, 12 Tex. Civ. App. 446.

Election Between Inconsistent Defenses. — In *Ferguson v. Prince*, 2 Kan. App. 7, it was held that when the defendant upon appeal stated in open court that he would offer evidence in support of two separate defenses, this amounted to the same thing in effect as though he had set up two defenses in an answer or bill of particulars, and placed the defendant in the same situation; that the same rule in relation to the evidence thereunder must be applied as though the statements were contained in a pleading, and that it was proper to require him to elect upon which of the defenses he would proceed to submit his evidence where the defenses stated were inconsistent.

2. *Arkansas.* — *Amis v. Cooper*, 25 Ark. 14.

Mississippi. — *Marx v. Trussell*, 50 Miss. 498; *Callahan v. Newell*, 61 Miss. 439.

Missouri. — *Hall v. Mills*, 11 Mo. 215; *Webb v. Tweedie*, 30 Mo. 491; *Chase v. Chase*, 8 Mo. 103.

Nebraska. — *Carr v. Luscher*, 35 Neb. 318.

Texas. — *Boudon v. Gilbert*, 67 Tex. 689; *Downtain v. Connellee*, 2 Tex. Civ. App. 95; *Curry v. Terrell*, 1 Tex. App. Civ. Cas., § 239; *Good v. Caldwell*, 11 Tex. Civ. App. 515; *White v. Johnson*, 5 Tex. Civ. App. 430.

Contra. — *Archibeque v. Miera*, 1 N. Mex. 160; *Tate v. Tate*, 2 Grant's Cas. (Pa.) 150; *Clark v. Howard*, 10 Yerg. (Tenn.) 250. See also *Ferguson v. Prince*, 2 Kan. App. 7.

Where the plaintiff on appeal is permitted to amend his claim by adding new items and no objection is made, this is no ground for allowing the defendant to add new items to his counterclaim over the plaintiff's objection. *Downtain v. Connellee*, 2 Tex. Civ. App. 95.

The Pleading Need Not Be a Technical Counterclaim in order to be inadmissible when offered for the first time on appeal. *White v. Johnson*, 5 Tex. Civ. App. 480.

Puis Darrein Continuance. — It has been held that a defendant on appeal can present any matters of defense he may have which did not exist when the judgment was rendered by the justice of the peace, like as under a plea of *puis darrein continuance*. *Minard v. Lawler*, 26 Ill. 301. But see *Chase v. Chase*, 8 Mo. 103.

3. *Brooks v. Carter*, 36 Ala. 682; *Waring v. Gilbert*, 25 Ala. 295; *Zitzer v. Jones*, 48 Md. 115; *Woodruff v. Carns*, 3 N. J. L. 98.

Sentence Greater than That Imposed by Justice. — In *Elbow Lake v. Holt*, (Minn. 1897) 72 N. W. Rep. 564 it was held that the District Court is not limited by the sentence of the justice, but may impose any sentence within the limits of the penalty prescribed by the ordinance or statute.

4. *Casey v. Coker*, (Ala. 1892) 11 So. Rep. 742.

Only the Sureties are entitled to limit the recovery against themselves on the

Recovery Limited to Claim Before Justice. — But it is held that the appellate court is powerless to enter a judgment beyond the amount claimed by the plaintiff before the justice.¹

“**EVIDENCE ON APPEAL.** — The same rules of evidence which govern the proceedings before the justice of the peace are applied in the trial of the case on appeal from the judgment of the justice,² but the evidence on appeal is not restricted to that which was introduced before him.³

penalty of the appeal bond they have signed. *Casey v. Coker*, (Ala. 1892) 11 So. Rep. 742; *Hurley v. Bevins*, 57 Ark. 547.

1. *Meyer v. Helland*, 3 Colo. App. 536; *St. Louis, etc., R. Co. v. Curtis*, 48 Kan. 179; *St. Louis, etc., R. Co. v. McMullen*, 48 Kan. 282; *Elfelt v. Smith*, 1 Minn. 125; *Fish v. Dodge*, 4 Den. (N. Y.) 311.

Amount Indorsed on Summons Conclusive. — The amount indorsed on the back of the summons as the amount of the plaintiff's claim, like the *ad damnum* in the ordinary complaint, concludes the plaintiff as to the amount of his recovery unless in some legal manner it be changed. *Meyer v. Helland*, 3 Colo. App. 536; *Eaton v. Graham*, 11 Ill. 619; *Dowling v. Stewart*, 4 Ill. 193; *Toledo, etc., R. Co. v. Pence*, 71 Ill. 174. *Contra*, see *Millar v. Criswell*, 3 Pa. St. 449.

2. *Johnson v. Gould*, 23 N. H. 251, holding that evidence which is inadmissible before the justice cannot be received on appeal; *Atwood v. Reyburn*, 5 Mo. 555, holding that the act giving to “either party to a suit in any court of record” a discovery from the other party did not apply to cases brought to a court of record by appeal from the judgment of a justice of the peace.

3. *Brown v. Landon*, 11 Colo. 162; *Carmien v. Whitaker*, 36 Ind. 509; *Kennedy v. Gooding*, 7 Gray (Mass.) 417; *Russell v. Moore*, 8 Smed. & M. (Miss.) 700; *Milam v. Filgo*, 3 Tex. Civ. App. 343.

Where no written pleadings are required on appeal, effect is given to all evidence which would be admissible in a court of record under the proper pleadings. *Miner v. Reed*, 25 Ill. App. 175.

In *New Jersey* a statute which provided that on appeal the parties “shall be confined to the same evidence that was offered upon the trial before the justice” was held to mean that “new

witnesses shall not be introduced on the appeal except to prove newly discovered evidence.” *Sherron v. Humphreys*, 14 N. J. L. 217.

Waiver of Objections Not Raised Before the Justice. — It has been held that if the party permit the introduction of testimony before the justice without objection, he cannot on the trial on appeal object either to the competency of the witness, *Price v. Ward*, 7 N. J. L. 127; or to the evidence, *Wilcox v. Toledo, etc., R. Co.*, 45 Mich. 280; *Irvine v. Lopez*, 1 Arizona 86.

Evidence Limited by Return. — Where a bill of particulars is required to be filed before the justice and “the evidence on the trial shall be confined to the items set forth” in said bill, the restriction is not limited to the trial before the justice, and the justice being required to send up the bill of particulars with the papers on appeal the evidence on appeal must be confined to the items set out in the bill of particulars. *McCoy v. Thompson*, *Wright* (Ohio) 649. See also *Smith v. Kirby*, 10 Met. (Mass.) 150.

Where a suit was brought before a justice for the plaintiff's share of certain timber, on appeal the plaintiff was permitted to offer in evidence a promissory note evidencing the debt of the defendant. The note did not change the cause of action, which the transcript showed to have been for timber sold but was merely evidence of the amount due. *Boner v. Luhman*, 148 Pa. St. 591.

In *Iowa*, under a statute requiring that at the commencement of the suit the plaintiff shall set forth in writing and file with the justice before the entry of the case or the issuance of the process a plain statement of his demand or cause of action, it was held that notes not marked filed by the justice could not be received in evidence on the trial in the appellate court, *Graft v. Diltz*, 2 Greene (Iowa) 570; and that on such appeal parol evidence of the de-

(2) *Trial De Novo or Review of Error* — (a) *Proceedings in Error*. — In some states a petition or proceeding in error is provided for the correction of errors independently of the proceeding by appeal for a retrial.¹

(b) *Review of Error on Appeal*. — But an appeal does not always operate to secure a new trial, as particular statutes bring about a different result, under various conditions.²

Amount in Controversy. — Thus, whether there will be a new trial upon the merits or a mere review of error on the record is sometimes made to depend upon the amount in controversy;³ and when the case is required by statute to be heard on the original papers

every of a written contract to the justice, and of his neglect to file it, and that it was introduced in evidence before the justice, was admissible for the purpose of making the contract competent evidence on the appeal. *Eggleston v. Collis*, 10 Iowa 554.

1. *Condray v. Stifel*, 77 Iowa 283; *Long v. Froman*, 49 Kan. 360; *Winter v. Shutter*, 42 Kan. 544; *Hennigh v. Commercial Nat. Bank*, 53 Kan. 370; *Chicago, etc., R. Co. v. Goracke*, 32 Neb 90. See also generally articles CERTIORARI, vol. 4, p. 1; ERROR, WRIT OF, vol. 7, p. 817.

Common-law Writ of Error. — In *West Virginia*, the constitutional provision that "no fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law" was applied to appeals from justices' courts where the trials there had been before a jury, and in such case it was held that the judgment of the justice could only be reviewed by the common-law writ of error, if at all. *Barlow v. Daniels*, 25 W. Va. 512; *Hall v. Wadsworth*, 30 W. Va. 55; *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296.

Proceedings in Error—New Trial on Reversal. — In *Ohio* it was held, under a statute so providing, that upon the reversal of a judgment of a justice taken to the Court of Common Pleas on error the cause shall be retained by the court for trial and final judgment, as in cases of appeal. *Faucett v. Meeker*, 31 Ohio St. 634. See also *Jones v. School Dist. No. 47*, 8 Kan. 364.

2. *Special Appeal*. — In *Michigan* a special appeal is provided which gives to the appellant the right to avail himself of certain errors in the proceedings and erroneous rulings and decisions in the course of the cause distinct from the judgment on the merits, which stat-

ute is said to give to the appeal the characteristics of a certiorari. *Chappe v. Thomas*, 5 Mich. 56. But under this provision it is held that questions which arose upon the trial cannot be made the ground of a special appeal for reversing the judgment without a trial at the circuit. *Webster v. Williams*, 69 Mich. 135; *Manhard v. Schott*, 37 Mich. 234; *Albert v. Sutton*, 28 Mich. 2; and that errors which do not involve some decision or question of jurisdiction will not be reviewed upon special appeal. *Webster v. Williams*, 69 Mich. 135; *Deitz v. Groesbeck*, 32 Mich. 303; *Maxwell v. Deens*, 46 Mich. 35. See also *Stevens v. Harris*, 99 Mich. 230; *Dalton v. Laudahn*, 30 Mich. 349; *McGraw v. Sturgeon*, 29 Mich. 426.

3. *Dudley v. Brinckerhoff*, (Supreme Ct.) 2 N. Y. Supp. 321; *Baum's Castorine Co. v. Thomas*, 92 Hun (N. Y.) 1; *Risley v. Van Delinder*, 17 Misc. Rep. (N. Y. Supreme Ct.) 661; *Hall v. Werney*, 18 N. Y. App. Div. 565; *Royce v. Gibbons*, 50 Hun (N. Y.) 341; *Houghton v. Kenyon*, 38 How. Pr. (Herkimer County Ct.) 107; *Cowles v. Hayes*, 67 N. Car. 128; *Steinam v. Schulte*, 83 Wis. 567; *Wold v. Ordway*, 68 Wis. 176; *Vroman v. Dewey*, 22 Wis. 323; *Hassa v. Junger*, 15 Wis. 598; *Shaw v. Webster*, 18 Wis. 498. See also *State v. Baker*, 19 Fla. 19; *State v. Walker*, 32 Fla. 432.

How Amount in Controversy Determined—In Replevin. — If the justice omits to find the value of property taken in replevin, the amount stated in the affidavit for the writ of replevin will control in determining whether or not a trial *de novo* is to be had in the appellate court. *Shaw v. Webster*, 18 Wis. 498.

Amount Controlled by Pleading. — If a set-off pleaded entitles the defendant to a new trial on appeal, he will not be deprived thereof because his bill of

to the return of the justice, it is held that the parties cannot by stipulation confer upon the appellate court jurisdiction to try the case *de novo*.¹

Appeal upon Questions of Law and Fact. — In several states the appeal may be taken on questions of law alone or on questions of law and fact, the first method raising questions upon the return of the justice and the second bringing the case up for a new trial.² In

particulars shows an amount below that which entitles him to a new trial. *Dudley v. Brinckerhoff*, (Supreme Ct.) 2 N. Y. Supp. 321.

Amended Pleading. — In *Risley v. Van Delinder*, 17 Misc. Rep. (N. Y. Supreme Ct.) 661, it was held that the provision of the statute that where an issue is joined before the justice and the sum for which judgment is demanded exceeds \$50 the appellant may take a new trial in the County Court does not necessarily refer to the issues joined on the return day and render the pleadings then filed effectual to give the right to a new trial although afterwards amended and the sum demanded reduced below \$50, and that the question of the right to a new trial is dependent upon the amended pleading if it differs from the original in the amount for which judgment is demanded. See also *Hinkley v. Troy*, etc., *Horse R. Co.*, 42 Hun (N. Y.) 281.

An amendment on appeal cannot be made to change the amount in controversy so as to entitle the party to a new trial. *Langrill v. Downey*, (Buffalo Super. Ct.) 7 N. Y. Supp. 503.

A Counterclaim must be one which is admissible in a particular suit, in order to entitle the parties to rely thereon for a new trial on appeal. *Kinkley v. Troy*, etc., *Horse R. Co.*, 42 Hun (N. Y.) 281; *Hall v. Werney*, 18 N. Y. App. Div. 565 [citing *Harvey v. Van Dyke*, 66 How. Pr. (N. Y. Supreme Ct.) 396; *Denniston v. Trimmer*, 27 Hun (N. Y.) 393; *Houghton v. Kenyon*, 38 How. Pr. (Herkimer County Ct.) 107; *Baum's Castorine Co. v. Thomas*, 92 Hun (N. Y.) 2].

Where matter which may constitute either a counterclaim or a defense is pleaded as a defense without designating it either as a defense or a counterclaim, it will be treated as a defense merely, and the defendant will not be entitled to a new trial under it. *Royce v. Gibbons*, 50 Hun (N. Y.) 341.

If a counterclaim is good on its face for the purpose of a new trial, it can-

not be attacked by a motion on the ground that it was interposed merely for the purpose of procuring a new trial and not in good faith. *Baum's Castorine Co. v. Thomas*, 92 Hun (N. Y.) 1.

1. *Bullard v. Kuhl*, 54 Wis. 544.

2. *Rossi v. Superior Ct.*, 114 Cal. 371; *Fabretti v. Superior Ct.*, 77 Cal. 305; *Hinds v. American Express Co.*, 24 Minn. 95; *Craighead v. Martin*, 25 Minn. 41; *Croonquist v. Flatner*, 41 Minn. 291; *Terryll v. Bailey*, 27 Minn. 304; *Daley v. Mead*, 40 Minn. 382; *Thorson v. Sauby*, (Minn. 1897) 70 N. W. Rep. 1083; *Husted v. Bliss*, (Supreme Ct.) 16 N. Y. Supp. 644, 62 Hun (N. Y.) 619; *Risley v. Van Delinder*, 17 Misc. Rep. (N. Y. Supreme Ct.) 661; *Bartlett v. Mudgett*, 75 Hun (N. Y.) 292, 31 Abb. N. Cas. (N. Y.) 259, 23 Civ. Pro. Rep. (N. Y.) 288.

When No Issue of Fact Tried Before Justice. — Under a code provision that "all appeals from justices' courts shall be tried anew in the District Court on the papers filed in the justice's court," to entitle the appellant to a new trial on appeal there must have been an issue tried before the justice. *Gage v. Maryatt*, 9 Mont. 265; *Martin v. District Ct.*, 13 Nev. 90. See also *Forbis v. Inman*, 23 Oregon 68.

Review of Evidence. — The appellate court, upon the hearing of an appeal from the justice's court, when no trial can be had, can only reverse the justice's judgment upon questions of fact litigated in the justice's court when the judgment of the justice or the verdict of the jury is clearly unsupported by the evidence. *Croonquist v. Flatner*, 41 Minn. 291; *Palmer v. St. Paul*, etc., R. Co., 38 Minn. 415; *Campbell v. Babbitts*, 53 Wis. 276; *Neave v. Arntz*, 56 Wis. 174; *West v. Vanden Brook*, 71 Wis. 469.

In *New York*, unless there is an entire absence of evidence to support the judgment of the justice, there can be no reversal. In other words, if there is any evidence in the record to support

detail, however, the proceedings under this system sometimes differ. Thus, while on appeal from questions of law alone the court may affirm or reverse,¹ in some states it cannot enter a new judgment on the merits, as this can be done only by a new trial,² while in others in the case of reversal it may determine the merits and render judgment thereon for the appellants.³ Where the appeal is on both questions of law and fact, the appellant is entitled to a new trial.⁴

Power to Render Judgment on Record or Order a New Trial. — Sometimes the court may, on appeal, examine the return, and either enter judgment thereon or order a new trial when the error complained of cannot otherwise be reached.⁵ The jurisdiction of the appel-

the judgment, it will be sufficient for that purpose. *Staples v. Hager*, (Supreme Ct.) 42 N. Y. Supp. 458; *Ludlum v. Couch*, 10 N. Y. App. Div. 603; *Hommel v. Meserole*, 18 N. Y. App. Div. 106; *Brooklyn v. Brooklyn City, etc.*, R. Co., 11 N. Y. App. Div. 168; *Lockwood v. Lockwood*, (Supreme Ct.) 14 N. Y. Supp. 831.

Where the return on appeal must contain all the evidence, if it sets forth the evidence in detail it is to be considered as stating the whole testimony unless the contrary distinctly appears. *Hance v. Cayuga, etc.*, R. Co., 26 N. Y. 428; *Orcutt v. Cahill*, 24 N. Y. 578; *Bruins v. Downey*, 51 Wis. 120.

When the record on appeal does not purport to contain all the evidence, and the return of the justice does not show that any request was made by either party for such a return, if the evidence tends to support the judgment it will be presumed that there was sufficient evidence offered for that purpose. *Warner v. Fischbach*, 29 Minn. 262; *Hinds v. American Express Co.*, 24 Minn. 95.

1. *Sherer v. Superior Ct.*, 94 Cal. 356; *Thorson v. Sauby*, (Minn. 1897) 70 N. W. Rep. 1083; *Terryll v. Bailey*, 27 Minn. 304; *Powers v. Hanford*, 7 N. Y. App. Div. 343; *Frost v. Frost*, 16 N. Y. Misc. Rep. (Onondaga County Ct.) 430.

2. *Sherer v. Superior Ct.*, 94 Cal. 356; *Frost v. Frost*, 16 N. Y. Misc. Rep. (Onondaga County Ct.) 430; *Powers v. Hanford*, 7 N. Y. App. Div. 343; *Manheim v. Seltz*, 21 N. Y. App. Div. 16 [citing *Ludlum v. Couch*, 10 N. Y. App. Div. 603; *Hewitt v. Ballard*, 16 N. Y. App. Div. 466]; *Coughran v. Wilson*, 7 S. Dak. 155.

Reversal Equivalent to Dismissal. — Where there was no provision for remanding a cause upon reversal of the judgment of a justice, it was held that

on appeal on questions of law alone a reversal is equivalent to a dismissal of the cause and leaves the parties *in statu quo*. *Daley v. Mead*, 40 Minn. 382; *Terryll v. Bailey*, 27 Minn. 304; *Frost v. Frost*, 16 N. Y. Misc. Rep. (Onondaga County Ct.) 430.

Reversal Dependent on Remission of Part of Judgment. — An order on appeal from the judgment of a justice of the peace reciting "judgment reversed, unless the respondent elect, within ten days after service of copy of decision, to reduce the damages in the judgment to five dollars," was upheld. *Powers v. Hanford*, 7 N. Y. App. Div. 343.

3. *Thorson v. Sauby*, (Minn. 1897) 70 N. W. Rep. 1083; *Terryll v. Bailey*, 27 Minn. 304; *Meister v. Russell*, 53 Minn. 54; *Watson v. Ward*, 27 Minn. 29.

4. *Welter v. Nokken*, 38 Minn. 376; *Finke v. Lukensmeyer*, 51 Minn. 252; *Yankton v. Douglass*, 8 S. Dak. 440; *Purcell v. Booth*, 6 Dakota 17.

In *California*, if the appeal is on questions of both law and fact, it is held that the appellant is entitled to have the court pass on the questions of law and try anew the questions of fact. *Rossi v. Superior Ct.*, 114 Cal. 371.

When No Issues Tried Below. — If an appeal is taken on questions of law and fact when no issues of fact were tried in the justice's court, the appellate court must entertain and decide the appeal upon questions of law alone. *Fabretti v. Superior Ct.*, 77 Cal. 305; *Southern Pac. R. Co. v. Superior Ct.*, 59 Cal. 471; *Curtis v. Superior Ct.*, 63 Cal. 435; *Risley v. Van Delinder*, 17 Misc. Rep. (N. Y. Supreme Ct.) 661.

5. *Irvine v. Lopez*, 1 Arizona 81; *Evans v. Southern R. Co.*, 74 Miss. 230; *Ferguson v. Harrison*, 34 S. Car. 169.

Where the appellate court can see

late court may sometimes be entirely restricted to a mere review of the record for errors in the proceedings of the justice.¹

(c) **Errors and Technical Defects Disregarded.** — Where the system prevails of appealing for a new trial in proper cases or for a review of the judgment upon the record, when a new trial is had the case is heard without regard to errors in the proceedings before the justice,² as in those states where the appeal generally takes up the case for a trial *de novo*.³ And even when the appeal is for a review of the case upon the record, the judgment on the record is usually without regard to technical defects not affecting the merits of the case.⁴

(d) **Statement of Grounds of Appeal — Bill of Exceptions.** — The review of errors on appeal is sometimes restricted by statute to such errors as are specially relied upon by the appellant in a statement of the case settled by the justice,⁵ or in the notice of appeal,⁶ or in an affi-

from the record of the proceedings alone what final judgment as an entirety the justice should have rendered, that judgment should be entered by the Circuit Court; but where there is nothing in the record or proceeding alone from which the Circuit Court could order what final judgment should have been rendered by the justice, upon reversing the judgment of the justice the Circuit Court should proceed to "try the cause anew on its merits." *Evans v. Southern R. Co.*, 74 Miss. 230. See also *Irvine v. Lopez*, 1 Arizona 81.

1. *Sams v. Hoover*, 33 S. Car. 401; *Harris v. Ferguson*, 2 Bailey L. (S. Car.) 397.

2. *Coyle v. Baldwin*, 5 Cal. 75; *Welter v. Nokken*, 38 Minn. 376.

3. See *supra*, IV. 11. f. (1) (b) *Errors and Irregularities Disregarded*.

4. *Irvine v. Lopez*, 1 Arizona 81; *Kilmer v. Messling*, 70 Hun (N. Y.) 582; *Lockwood v. Lockwood*, (Supreme Ct.) 14 N. Y. Supp. 831; *Purdy v. Dinkle*, (Supreme Ct.) 6 N. Y. Supp. 158; *Cambels v. Third Ave. R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 158; *Marble v. Towman*, 5 N. Y. App. Div. 613; *Campbell v. Babbitts*, 53 Wis. 276; *Wold v. Ordway*, 68 Wis. 176.

5. *Tschetter v. Heiser*, (S. Dak. 1896) 68 N. W. Rep. 744.

6. *Dargan v. West*, 27 S. Car. 156.

In *South Carolina* the appellate court is confined to the consideration of such questions only as are raised by the exceptions made before the justice. *Burns v. Gower*, 34 S. Car. 160.

Statute Mandatory. — In *Tschetter v. Heiser*, (S. Dak. 1896) 68 N. W. Rep.

744, it was held that the statute requiring the statement of the case settled by the justice to contain a statement of the errors relied upon by the appellant created the method by which an appeal could be taken for a review of questions of law alone, and that if the errors relied upon are not so pointed out, the appellate court has no authority to act upon them, and the appeal will be dismissed.

Sufficiency of Notice. — Under a code provision requiring the appellant to serve a notice of appeal, "stating the grounds upon which the appeal is founded," but in no way prescribing the manner in which such statement should be made, it was held that, the prime object of the code being to dispense with mere form whenever practicable, especially in inferior courts, the appeal "on the ground of the manifest injustice done this defendant, and those set out in writing, made on the motion for a new trial before the trial justice, and the affidavits there used in behalf of said motion, and all the evidence and records in the case," was sufficient, the reference to the grounds set out in writing made on the motion for a new trial having the same effect as incorporating them in the grounds of appeal. *Dargan v. West*, 27 S. Car. 156.

In *New York*, under the provisions prior to the Code of Civil Procedure, it was held that the notice of appeal was for the purpose of giving jurisdiction to the appellate court, and that the requirement that the notice should contain the grounds of appeal was "for two purposes: (1) That the justice may know the errors relied on and thus be

davit for a special appeal.¹

(3) *In Criminal Cases.* — The method of trial in criminal cases depends upon the provisions of the statutes, as in civil cases, under which the case may stand for trial anew in the appellate court in the same manner as it should have been tried before the justice,² or, under provisions as in civil cases, the appeal may be

careful to return accurately and fully in reference to them. (2) That the opposite party, upon whom the notice is required to be served, may know the errors complained of, and thus be enabled to compel by amended return, if necessary, a full and accurate return in reference to them, and that he may know beforehand the errors relied on, and thus be prepared for the argument of the appeal." *Christman v. Paul*, 16 How. Pr. (Herkimer County Ct.) 17, holding further that "a mere notice of appeal, without stating the grounds upon which the appeal is founded, is not sufficient. In such a case the justice would not be bound to make his return. And if he did make it, the appeal would, on motion, be dismissed. And it is not sufficient for the notice to contain 'a ground of error,' or 'grounds of error;' but it must state the grounds upon which the appeal is founded." To the same point are *Derby v. Hannin*, 15 How. Pr. (N. Y. Supreme Ct.) 32; *Bush v. Dennison*, 14 How. Pr. (N. Y. Supreme Ct.) 307; *Delong v. Brainard*, 1 Thomp. & C. (N. Y.) 1; *Schwartz v. Bendel*, 2 E. D. Smith (N. Y.) 123; *Kelty v. Jenkins*, 1 Hilt. (N. Y.) 73; *Davis v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 543; *Lee v. Schmidt*, 1 Hilt. (N. Y.) 537; *New York v. Green*, 1 Hilt. (N. Y.) 393; *Griswold v. Van Deusen*, 2 E. D. Smith (N. Y.) 178. *Contra*, *Webster v. Hopkins*, 11 How. Pr. (N. Y. Supreme Ct.) 140; *Forman v. Forman*, 17 How. Pr. (N. Y. Supreme Ct.) 255.

The Errors Must Be Specifically Pointed Out, and a general statement that evidence was incompetent or that the judgment was contrary to law is not sufficient. *Delong v. Brainard*, 1 Thomp. & C. (N. Y.) 1; *Kelty v. Jenkins*, 1 Hilt. (N. Y.) 73; *Lee v. Schmidt*, 1 Hilt. (N. Y.) 537; *Derby v. Hannin*, 15 How. Pr. (N. Y. Supreme Ct.) 32; *Amsdell v. McCaffrey*, 16 Hun (N. Y.) 255; *Deuchars v. Wheaton*, 16 How. Pr. (N. Y. Supreme Ct.) 471.

A reference to the proceedings on the trial for the grounds of appeal is not

sufficient. *New York v. Green*, 1 Hilt. (N. Y.) 393.

In *Vedder v. Van Buren*, 14 Hun (N. Y.) 250, it was held that "the specification in the notice of appeal that 'the justice rejected proper evidence offered by the appellant' must be held to be sufficiently specific to authorize an examination of the question as to the rejection of the evidence above alluded to;" the court saying that "this, perhaps, might be doubtful under the decision in *Deuchars v. Wheaton*, 16 How. Pr. (N. Y. Supreme Ct.) 471; but this case was criticised, if not overruled, in *Saunders v. Keough*, 27 How. Pr. (N. Y. Supreme Ct.) 477, and since the decision in *Sperry v. Reynolds*, 65 N. Y. 179, can no longer be deemed authoritative."

Where by reason of the amount involved the appellate court cannot pass upon any questions suggested by the grounds of appeal, but must proceed to a new trial whether such grounds can be sustained or not, it is held that there can be no reason for requiring particularity in the statement of the grounds of appeal, and that in such a case an allegation that the judgment was against the law and evidence is a sufficient compliance with the requirement that the grounds of appeal shall be stated in the notice. *Fowler v. Westervelt*, 40 Barb. (N. Y.) 374.

1. *Chappee v. Thomas*, 5 Mich. 56.

2. *State v. Dow*, 74 Iowa 144; *Ottumwa v. Schaub*, 52 Iowa 515; *Higgins v. State*, 34 Tex. 137; *Read v. Com.*, 24 Gratt. (Va.) 618. See also *Johnson's Case*, 1 Mc. 230, placing the right to an appeal upon the constitutional right to a trial by jury.

Several Counts Before Justice. — Where an information before a justice charges several offenses, if there is a conviction on but one charge, but no acquittal on the other counts, the trial on appeal may be on all the counts. *State v. Malling*, 11 Iowa 239.

Withdrawal of Counts Before Justice. — Where a defendant is tried on one count of an information containing

upon questions of law alone.*

Errors Consisting of Mere Irregularities before a justice in the trial of a criminal cause will not be regarded on the trial in the appellate court.²

Pleadings. — Where no formal pleadings are required before the justice none can be required on appeal.³

g. OBJECTIONS ON APPEAL — (1) *Form of Appeal—Waiver of Objections.* — By an appearance in the appellate court,⁴ or, as held in some cases, by acquiescence in the appeal, which may be inferred from delay as well as from other acts, a party may often waive his right to object to the form of the appeal.⁵

(2) *Matters Pleadable Before a Justice.* — When the appeal is for a trial upon the merits, matters in abatement which should have been pleaded before the justice cannot be pleaded for the first time in the appellate court.⁶

three counts, the other two having been withdrawn before the justice, on appeal he can be tried only on the count upon which he was tried before the justice, and not upon those which were withdrawn. *State v. Shilling*, 10 Iowa 106.

Change of Plea on Appeal. — Upon appeal the defendant may change his plea from a plea of guilty to the charge of assault and battery to that of not guilty, or to that of guilty to assault merely. *State v. Farlee*, 74 Iowa 451. To the same effect see *State v. Kraft*, 10 Iowa 330; *State v. Oehlshlager*, 38 Iowa 297.

Presumption of Same Offense on Appeal. — If the proof at the trial corresponds with the allegations in the complaint, the jury may presume that the offense proved on appeal is the same as that proved before the magistrate, in the absence of evidence to the contrary. *Com. v. Burke*, 14 Gray (Mass.) 81.

1. *State v. Bliss*, 21 Minn. 458, holding that the appellate court may, when the appeal is on questions of law alone, render such judgment according to the law of the case as ought to be entered, and if the judgment of the justice is in part valid and in part erroneous, the appellate court may reject what is erroneous and confirm as to the remainder.

2. *Shirliff v. People*, 3 Ill. 7; *State v. Valure*, 95 Iowa 401; *Ottumwa v. Schaub*, 52 Iowa 515; *Com. v. Gavin*, 148 Mass. 449; *Com. v. Tinkham*, 14 Gray (Mass.) 12; *State v. Tiner*, 13 Minn. 520; *State v. Mays*, 24 S. Car. 190.

Void Judgment. — In *Com. v. O'Neil*, 6 Gray (Mass.) 345, it was held that if

the sentence of the justice be void the defendant may undoubtedly omit to claim an appeal, and if committed to prison may be discharged on a writ of habeas corpus, or may successfully defend against a suit on his recognizance, if he has entered into one, for not abiding the sentence; but that if he does appeal, the whole case is opened to him as to the law, the facts, and the judgment, and he will be released or a legal sentence will be imposed.

If in a prosecution for a misdemeanor the justice has jurisdiction of the subject matter and of the defendant, but renders a judgment unwarranted by law and void, an appeal by the defendant gives jurisdiction to the Circuit Court. *State v. Haas*, 52 Wis. 407.

3. The issue will be presumed to have been joined, notwithstanding the defendant filed no plea either before the justice or on appeal. *Hennies v. People*, 70 Ill. 101.

4. *McElhaney v. Gilleland*, 30 Ala. 183; *Shaw v. Moser*, 3 Mich. 71; *Sherwood v. Ionia Circuit Judge*, 107 Mich. 136; *Steven v. Nebraska, etc., Ins. Co.*, 29 Neb. 187; *Claffin v. American Nat. Bank*, 46 Neb. 584; *Cochran v. Parker*, 6 S. & R. (Pa.) 549; *Robinson v. Shrouds*, 1 Ashm. (Pa.) 168; *Cason v. Connor*, 83 Tex. 26. See also the various subsections treating of the steps in perfecting an appeal.

5. *Delaware, etc., Canal Co. v. Loftus*, 71 Pa. St. 420; *Shank v. Warfel*, 14 S. & R. (Pa.) 205; *Craig v. Brown*, 48 Pa. St. 202. See also *Clarke v. McAnulty*, 3 S. & R. (Pa.) 364; *Cameron v. Montgomery*, 13 S. & R. (Pa.) 128.

6. *Clough v. Johnson*, 9 Ala. 425;

(3) *Irregularities*. — Technical objections and irregularities occurring before the justice of the peace will not be regarded upon appeal from the judgment of the justice.¹

(4) *Defects in Capias, Summons, or Process* — (a) *In General*. — Defects in, or the invalidity of, the capias, summons, or process in the justice's court must be objected to in that court, and cannot be raised after a trial there and the removal of the cause on appeal.² The object of a citation is merely to give the defendant notice of the suit that is brought against him, and when he brings

Collins v. Nichols, 7 Ind. 447; *Agee v. Dement*, 1 Humph. (Tenn.) 332; *Glass v. Stovall*, 10 Humph. (Tenn.) 453; *Hopkins v. Elmore*, 49 Vt. 176.

Even where the appeal brings up the case entirely unembarrassed by the pleadings or proceedings before the justice and places it in the appellate court for entirely new proceedings and pleadings, it is indicated that such pleas as are waived before the justice cannot be filed on appeal. *Curtiss v. Beardsley*, 15 Conn. 518. Though in *Missouri* it is held, on the other hand, that under the rule that a defendant may take advantage of any defense on appeal which he could have made before the justice, the defendant in attachment may file a plea in abatement for the first time on appeal. *Meyers v. Boyd*, 37 Mo. App. 535 [citing *Hubbard v. Quisenberry*, 28 Mo. App. 26; *Phillips v. Bliss*, 32 Mo. 427]. See also *Grove v. Campbell*, 9 Yerg. (Tenn.) 7. 1. *Davis v. Brinker*, 50 Ind. 25; *Scranton v. Levy*, 1 Hilt. (N. Y.) 261; *People v. Powers*, 19 Abb. Pr. (N. Y. Supreme Ct.) 99; *Graham v. Vandalore*, 2 Watts (Pa.) 131.

Waiver of Objections Available on Appeal. — Though an objection may be available on appeal from the judgment of a justice of the peace, it must be made before submitting to trial on the merits, or it will be waived. *Harrington v. Luddington*, 23 Ind. 542; *Gould v. Brown*, 9 N. J. L. 165. See also *Kirk v. Taylor*, 8 B. Mon. (Ky.) 262.

In *Alford v. Colson*, 8 Ala. 551, it was held that if the Circuit Court should entertain a motion to dismiss a cause for defects in the proceedings before the justice, it is certainly too late after one or more continuances of the cause subsequent to the appearance of the parties to entertain such a motion.

2. *Alabama*. — *Hill v. White*, 1 Ala. 576; *Slaton v. Apperson*, 15 Ala. 721; *Needham v. Newsom*, Minor (Ala.) 407; *McElhaney v. Gilleland*, 30 Ala. 183;

Walton v. Parker, (Ala. 1897) 21 So. Rep. 826; *McConnell v. Worns*, 102 Ala. 587; *McCrary v. Smith*, 1 Ala. 157; *Hart v. Turk*, 15 Ala. 675; *Catterlin v. Spinks*, 16 Ala. 467; *Perry v. Brown*, Minor (Ala.) 57.

Arkansas. — *Patterson v. Wilson*, 6 Ark. 476.

Illinois. — *Ohio, etc., R. Co. v. McCutchin*, 27 Ill. 10; *Frye v. Tucker*, 24 Ill. 181; *Shook v. Thomas*, 21 Ill. 87; *Vaughan v. Thompson*, 15 Ill. 39; *Swingley v. Haynes*, 22 Ill. 214; *Roberts v. Formhalls*, 46 Ill. 67; *Reynolds v. Foster*, 89 Ill. 259.

Indiana. — *Vermilya v. Davis*, 7 Blackf. (Ind.) 158; *Dudley v. Fisher*, 7 Blackf. (Ind.) 553.

Kentucky. — *Burton v. Longs*, 3 Litt. (Ky.) 443.

Massachusetts. — *Cahoon v. Harlow*, 7 Allen (Mass.) 151.

Missouri. — *Boulware v. Chicago, etc., R. Co.*, 79 Mo. 494; *Gant v. Chicago, etc., R. Co.*, 79 Mo. 503.

Montana. — *Cage v. Maryatt*, 9 Mont. 265.

New Hampshire. — *Parker v. Barker*, 43 N. H. 35.

New York. — *Clapp v. Graves*, 26 N. Y. 418; *Baird v. Pridmore*, 31 How. Pr. (N. Y. Supreme Ct.) 359, 29 How. Pr. (N. Y. County Ct.) 253.

North Carolina. — *Taylor v. Marcus*, 8 Jones L. (N. Car.) 402.

Tennessee. — *Childress v. Nashville*, 3 Sneed (Tenn.) 347.

Texas. — *White v. Johnson*, 5 Tex. Civ. App. 480.

West Virginia. — *Blankenship v. Kanawha, etc., R. Co.*, (W. Va. 1897) 27 S. E. Rep. 355.

Wisconsin. — *Woodruff v. Sanders*, 18 Wis. 161.

The Manner of Service of process cannot be objected to for the first time on appeal. *McKee v. Murphy*, 1 Ark. 55; *Pearce v. Nester*, 50 Hun (N. Y.) 546; *Childress v. Nashville*, 3 Sneed (Tenn.) 347; *Woodruff v. Sanders*, 18 Wis. 161.

his case into the appellate court he is fully apprised of the nature of the action he is called upon to defend and may make his defense *de novo*.¹

(b) *Jurisdiction Acquired by Appeal*. — It is held that by the appeal the appellate court acquires jurisdiction of the parties notwithstanding defects in the summons² or an entire absence of summons.³

(5) *Form and Sufficiency of Pleadings*. — Objections to the form and sufficiency of pleadings before the justice of the peace which should be made in that court are waived if not made there, and cannot be raised for the first time in the appellate court.⁴

(6) *Motion to Dismiss Action or Appeal*. — Proceedings for the dismissal of an action or appeal on motion in the appellate court are usually provided for and regulated by statute.⁵

1. *Irwin v. Davenport*, 84 Tex. 512 [citing *Sheldon v. San Antonio*, 25 Tex. Supp. 177; *Perry v. Rohde*, 20 Tex. 729; *Boaz v. Paddock*, 1 Tex. App. Civ. Cas., § 39].

2. *Alabama*. — *Monroe v. Brady*, 7 Ala. 59.

Illinois. — *Eckels v. Wolf*, 55 Ill. App. 310.

Indiana. — *Baltimore, etc., R. Co. v. Tess*, 2 Ind. App. 507.

Iowa. — *State v. McCombs*, 13 Iowa 426; *Cane v. Watson*, 1 Morr. (Iowa) 52; *Drake v. Achison*, 4 Greene (Iowa) 297.

Kansas. — *Haas v. Lees*, 18 Kan. 454. *Missouri*. — *Boulware v. Chicago, etc., R. Co.*, 79 Mo. 494; *Gant v. Chicago, etc., R. Co.*, 79 Mo. 502; *Fitterling v. Missouri Pac. R. Co.*, 79 Mo. 504; *Myers v. Woolfolk*, 3 Mo. 348; *Rice v. St. Louis, etc., R. Co.*, 30 Mo. App. 110.

Montana. — *Gage v. Maryatt*, 9 Mont. 265.

North Dakota. — *Lyons v. Miller*, 2 N. Dak. 1.

Ohio. — *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563.

Wisconsin. — *Lowe v. Stringham*, 14 Wis. 222.

Judgment by Default. — A defective summons is cured by appeal from a judgment by default. *Haas v. Lees*, 18 Kan. 449; *Eubank v. Pope*, 27 Mo. App. 463; *Gage v. Maryatt*, 9 Mont. 265; *Barnum v. Fitzpatrick*, 11 Wis. 81. But see *Moore v. Hansen*, 75 Mich. 564; *Nichols v. Fanning*, 20 N. Y. Misc. Rep. (Suffolk County Ct.) 73; *Fitch v. Devlin*, 15 Barb. (N. Y.) 47.

3. *Reynolds v. Foster*, 89 Ill. 259; *Swingley v. Haynes*, 22 Ill. 214. See

also *South, etc., Alabama R. Co. v. Seale*, 59 Ala. 608.

4. *Illinois*. — *Willerton v. Shoemaker*, 60 Ill. App. 126; *Tisdale v. Minonk*, 46 Ill. 9.

Indiana. — *Green v. Witte*, 5 Ind. App. 343; *Harper v. Pound*, 10 Ind. 32; *McClelland v. Quarles*, 3 Blackf. (Ind.) 459.

Maine. — *Strout v. Durham*, 23 Me. 483.

New York. — *Ross v. Hamilton*, 3 Barb. (N. Y.) 609; *Fowler v. Westervelt*, 40 Barb. (N. Y.) 374; *Stephens v. Baird*, 9 Cow. (N. Y.) 274; *McNeil v. Scofield*, 3 Johns. (N. Y.) 436; *Brownell v. Slocum*, 3 Johns. (N. Y.) 430; *Neff v. Clute*, 12 Barb. (N. Y.) 466.

Pennsylvania. — *Steckel v. Weber*, 20 Pa. St. 432.

Texas. — *Cahill v. Texas Mexican R. Co.*, 76 Tex. 100.

Compare Smith v. Scott, 86 Ind. 346; *Moore v. Hansen*, 75 Mich. 564.

Misjoinder of Issues. — *Wirth v. Bartell*, 84 Wis. 209.

Misjoinder of Parties. — *McCampbell v. Cavis*, (Colo. App. 1897) 50 Pac. Rep. 728; *Matula v. Fitzgerald*, (Tex. App. 1890) 15 S. W. Rep. 644.

Waiver of Objections Made Below. — By answering over after objections made to pleadings before the justice the party waives such objections. *Harper v. Leal*, 10 How. Pr. (N. Y. County Ct.) 276; *Irvine v. Forbes*, 11 Barb. (N. Y.) 587; *Jones v. Thompson*, 6 Hill (N. Y.) 621; *Peck v. Cowing*, 1 Den. (N. Y.) 222.

5. See the various sections of this title, treating of the steps necessary in perfecting an appeal. See also *supra*, IV. 11. c. *Prosecution of Appeal*.

Distinction Between Dismissal of Appeal and of Action. — A distinction is observed between a motion on appeal to dismiss the action and one to dismiss the appeal. If the justice had jurisdiction and the objection arises merely to the jurisdiction of the appellate court, the motion to dismiss should be directed against the appeal, and not against the action,¹ and where the objection reaches the jurisdiction of the justice, the suit, and not the appeal, should be dismissed.²

h. NEW TRIAL, REHEARING, AND REINSTATEMENT. — The practice in regard to the granting of a new trial or a rehearing after disposition of a cause on appeal from a justice, or the reinstatement of a dismissed appeal or action, depends upon the particular statutes prevailing,³ under which a new trial may⁴ or may not be granted,⁵

Demurrer Taken as Motion to Dismiss. — Where a demurrer to a complaint is not a proper pleading before a justice of the peace, it may be taken and treated as a motion to dismiss on appeal if it is preserved in the record by a bill of exceptions. *Langford v. Doniphan*, 53 Mo. App. 63.

Notice of Motion. — If a party is entitled to notice of a motion to dismiss an appeal, he waives his right by the presence of his attorney at the hearing of such motion and the concurrence of the latter in the dismissal. *McFarland v. Butler*, 11 Minn. 72.

1. *State v. Kutter*, 59 Ind. 572; *Ely v. Dillon*, 21 Iowa 47; *Cavanaugh v. Titus*, 5 Wis. 143. See also *Wynn v. Garland*, 11 Ark. 302; *Bassett v. Oldham*, 7 Dana (Ky.) 168; *Bell v. Brown*, 11 Tex. Civ. App. 526.

In *Hunter v. Cole*, 49 Me. 557, the action was dismissed for failure to file the transcript on appeal, and the court said that while technically the dismissal of the appeal might be required, there was no difference in fact between the dismissal of the appeal and the dismissal of the action. See also *Felt v. Felt*, 19 Wis. 193.

Motion to Dismiss Action as Appearance. — A motion to dismiss the action has been held to be such an appearance as to confer jurisdiction on the appellate court so as to preclude the party upon such questions of appellate jurisdiction as may be waived. *Northrup v. Smothers*, 39 Ill. App. 588.

2. *Fitzgerald v. Beebe*, 7 Ark. 305; *Pendleton v. Fowler*, 6 Ark. 41; *Levy v. Shurman*, 6 Ark. 182; *Dickey v. Pettigrew*, 6 Ark. 424; *Ford v. Smith*, 5 Cal. 331; *Fleming v. Limebaugh*, 2 Metc. (Ky.) 265; *Bassett v. Oldham*, 7

Dana (Ky.) 168; *Dodd v. Cady*, 1 Minn. 289; *Paul v. Southern R. Co.*, 50 S. Car. 23. See also *supra*, IV. 10. *Jurisdiction on Appeal*.

In *Klugman v. Laskowitz*, (Ga. 1897) 27 S. E. Rep. 179, an execution issued from a justice's court was, together with an affidavit of illegality filed thereto, returned to a justice's court in a different county. The latter court sustained the affidavit of illegality and dismissed the levy. Upon appeal to the Superior Court of that county, the fact that the affidavit of illegality together with the execution had been returned to the wrong justice, appearing in the record, the court declined to act upon a motion to dismiss the appeal, and dismissed the case with direction that the proceeding be returned to the proper court, and this action was held by the Supreme Court to be proper.

3. See generally the articles NEW TRIAL; REHEARING.

4. *Massman v. Superior Ct.*, 71 Cal. 582; *Squier v. Gale*, 6 N. J. L. 157.

5. *Schuyler v. Mills*, 28 N. J. L. 138, holding that the Court of Common Pleas, in cases of appeal, has in general no powers except such as are conferred by statute, and that there can be no revival of a case or reinstatement or opening of a judgment or setting aside a verdict for a retrial, but that after judgment the case is disposed of, and it is beyond the power of the appellate court to resuscitate it.

In *California* it was held that a petition for a rehearing is a proceeding unknown to the law or to the practice of the Superior Court in that state, though that court might set aside its judgment upon an application under section 473 of the Code of Civil Procedure, which

or an appeal¹ or a cause² may be reinstated after the dismissal of the one or the other.³

12. *Costs on Appeal*.⁴ — See article COSTS, vol. 5, p. 205.

V. **PROCEEDINGS AGAINST JUSTICES** — 1. **Criminal Prosecutions**. — In a criminal prosecution against a justice of the peace for a wrongful act committed under color of office, the indictment should allege that the act was done with improper motives⁵ and

provides for the relief of a party against "a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," etc., or on motion for a new trial; but that neither of these modes is applicable in a case where the judgment was not taken through the mistake, inadvertence, surprise, or excusable neglect of the party, and where the judgment was one of affirmance on an appeal upon questions of law alone. *Fabretti v. Superior Ct.*, 77 Cal. 305.

Reconsideration of First Decision. — It is held in *Minnesota* that, upon appeal from a justice on questions of law, the appellate court may reconsider and modify its first decision. *Meister v. Russell*, 53 Minn. 54.

Petition at Subsequent Term. — In *Vermont* it was held that a petition praying that a judgment at a former term dismissing a complaint for the affirmance of a justice's judgment be vacated and the suit reinstated was in substance and character a petition for a new trial, and as such could not be supported at a term subsequent to that in which the judgment was rendered, under a statute limiting the power of the court to grant a new trial to that term. *Foster v. Austin*, 33 Vt. 615.

1. *Watts v. Naylor*, 5 Kan. App. 146; *Howell v. Van Ness*, 31 N. J. L. 443, holding that the power to dismiss an appeal for want of prosecution is clear and that the power to reinstate the appeal is equally clear. "But it must be for some good cause shown. If it were dismissed on a misapprehension of the law, as in *Case v. Rowland*, 17 N. J. L. 76, or on a mistake of the facts, as in *Adams v. Mathis*, 18 N. J. L. 310, it is the duty of the court to reinstate; and if it refuse, a mandamus will issue from this court commanding it to be done. So where the appellant has a meritorious defense which, by some surprise, he has been prevented from showing, the only redress is by reinstating the appeal to afford him the opportunity. But when an appeal

has been properly dismissed, and there is no error in law or mistake in fact, and no surprise, the power of the Common Pleas over it is gone. Their jurisdiction is then exhausted, and they cannot legally reinstate the appeal. The decision in such a case is as final as if they had rendered judgment upon the merits, and they have no power to reinstate or to grant a new trial." See also *Main v. McLaughlin*, 78 Wis. 449, to the same effect.

2. *Bigbee v. Hutcheson*, 99 Ga. 398.

3. **Reinstatement at Subsequent Term**. — A cause or appeal cannot be reinstated at a term subsequent to that at which the dismissal was ordered. *Smith v. Wilson*, 26 Ill. 186; *Chicago Title, etc., Co. v. Chicago, etc., R. Co.*, 58 Ill. App. 388; *Pinger v. Vanclick*, 36 Wis. 141.

Mistake of Fact. — The court may have the power under statute to vacate an order dismissing an appeal after the term at which it is entered, where the dismissal resulted through mistake, inadvertence, surprise, or excusable neglect on the part of a party to the suit. *Stone v. Halpin*, 83 Wis. 483. See also *Sutton v. Wegner*, 72 Wis. 294. But the mistake relied on for the purpose of setting aside such an order and reinstating the appeal must be a mistake of fact and not of law. *Main v. McLaughlin*, 78 Wis. 449.

4. As to costs on dismissal for want of jurisdiction, see article COSTS, vol. 5, p. 120, note 2. As to offer of judgment, see that title.

5. **Wilfully and Maliciously**. — An indictment against a justice for extortion under color of office should charge that the acts were wilfully and maliciously done. *State v. Latshaw*, 63 Mo. App. 620.

Sufficient Allegation. — Where, in an indictment against a justice for taking unlawful and extortionate fees, it was charged that he "unlawfully, corruptly, deceitfully, extorsively, and by color of his office, did extort and receive from," etc., it was held that the

that the justice knew it to be in violation of the law.¹ It should also be alleged that such wrongful act was done by the justice while acting in his official capacity.² In charging the offense the indictment should state sufficient facts to show clearly that the justice has rendered himself liable to prosecution.³ If the prosecution is under a statute, it should be shown that the offense falls within the terms of the statute.⁴

offense was well charged, and that the indictment was sufficient, especially after verdict. *State v. Cansler*, 75 N. Car. 442.

1. Insufficient Indictment. — An indictment charging a justice with misconduct in office in taking jurisdiction of a criminal action for the purpose of making the acquittal of the defendant a bar to further prosecution for the same crime in an action pending in another township, but containing no averment that the justice intended to acquit the defendant, or that he acted from corrupt motives, or that he knew his acts to be unlawful, was held to be insufficient under section 758 of the *California* Penal Code. *People v. Ward*, 85 Cal. 585.

Refusal to Grant Change of Venue. — An indictment against a justice for an improper refusal to grant a change of venue charged that the defendant rendered the judgment corruptly, but did not state that he knew his decision to be in violation of the law. It was held that the indictment was insufficient. *State v. Ross*, 4 Ind. 541.

Technical Words Not Required. — In an indictment against a justice for misbehavior in office, it is necessary that the act imputed as misbehavior be distinctly and substantially charged to have been done with corrupt, partial, malicious, or improper motives, and above all with knowledge that it was wrong; however, there are no technical words indispensably required in which the charge of corruption, partiality, etc., shall be made. *Jacobs v. Com.*, 2 Leigh (Va.) 709.

2. Taking Illegal Fees. — An indictment against a justice for taking illegal fees must allege that he held the office of justice of the peace. *Territory v. McElroy*, 1 Mont. 86.

Failure to Allege Acceptance of Appointment. — An indictment against a justice of the peace for failing to apportion hands to a road district, which alleges his appointment as apportioning justice but fails to allege his acceptance

of such appointment, is defective. *State v. Lewis*, 53 Ark. 340.

3. Facts Showing Corruption. — In an indictment against a justice for corruption in an act done under color of office, it is not sufficient to allege that the act was done corruptly; the facts must be set out in which the corruption consists. *State v. Zachary*, Busb. L. (N. Car.) 432.

Refusal to Issue Warrant. — An indictment against a justice for refusing to issue a warrant for the arrest of a felon should charge either that the felony was committed in his presence, or that an affidavit of its commission was tendered him; and it should also charge that the felon was in the justice's county at the time of the refusal. *State v. Leigh*, 3 Dev. & B. L. (N. Car.) 127.

Failure to File List of Fines. — In an indictment against a justice for failing to make out and file in the clerk's office a list of all the fines, etc., assessed by him, it is not necessary to state the names of the persons against whom the fines had been assessed. *State v. McCormack*, 2 Ind. 305.

Failure to Pay Over Fines. — An information against a justice for failure to pay over to the county treasurer money received for fines need not state from whom the money was received. *Alexander v. State*, 9 Ind. 337.

4. Failure to Pay Over Fees. — Under a statute providing that all justices of the peace "shall, on the first Monday in August in each year, or within ten days thereafter, pay over to the school commissioner of their respective counties, who shall receipt therefor, all such fees as may have come into their hands respectively, by virtue of their several offices, at any time prior to the preceding first Monday in August," it was held that an indictment against a justice for not paying over fees, etc., on the first Monday of August of a certain year, must aver that the fees were received by him prior to the first Monday of August of the preceding year. *State v. Boyles*, 7 Blackf. (Ind.) 90.

2. Civil Actions. — Civil actions brought against justices for acts done *virtute officii* are generally brought on their official bonds. Such actions will receive treatment at another place in this work.¹ In a civil suit against a justice in his official capacity the declaration should show that the plaintiff has suffered loss or damage through the failure, refusal, or neglect of the justice.² The jus-

Failure to Make Affidavit of No Fees. — Under a statute providing that if on the first Monday in August a justice has no fees in his hands liable to be paid over, he shall file an affidavit to that effect within ten days after such first Monday in August, an indictment against a justice for not making an affidavit that he had no fees, etc., should aver that no such fees came to his hands. *State v. Boyles*, 7 Blackf. (Ind.) 90.

Failure to Pay Over Funds for Seminary Purposes. — Under a statute providing that "all officers in whose hands or possession there may now be, or hereafter come, any money or moneys set apart for seminary purposes, are required to pay over the same to the trustee of the seminary fund of the proper county within sixty days after the receipt thereof," it was held that an indictment against a justice found at the March term, 1840, which charged that the defendant had in his hands on the 1st of January, 1840, a certain sum of money received by him as a fund, etc., for seminary purposes, and that he had failed to pay the money over, etc., within sixty days after the receipt thereof, sufficiently described the offense and showed with sufficient certainty its commission within the time prescribed by the statute. *State v. Noel*, 5 Blackf. (Ind.) 548.

Failure to Report Convictions. — *Missouri* Rev. Stat. 1889, § 4370, requires a justice to report the conviction and fining of persons in his court and the issuing of execution for the collection of such fines. An indictment against a justice for neglecting to make such report, which averred that the execution was delivered "to the proper officer for collection and service," was held insufficient for indefiniteness and uncertainty in not naming the particular constable to whom such execution was issued. *State v. Latshaw*, 63 Mo. App. 496.

Failure to Furnish List of Criminal Cases. — *North Carolina* Code, § 906, directs that "it shall be the duty of each

justice of the peace to furnish the clerk of the superior, criminal, or inferior court of his county with a list of the names and offenses of all parties tried and finally disposed of by such justice, together with the papers in each case, in all criminal actions since the last term of the superior, criminal, or inferior court." Under the statute, an indictment against the justice for failure to furnish the clerk of the Superior Court of his county with the list of criminal cases tried by him alleged that the defendant, as a justice of the peace, did on certain days try and finally dispose of certain criminal actions which were before him, and did wilfully and unlawfully fail to furnish the clerk of the Superior Court of said county with a list containing the names of all parties tried in all criminal actions finally disposed of by him. It was held that the indictment sufficiently advised the accused of the particulars of the criminal neglect imputed, and was a protection against any further prosecution for the same offense; and it was not defective because of an omission to state the names of the persons so tried, or that their names were unknown. *State v. Foy*, 98 N. Car. 744.

Failure to Keep Jail in Repair. — Under a statute directing that a justice shall from time to time lay a sufficient tax to erect and keep in good repair the public jail, an indictment against the justice for allowing the jail to get out of repair, which charges generally that he did negligently and unlawfully permit the jail to go to ruin and decay, is not sufficient; the indictment should charge which of the duties prescribed by the act has been neglected. *State v. Justices*, 4 Hawks (N. Car.) 194.

1. See the article OFFICIAL BONDS.

2. Neglecting to Send Up Papers on Appeal. — Where a justice rendered judgment in favor of the plaintiff, and the defendant appealed, the justice failed to transmit the papers in time to the clerk's office, and the appeal was dismissed. In a suit brought by the appellee against the justice for neglecting

tice has a right to be tried by his docket, and is entitled to the evidence it may furnish in his favor.¹

Notice of Suit. — In some states it is provided that in an action against a justice for an official act, notice must be given him a specified time — usually thirty days — before suit is brought, so that he may tender amends to the injured party.² In *Pennsylvania* it is held that such notice need not possess the technical formality of a declaration;³ it need only state the plaintiff's cause of action in language explicit enough to indicate clearly the injury for which redress is sought;⁴ but a circumstance unnecessarily

to send up the papers, it was held that the declaration should state that the appellee had a good defense to the whole or a part of the appellant's demand. *Crews v. Sheets*, 4 Blackf. (Ind.) 275.

A Rule Against an Officer for Failure to Collect Money is a suit or action, and must contain every allegation necessary to show the right of the plaintiff to recover. Therefore, where a rule was moved against a justice, the plaintiff merely alleging that the justice had failed and refused to enter up a judgment and issue execution upon a claim placed in his hands, although the justice answered denying these facts, and upon a traverse the issue was found in favor of the plaintiffs, there was no error in refusing to make the rule absolute, there being no allegation to show any loss or damage to the plaintiffs by reason of the failure, refusal, or neglect of the magistrate. *Barrett v. Pulliam*, 77 Ga. 552.

1. *Lancaster v. Lane*, 19 Ill. 242.

Unlawfully Issuing Execution. — In an action against a justice for unlawfully issuing an execution against the plaintiff, the justice's docket may be introduced in evidence for the purpose of showing whether the defendant issued the execution without lawful authority. *Dupont v. Downing*, 6 Iowa 172.

2. *Collins v. Granniss*, 67 Ga. 716; *Ashton v. Isard*, 2 Phila. (Pa.) 39; *Wise v. Wills*, 2 Rawle (Pa.) 208; *Jones v. Hughes*, 5 S. & R. (Pa.) 299; *Prior v. Craig*, 5 S. & R. (Pa.) 44; *Mitchell v. Cowgill*, 4 Binn. (Pa.) 20.

Declaration Must Show Notice. — A declaration which fails to show such notice is demurrable. *Collins v. Granniss*, 67 Ga. 716.

Suits on Official Bonds. — In *Pennsylvania* it has been held that such statute does not apply to suits on the official bonds of justices. *Com v. Frailey*, 69 Pa. St. 260.

A Justice Has Jurisdiction of an action against another justice for demanding and receiving illegal fees. *Bartolett v. Achey*, 38 Pa. St. 273.

Variance Between Notice and Declaration. — In a suit against the justice for taking illegal fees, where the previous notice prescribed by the statute is given under one act, and the plaintiff declares on another act, the variance is fatally defective to the action. *Apple v. Rambo*, 13 Pa. St. 9.

Judgment for Costs. — Where a suit was instituted against a justice to recover the excess of fees taken by him in the execution of his office beyond what the Act of Assembly allows, judgment may be rendered for the excess and costs, including the fee of twenty shillings to the plaintiff's attorney for preparing and serving the notice under the Act of 1772. *Collins v. Hunter*, 1 Ashm. (Pa.) 60.

3. *Robinson v. English*, 34 Pa. St. 324.

4. *Bartolett v. Achey*, 38 Pa. St. 273; *Robinson v. English*, 34 Pa. St. 324; *McConahy v. Courtney*, 7 Watts (Pa.) 491; *Hansel v. Spaul*, 7 Watts (Pa.) 297; *Jewel v. Howe*, 3 Watts (Pa.) 144; *Miller v. Smith*, 12 S. & R. (Pa.) 145; *Mitchell v. Cowgill*, 4 Binn. (Pa.) 20.

Language Indicating Alternative. — Such notice is not bad because it states causes in language which might indicate an alternative. *Hansel v. Spaul*, 7 Watts (Pa.) 297.

Need Not State Kind of Writ. — Although it is necessary that this notice should be given and should precisely indicate the cause of action, it is not necessary that it should state the kind of writ that it is intended to issue out. *Mitchell v. Cowgill*, 4 Binn. (Pa.) 20; *Little v. Toland*, 6 Binn. (Pa.) 83.

Taking Illegal Fees. — Notice to a justice of the cause of action in a suit for the statutory penalty for taking illegal

set out must be proved as alleged.¹ The notice may be served by the plaintiff himself² or by his agent or attorney.³

fees need not specify what fees he was entitled to receive. *Coates v. Wallace*, 17 S. & R. (Pa.) 75.

Suit Brought in Different Court. — In a suit to recover from a justice a penalty imposed by statute for marrying minors without the consent of parents, where the notice apprised the defendant that suit would be brought against him in the Common Pleas, whereas it was instituted in the District Court, such notice was held good. *Lowrie v. Verner*, 3 Watts (Pa.) 317.

Insufficient Notice. — In an action on the case brought against a justice to recover damages for alleged misconduct in his official capacity, a notice of the cause of action signed by the plaintiff and indorsed, "Notice to J. S., Esquire. Henry Read, living in Poplar lane, between Third and Fourth streets," is defective in not stating that Henry Read was the agent of the plaintiff, and in not containing anything from which it could be inferred that Read was the plaintiff's agent, having authority to receive a tender of amends. *Lake v. Shaw*, 5 S. & R. (Pa.) 517.

1. *Stansbury v. Bertron*, 7 W. & S. (Pa.) 362.

2. In an action against a justice for marrying a minor, the plaintiff himself may give the requisite notice, and in such case the indorsement of the name

and residence of his attorney is unnecessary; and if he do employ an attorney, the statute does not require that the attorney shall reside in the county where the justice lives. *Byerly v. Vankirk*, 5 Watts (Pa.) 370.

Must Be Signed by Plaintiff. — A notice to a justice not signed by the party is insufficient, though delivered by the party in person, who was known to the justice. *Grimes v. Percival*, 9 Pa. St. 135.

3. **Need Not Be Served by Attorney.** — A notice to a justice signed by an agent or attorney need not be served by such attorney or agent personally, but may be served by a person employed by him for the purpose. *Bates v. Shaw*, 13 S. & R. (Pa.) 420.

Sufficient Showing of Authority. — The indorsement on the notice of the name and residence of the plaintiff's attorney is equivalent to an assertion that such attorney is the agent of the plaintiff and authorized to receive amends. *Bartolett v. Achey*, 38 Pa. St. 273.

Insufficient Notice. — Where a notice to a justice, under the Pa. Act of 1772, was signed by the attorney for the plaintiff and dated at W., but there was no indorsement of the attorney's name, nor was it said that he resided at W., it was held insufficient. *Slocum v. Perkins*, 3 S. & R. (Pa.) 295.

JUSTIFICATION.

See the particular titles in this work upon subjects in connection with which the plea of justification may arise, as *ASSAULT AND BATTERY*, vol. 2, p. 862; *FALSE IMPRISONMENT*, vol. 8, p. 850; *LIBEL AND SLANDER*; *MALICIOUS PROSECUTION*, etc. See also articles *ANSWERS IN CODE PLEADING*, vol. 1, pp. 834, 845; *ATTACHMENT*, vol. 3, p. 57; *PUBLIC OFFICERS*.

KIDNAPPING.

I JURISDICTION, 825.

II INDICTMENT, 825.

1. *Essential Averments*, 825.
 - a. *At Common Law*, 825.
 - b. *Under Statute*, 826.
2. *Charging Similar Offenses in Separate Counts*, 827.

I JURISDICTION. — It is generally provided by statute that the jurisdiction of an indictment for kidnapping is in any county in which the offense is committed or into or out of which the person kidnapped has been brought.¹

II INDICTMENT — 1. **Essential Averments** — a. **AT COMMON LAW.** — At common law the offense of kidnapping is an aggravated species of false imprisonment, and the indictment must contain every averment necessary to the description of that offense, and in addition the facts which transform it into the greater offense.²

1. *Smith v. State*, 63 Wis. 453. See statutes of the different states.

2. *Click v. State*, 3 Tex. 282.

Assault. — The averment of an assault would seem to be proper, even if not absolutely necessary. *Click v. State*, 3 Tex. 282.

Unlawful Asportation. — The indictment should also allege the carrying away of the person injured, unlawfully and against his will. *Click v. State*, 3 Tex. 282. In this case the court said: "The unlawfulness, or the want of lawful authority, we have seen is one of the circumstances necessary to constitute the offense. * * * The

omission cannot be supplied by the conclusion of the indictment 'contrary to the form of the statutes,' for it is founded on no statute, and can only be sustained as a good indictment at common law by rejecting the conclusion as surplusage. * * * To constitute the crime of kidnapping, the asportation or conveying away must have been against the will and without the consent of the party injured and without any lawful warrant or authority therefor, and these essential circumstances descriptive of the offense charged should appear by averment in the indictment."

b. UNDER STATUTE. — Where kidnapping is made a statutory crime the indictment will be sufficient if it charges the offense in the language of the statute defining it ¹ or in words of equivalent meaning.²

Averment of Intent. — In *Wisconsin* it is held that an information alleging the forcible confinement of a person within the state, against his will, and without lawful authority, but not alleging any specific intent in such confinement, charges merely the common-law offense of false imprisonment, and not an offense under Wis. Rev. Stat., § 4387, according to which an intent "to cause such person to be secretly confined * * * or to be sent or carried out of this state against his will" must be alleged and proved in order to obtain a conviction for kidnapping. *Smith v. State*, 63 Wis. 453.

Conspiracy to Abduct Child. — In *Pennsylvania*, by section 94, Act of March 31, 1860, P. L. 405, the abduction of any child under the age of ten years, with intent to deprive its parent or parents, or other persons having its lawful charge or care, of its possession, etc., is made a misdemeanor. An indictment under this section which does not aver the name or sex of the child, and that it was under the age of ten years, and the intent to deprive those having charge of it of its possession, or to steal any article of apparel, etc., upon it, is defective. *Com. v. Myers*, 146 Pa. St. 24.

1. *People v. Fick*, 89 Cal. 144; *Dowda v. State*, 74 Ga. 12; *State v. Sutton*, 116 Ind. 527; *State v. M'Roberts*, 4 Blackf. (Ind.) 178.

Evidence Need Not Be Set Out. — "The law does not require the evidence to be set out in the indictment, but only that the offense be charged in the terms and language of the code." *Dowda v. State*, 74 Ga. 12.

Allegation of Purpose—Surplusage. — The acts constituting the crime of kidnapping are sufficiently alleged if the indictment follows the language of the statute defining the offense; and an allegation as to the purpose of the kidnapper is surplusage, and need not be proved. *People v. Fick*, 89 Cal. 144.

In *Indiana* the statute defining kidnapping (Rev. Stat. 1881, § 1915) is composed of two subdivisions. Under the first, to constitute the crime there must be a carrying or decoying of the per-

son injured away from the place of residence, forcibly or fraudulently. Under the second subdivision, it is not necessary that the person injured be compelled or induced to leave his place of residence. In defining the crime embraced in the second subdivision the words "with the intention of having such person carried away from his place of residence" must be employed, but the crime embraced in the first subdivision necessarily involves an intentional carrying away or decoying, and such words need not be used in defining it. *Boes v. State*, 125 Ind. 205. See also *State v. Sutton*, 116 Ind. 527.

2. Must Negative Exceptions in Statute.

— In *Indiana*, Rev. Stat. 1881, § 1915, defines the offense as follows: "Whoever kidnaps or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons, any person, with the intention of having such person carried away from his place of residence, unless it be in pursuance of the laws of this state or of the United States, is guilty of kidnapping," etc. An indictment based upon this statute must, in addition to alleging the unlawful and felonious character of the acts with which the defendant is charged, negative the exceptions in the statute, and allege that the acts were not done in pursuance of the laws of that state or of the United States. *State v. Kimmerling*, 124 Ind. 382. See also *State v. Sutton*, 116 Ind. 527.

Insufficient Negation of Exception. —

An averment in the indictment that the defendant carried away from her residence the person named, "not then and there having first established a claim upon her * * * according to the laws of the state of *Indiana* or the laws of the United States," is not the equivalent of that required by the statute. It does not sufficiently negative the exception "unless it be in pursuance of the laws of this state or of the United States." *State v. Kimmerling*, 124 Ind. 382.

Charging Assault as Part of Offense. —

An indictment charging an assault and battery only as a part of or manner of the kidnapping is not subject to the ob-

Indictment.

KIDNAPPING.

Charging Similar Offenses.

2. Charging Similar Offenses in Separate Counts. — An indictment which charges in one count the offense of kidnapping and in another that of abduction of a female for the purpose of prostitution will not be bad for duplicity.¹ So, also, an indictment for kidnapping a child may contain counts charging the kidnapping and also the harboring and concealing it with a knowledge that it was enticed away.²

jection that it includes two separate and distinct offenses. *People v. Ah Own*, 39 Cal. 604.

1. *Mason v. State*, 29 Tex. App. 24.

2. *Com. v. Westervelt*, 11 Phila. (Pa.)

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LABOR OFFENSES.

See article *MASTER AND SERVANT*.

LACHES.

By SIDNEY R. PERRY.

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CROSS-REFERENCE.

As to *Limitations Prescribed by Statute*, see article *LIMITATIONS*.

I. DEFINITION AND SCOPE OF ARTICLE. — Laches is defined to be unreasonable delay; or the neglect to do at the proper time what by law or duty ought to be done; or the failure to prosecute a claim within a proper and reasonable period.¹

This article deals only with general questions of pleading and practice, relating to the raising and avoidance of the defense and the action of the court upon the case. For questions of laches connected with the various specific articles in this work, resort is to be had to those articles.

II. TAKING ADVANTAGE OF — 1. Necessity of Pleading — a. DOCTRINE THAT LACHES NEED NOT BE PLEADED — OBJECTION AT HEARING — (1) *In General*. — According to what is considered the better practice, the defense of laches is one of which it is not necessary to take advantage by the pleadings. If the case as it appears at the hearing is liable to such an objection, the court may and usually will remain passive, and refuse relief or decline to entertain the suit.²

(2) *Defense Arising upon Bill or upon Whole Case*. — In some cases the defense arises upon the bill as presented to the court,³

1. See 2 Abb. L. Dict., tit. Laches; 2 Bouv. L. Dict., tit. Laches; Am. and Eng. Encyc. of Law, tit. *Laches*.

2. *Alabama*. — *Espy v. Comer*, 76 Ala. 501; *James v. James*, 55 Ala. 525. But see *Solomon v. Solomon*, 81 Ala. 505.

Arkansas. — *Adams v. Taylor*, 14 Ark. 62. But see *Humphreys v. Butler*, 51 Ark. 351.

California. — *Harris v. Hillegass*, 66 Cal. 79; *Chapman v. State Bank*, 97 Cal. 155.

Colorado. — *Hagerman v. Bates*, (Colo. 1897) 49 Pac. Rep. 139.

Connecticut. — *Haskell v. Bailey*, 22 Conn. 574.

District of Columbia. — *Mayse v. Gaddis*, 2 App. Cas. (D. C.) 20.

Maryland. — *Hepburn's Case*, 3 Bland (Md.) 95.

Massachusetts. — See *Snow v. Boston Blank Book Mfg. Co.*, 153 Mass. 456.

Missouri. — *Murphy v. De France*, 105 Mo. 53. See also *Kelly v. Hurt*, 74 Mo. 561.

Rhode Island. — *Chase v. Chase*, (R. I. 1897) 37 Atl. Rep. 804.

Wisconsin. — *Coon v. Seymour*, 71 Wis. 340; *Melms v. Pabst Brewing Co.*, 93 Wis. 153.

United States. — *Sullivan v. Portland*,

etc., R. Co., 94 U. S. 806; *Fisher v. Boody*, 1 Curt. (U. S.) 206; *Pratt v. California Min. Co.*, 9 Sawy. (U. S.) 354; *Badger v. Badger*, 2 Wall. (U. S.) 87; *Richards v. Mackall*, 124 U. S. 183; *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 337; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46; *Woodmanse, etc., Mfg. Co. v. Williams*, 68 Fed. Rep. 489.

Waiver by Failure to Plead. — The failure formally to plead the objection of laches will not be considered a waiver thereof. *Chase v. Chase*, (R. I. 1897) 37 Atl. Rep. 804.

Dismissal of Bill and Cross-bill. — In *Mayse v. Gaddis*, 2 App. Cas. (D. C.) 20, both the bill of the plaintiff and the cross-bill of the defendant in a suit to remove a cloud upon title were dismissed for laches in the plaintiff and defendant, respectively, and this though the laches was not relied upon as a defense.

3. *Espy v. Comer*, 76 Ala. 501; *Haskell v. Bailey*, 22 Conn. 574; *Coon v. Seymour*, 71 Wis. 340; *Pratt v. California Min. Co.*, 9 Sawy. (U. S.) 354; *Leavenworth County v. Chicago, etc., R. Co.*, 18 Fed. Rep. 209; *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 337.

and in others upon the whole case as disclosed by the evidence.¹

(3) *Objection at Hearing.* — Under this doctrine the objection may be made by the parties at the hearing,² or may be raised or the laches taken notice of by the court on its own motion.³

b. DOCTRINE THAT LACHES MUST BE PLEADED — *In General.* — The doctrine which is conceived to be the better one, that laches need not be pleaded to be available as a defense, has not been universally accepted. It is held by many respectable authorities that in order to secure the benefit of this defense, advantage of it must be taken by some appropriate method of pleading.⁴

1. *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 337; *Pratt v. California Min. Co.*, 9 Sawy. (U. S.) 354; *James v. James*, 55 Ala. 525.

2. *Hagerman v. Bates*, (Colo. 1897) 49 Pac. Rep. 139; *Adams v. Taylor*, 14 Ark. 62; *Woodmanse, etc., Mfg. Co. v. Williams*, 68 Fed. Rep. 489.

If the case at the hearing is liable to objection for laches, such objection may then be made. *Hepburn's Case*, 3 Bland (Md.) 95; *Murphy v. De France*, 105 Mo. 53. See also *Kelly v. Hurt*, 74 Mo. 561.

If the laches appears on the face of the bill and is unexplained, it is good ground for dismissing the bill on motion for want of equity, without answer, demurrer, or plea. *Espy v. Comer*, 76 Ala. 501.

If the fact appears on the face of the bill, or in the report of a committee to which it is referred, the objection may be taken without being pleaded. *Haskell v. Bailey*, 22 Conn. 574.

Upon either a Preliminary or a Final Hearing, the defense of laches may be presented in argument. *Woodmanse, etc., Mfg. Co. v. Williams*, 68 Fed. Rep. 489.

3. *Hagerman v. Bates*, (Colo. 1897) 49 Pac. Rep. 139; *Mayse v. Gaddis*, 2 App. Cas. (D. C.) 20; *Adams v. Taylor*, 14 Ark. 62; *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 337.

Whether the laches arises upon the bill and pleadings presented to the court or upon the whole case as disclosed by the evidence, the court will often take notice of it, though the objection be not made by the parties. *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 337.

Laches Disclosed by Bill. — Where the bill discloses gross laches the court will, on its own motion, refuse relief, even without such laches having been

pleaded. *Coon v. Seymour*, 71 Wis. 340; *Leavenworth County v. Chicago, etc., R. Co.*, 18 Fed. Rep. 209.

Upon Court's Own Motion. — While the defense of laches need not be specially pleaded by the defendant, still, when not pleaded, unless it clearly and satisfactorily appears to the court from the evidence that there has been an unreasonable delay in prosecuting the suit, the court, on its own motion, should not rest its decision upon that ground. *Hagerman v. Bates*, (Colo. 1897) 49 Pac. Rep. 139.

Appellate Court Raising Laches on Own Motion. — On an appeal and cross-appeal from a decree setting aside a sale of real estate under a deed of trust, and directing an accounting by the auditor, it was held that as the defendant did not suggest the laches in the court below, the appellate court would not raise it on the appeal, though it was within its discretion and was sometimes its duty to do so of its own motion. *Crutchfield v. Hewett*, 2 App. Cas. (D. C.) 373.

4. *Arkansas.* — *Humphreys v. Butler*, 51 Ark. 351. But see *Adams v. Taylor*, 14 Ark. 62.

Illinois. — *School Trustees v. Wright*, 12 Ill. 432; *Beach v. Shaw*, 57 Ill. 17; *Zeigler v. Hughes*, 55 Ill. 288; *Hall v. Fullerton*, 69 Ill. 451; *Williams v. Rhodes*, 81 Ill. 571; *Simpson v. McPhail*, 17 Ill. App. 499; *Dawson v. Vickery*, 150 Ill. 398.

Texas. — *De Witt v. Miller*, 9 Tex. 246.

The Reason of This Rule requiring the defendant to set up and to insist on the complainant's laches is to give the latter an opportunity to amend his bill by inserting allegations accounting for the delay. *School Trustees v. Wright*, 12 Ill. 432; *Zeigler v. Hughes*, 55 Ill. 288; *Hall v. Fullerton*, 69 Ill. 451; *Williams*

Waiver by Nonreliance on. — If not so relied on in the lower court the defense of laches will be considered waived¹ and cannot be urged in the appellate court.²

In Admiralty. — In an admiralty case the defendant cannot legitimately avail himself of lapse of time or staleness of the demand without interposing a defensive allegation to the libel.³

2. Manner of Pleading — a. IN GENERAL. — It is stated that laches is a defense which may be made by plea, answer, or demurrer.⁴ Where the rule prevails that laches need not be pleaded the defense may be presented by argument, either

v. Rhodes, 81 Ill. 571; *Simpson v. McPhail*, 17 Ill. App. 499.

Laches Shown by Bill — Allegations of Excuse. — In *Beach v. Shaw*, 57 Ill. 17, the doctrine laid down in *School Trustees v. Wright*, 12 Ill. 432, that laches must be pleaded, was followed, but the court referred to that case as "an authority we are reluctant to overrule, but with which we are not altogether satisfied when applied to cases in which the laches appears upon the face of the bill."

The later *Illinois* cases expressly deny the application of the rule where the complainant in his bill undertakes in advance to excuse himself for the apparent laches. *Hall v. Fullerton*, 69 Ill. 451; *Williams v. Rhodes*, 81 Ill. 571; *Simpson v. McPhail*, 17 Ill. App. 499.

Reliance on Statutory Title by Possession. — In *Illinois* where the defendant, in a suit to set aside a deed which constitutes his color of title to certain lands, relies on the statutory title created by possession for seven years and payment of taxes on the land, it is not necessary for him to plead laches on the statute of limitations. The defense relied on at the hearing in the case cited was the above statutory title, independent of laches or limitations. *Coward v. Coward*, 148 Ill. 268.

Laches Applicable to Equitable Claim in Suit for Land. — In *Texas* where the defendant in a suit for land sets up fraud, or an equitable claim to which the defense of laches or stale claim is applicable, the plaintiff should plead that defense by way of replication; otherwise the objection of laches or staleness will not be available on appeal. *Bullock v. Smith*, 72 Tex. 549; *Hensel v. Kegans*, 79 Tex. 347; *Walet v. Haskins*, 68 Tex. 418; *Smith v. Perkins*, 81 Tex. 152.

Payment evidenced by lapse of time must be pleaded. *Tibbs v. Clark*, 5 T.

B. Mon. (Ky.) 527; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 287.

1. *School Trustees v. Wright*, 12 Ill. 432; *Beach v. Shaw*, 57 Ill. 17; *Walker v. Denison*, 86 Ill. 142.

2. *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Darst v. Murphy*, 119 Ill. 343; *Dawson v. Vickery*, 150 Ill. 398; *Humphreys v. Butler*, 51 Ark. 351.

3. *Jones v. The Richmond*, 13 Fed. Cas. No. 7,492. See also *The Swallow*, 23 Fed. Cas. No. 13,665; *The Melissa*, 16 Fed. Cas. No. 9,400.

"The counsel for the respondent has urged an objection that goes to the whole libel; it is that the demand is stale, and not fit to be entertained by a court of justice. If it were the intention of the respondent to rely on this defense, it should have been regularly pleaded. According to the practice of the admiralty, a defense that does not meet the merits of the case cannot avail the respondent unless he gives the adverse parties notice of such defense by a plea or a distinct allegation in the answer." *The Platina*, 19 Fed. Cas. No. 11,210.

"On the oral argument, defendants, for the first time, claimed that complainant's claim, as made in the bill, was stale. If the bill was defective in not stating at what particular time complainants were informed of the existence of the disputed documents, it might have been made more specific in this respect if objections or exceptions had been timely made, and the fact considered essential; but upon the pleadings, and under all the facts and circumstances and character of this case, the defendants are not, in my opinion, in a position to make this claim." *Green v. Terwilliger*, 56 Fed. Rep. 384.

4. *Woodmanse, etc., Mfg. Co. v. Williams*, 68 Fed. Rep. 489; *Greenlees v. Greenlees*, 62 Ala. 330.

upon a preliminary or a final hearing.¹

b. WHERE NOT APPARENT ON FACE OF BILL. — If the laches is not apparent on the face of the bill, a demurrer is inapplicable and the defense should be raised by plea or answer.²

c. WHERE APPARENT ON FACE OF BILL. — But where the laches does appear on the face of the bill, it is well settled by the great weight of authority that the defense may be taken by demurrer rather than by plea or answer.³

3. Time of Presenting Defense. — A defendant presenting the defense of laches should do so at the proper time and stage.⁴

1. *Woodmanse, etc., Mfg. Co. v. Williams*, 68 Fed. Rep. 489. See also *supra*, II. 1. a. (3) *Objection at Hearing*.

2. *Scruggs v. Decatur Mineral, etc., Co.*, 86 Ala. 173; *Nimmo v. Stewart*, 21 Ala. 692; *Snow v. Boston Blank Book Mfg. Co.*, 153 Mass. 456; *Warren v. Providence Tool Co.*, 19 R. I. 360. See *McLaughlin v. People's R. Co.*, 21 Fed. Rep. 574.

Under the Code as in *New York*, it is held that laches or lapse of time should ordinarily be presented by answer, not by demurrer. *Sage v. Culver*, 147 N. Y. 241, citing *Zebley v. Farmers' L. & T. Co.*, 139 N. Y. 461. For it is a matter of evidence and not an absolute bar; and to be available lapse of time must be set up by answer. *M'Dowl v. Charles*, 6 Johns. Ch. (N. Y.) 132; *Fellers v. Lee*, 2 Barb. (N. Y.) 488.

In *Illinois* it is held that laches should be relied on in the answer, and if presented by demurrer the defense will not be before the appellate court. *Thompson v. Scott*, 1 Ill. App. 641; *Harris v. Cornell*, 80 Ill. 54; *Darst v. Murphy*, 119 Ill. 343.

Instance of Bill Not Showing Laches. — In an equity action for infringement of letters patent granted in September, 1879, and assigned to the complainant, an allegation in the bill that "since the date," etc., the defendant had infringed upon the complainant's rights does not necessarily mean "ever since" that date. It may mean after or subsequent to that time. Adopting the latter construction of the allegation, the court held that the bill did not show laches so as to be demurrable. *Brush Electric Co. v. Ball Electric Light Co.*, 43 Fed. Rep. 899.

Defense of Abandonment by Answer to Merits. — A defense of abandonment as laches in prosecution can only be made by motion to dismiss or by appropriate plea; an answer to the merits

waives and passes beyond such defense. *Collins v. North British, etc., Ins. Co.*, 91 Tenn. 432.

3. See article DEMURRERS IN CHANCERY, vol. 6, p. 404.

Demurrer may be either special or general. *Kerfoot v. Billings*, 160 Ill. 563.

Failure to Amend Where Demurrer Sustained. — Where a demurrer to the bill on the ground of staleness is sustained and the complainant declines to amend, it is not error to make the ruling absolute. *Solomon v. Solomon*, 81 Ala. 505.

Answer Instead of Demurrer Where Laches Apparent on Bill. — In *Baent v. Kennicutt*, 57 Mich. 268, the bill showed laches on its face and contained no excuse therefor. The objection, however, was not raised by demurrer, but by answer, and the case came before the court upon pleadings and proof. It was held that had the objection been taken by demurrer the complainant would have been obliged to go out of court or amend his bill, showing that the suit was not barred by laches; but that the objection could not be urged upon pleadings and proof, the proofs showing that the action was not barred.

4. **After a Decree to Account**, which in effect calls on both parties to be active in the conduct of the cause, the defendant who has in his possession all the materials by which an account could be taken can take no advantage of the apparent laches of the complainant. *Glenn v. Smith*, 17 Md. 260.

After Judgment on Issues on Accounts, it is too late for the losing party to set up the staleness of the other's claim. *Roemmich v. Wamsanz*, 8 Mo. App. 576.

Supplemental Affidavit to Meet Stale Claim. — Where leave is granted to file a supplemental affidavit to meet a stale

4. Requisites of Plea or Answer.—An answer or plea to take advantage of laches should be sufficient clearly to raise that defense and to contain the proper averments.¹

5. Insufficient Answer.—According to the generally accepted equity practice, an answer insufficient to present the defense of laches should not be demurred to, but should be excepted to or the case set down for hearing on bill and answer. But at times a demurrer has been held proper.²

claim, a reasonable time should be allowed to prepare it. *Lash v. Von Neida*, 109 Pa. St. 207.

1. Lapse of Time Need Not Be Plead Formally.—If there is enough in the answer to show that it is intended to be relied on, that is sufficient. *Weatherford v. Tate*, 2 Strobb. Eq. (S. Car.) 27.

Pleading Fact Inferred from Lapse of Time.—When equity acts in analogy to the common law, time is no bar of itself, but it furnishes the evidence of payment, satisfaction, or abandonment, which evidence may be rebutted by circumstances. The lapse of time itself is not, therefore, in the latter case, pleaded as a bar, but the fact which may be inferred from it is. *Falls v. Torrence*, 4 Hawks (N. Car.) 412.

Averment of Payment Evidenced by Lapse of Time.—Where lapse of time is relied on as evidence of payment, the payment must be averred as in other cases. *Tibbs v. Clark*, 5 T. B. Mon. (Ky.) 527. And if the defendant in his answer admits an original covenant to pay, and does not pretend to any payment, lapse of time cannot be urged as presumptive evidence of payment. *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 287.

Insufficient Plea as to Laches.—In a suit for infringement of a trademark and account of profits, the defendants pleaded that for twenty years they had used such trademark without knowledge of the plaintiffs' rights thereto, etc., and the only circumstance relied on to show acquiescence in the defendant's use and laches on the plaintiffs' part was the fact that the plaintiffs maintained an agency for the sale of the trademarked article several hundred miles from the headquarters of the defendants. The plea was held insufficient to present the defense of laches. *Gilka v. Mihalovitch*, 50 Fed. Rep. 427.

Answer Argumentative.—Such parts of a defendant's answer in equity as

are merely argumentative as to the effect of facts apparent in the bill as constituting laches are impertinent, and will be stricken out upon exception. *Florida Mortg., etc., Co. v. Finlayson*, 74 Fed. Rep. 671.

Laches Pleaded with Imperfect Defense.

—If laches properly applies, it is a good and conclusive defense, and cannot require the help of another defense imperfectly proved; but if it does not apply the other imperfect defense cannot help it; and neither's weakness is helped by the other. *Hagerty v. Mann*, 56 Md. 522.

2. See articles DEMURRERS IN CHANCERY, vol. 6, p. 395; ANSWERS IN EQUITY PLEADING, vol. 1, p. 871.

Answer Stricken Out on Exception.—If the answer is argumentative as to the facts shown by the bill constituting laches, it will be impertinent and will be stricken out on exception. *Florida Mortg., etc., Co. v. Finlayson*, 74 Fed. Rep. 671.

Although There Were No Exceptions to that part of the answer in which the defense of long delay, or laches, was pleaded, yet it was held proper for the counsel to discuss it and for the court to consider it, as it arose upon the facts as they were stated in the bill. *Leavenworth County v. Chicago, etc., R. Co.*, 18 Fed. Rep. 209.

Demurrer to Answer.—In *South Carolina* it was held that where a paragraph of an answer alleged gross laches on the plaintiff's part, but the matter of inducement as laid did not constitute a defense, a demurrer to the answer should have been sustained. *Mobley v. Cureton*, 6 S. Car. 49.

Demurrer Overruled—Order for Trial of Issues.—In a case in *South Carolina* a paragraph of the answer alleged gross laches against the plaintiff, but the nature of the laches was not disclosed, and the court could not determine, on the face of the pleading, whether the laches was of such a nature as to amount to a wrong as regarded any

III. AVOIDANCE OF — 1. General Necessity of Alleging Avoidance in Bill — Reasons for Delay. — Where there has been apparent laches in the prosecution of a suit in equity, it is incumbent upon the plaintiff, in order to repel the presumption of laches or unreasonable delay, to set up in his bill the reasons why the suit was not brought at an earlier period, stating specifically what were the impediments to an earlier prosecution of the claim.¹

Excuse or Explanation. — If any circumstances exist which will excuse or explain the laches, or bring the case within any exception to the rule against unreasonable delay, it is necessary that such excuse or explanation be stated in the bill.²

Absence of Allegation of Avoidance. — In the absence of such aver-

duty the plaintiff might have owed to the defendant. It was obvious to the appellate court that an order overruling a demurrer to this paragraph should have been followed by proper orders for the trial of issues of fact raised by the paragraph. *Mobley v. Cureton*, 6 S. Car. 49.

1. *Stearns v. Page*, 1 Story (U. S.) 204, *affirmed* 7 How. (U. S.) 819; *Badger v. Badger*, 2 Wall. (U. S.) 95; *Harwood v. Cincinnati, etc., Air-Line R. Co.*, 17 Wall. (U. S.) 78; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Godden v. Kimmell*, 99 U. S. 201; *Landsdale v. Smith*, 106 U. S. 391; *Richards v. Mackall*, 124 U. S. 183; *Jones v. Perkins*, 76 Fed. Rep. 82.

2. *Alabama*. — *Haggerty v. Elyton Land Co.*, 89 Ala. 428; *Scruggs v. Decatur Mineral, etc., Co.*, 86 Ala. 173; *Philippi v. Philippi*, 61 Ala. 41. See *Johnson v. Johnson*, 5 Ala. 90; *Ragland v. Morton*, 41 Ala. 344, 91 Am. Dec. 516.

Illinois. — *Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 299; *Walker v. Ray*, 111 Ill. 315. See *Castner v. Walrod*, 83 Ill. 171.

Indiana. — *Hollinger v. Reeme*, 138 Ind. 363.

Kentucky. — *Hunt v. Forman*, 2 Dana (Ky.) 471.

Michigan. — *Campau v. Chene*, 1 Mich. 400; *Reynolds v. Green*, 10 Mich. 355; *McLean v. Barton*, Harr. (Mich.) 279. See *Birdsall v. Johnson*, 44 Mich. 134.

Missouri. — *Bliss v. Prichard*, 67 Mo. 189.

New Jersey. — *Olden v. Hubbard*, 34 N. J. Eq. 85.

Oregon. — See *Neppach v. Jones*, 20 Oregon 491, 23 Am. St. Rep. 145.

Texas. — *Walton v. Talbot*, 1 Tex. Unrep. Cas. 511.

Wisconsin. — *Holden v. Meadows*, 31 Wis. 284; *Archer v. Meadows*, 33 Wis. 166; *In re Holden*, 37 Wis. 98.

United States. — *Mackall v. Casilear*, 137 U. S. 556; *Coddington v. Pensacola, etc., R. Co.*, 103 U. S. 409; *Wagner v. Baird*, 7 How. (U. S.) 234; *Wollensak v. Reiher*, 115 U. S. 96; *Wollensak v. Sargent*, 33 Fed. Rep. 840; *Hoskin v. Fisher*, 125 U. S. 217; *Taylor v. Holmes*, 14 Fed. Rep. 498; *De Estrada v. San Felipe Land, etc., Co.*, 46 Fed. Rep. 280; *Galbes v. Girard*, 46 Fed. Rep. 500; *Naddo v. Bardon*, 47 Fed. Rep. 782, *affirmed* 51 Fed. Rep. 493, 4 U. S. App. 642; *Richardson v. Walton*, 49 Fed. Rep. 888; *Jones v. Perkins*, 76 Fed. Rep. 82. See also *Hanner v. Moulton*, 138 U. S. 486; *Hume v. Beale*, 17 Wall. (U. S.) 336; *Piatt v. Vattier*, 9 Pet. (U. S.) 416; *Speidel v. Henrici*, 120 U. S. 387.

Exceptions Averred by Bill or Special Replication. — In *Alabama* it was held that when lapse of time is relied on by the defendant, if the complainant wishes to bring his case within any of the exceptions he must allege them in his bill, or in the amendment thereto, or by way of special replication. *Johnson v. Johnson*, 5 Ala. 90; *Ragland v. Morton*, 41 Ala. 344, 91 Am. Dec. 516.

Where Lapse of Time Raises Presumption Instead of Bar. — It is held that since a bill in equity should contain only a statement of facts upon which the plaintiff's claim is founded, and not the evidence of those facts, therefore when lapse of time forms no bar to the claim asserted, but only raises a presumption of fact inconsistent with it, the lapse need not be accounted for in the bill. *Nesbit v. Brown*, 1 Dev. Eq. (N. Car.) 30.

ments, where the bill shows the laches the court will, according to the usual practice, refuse relief, or sustain a demurrer interposed to the bill for want of equity.¹

2. Amendment of Bill.—Where the excuse or explanation for laches has not been stated in the bill in the first instance, yet, under liberal practice in many cases, such averments have been introduced by amendments.²

3. General Requisites of Allegations of Avoidance — Facts and Circumstances.—The allegations in the bill to excuse the laches must be those of facts and circumstances,³ and they must be sufficient to constitute a good excuse.⁴ Averments of an imaginary im-

1. *Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 299; *Hollinger v. Reeme*, 138 Ind. 363; *Campau v. Chene*, 1 Mich. 400; *McLean v. Barton, Harr.* (Mich.) 279; *De Estrada v. San Felipe Land, etc., Co.*, 46 Fed. Rep. 280; *Galbes v. Girard*, 46 Fed. Rep. 500; *Richardson v. Walton*, 49 Fed. Rep. 888; *Wollensak v. Reiher*, 115 U. S. 96; *Wollensak v. Sargent*, 33 Fed. Rep. 840; *Hoskin v. Fisher*, 125 U. S. 217.

2. When Amendment Allowed.—Under the liberal practice in *Illinois* and elsewhere, allowing amendments, if the bill was defectively framed in this respect and a demurrer sustained, or the bar of laches was set up as a defense, the court would permit an amendment of the bill to avoid the bar if the case was within any exception, or if the complainant could show an equitable excuse for delay in filing his bill. *Walker v. Ray*, 111 Ill. 315; *Lant v. Manley*, 75 Fed. Rep. 627.

But the complainant will not be allowed to amend his bill unless it offers some legal excuse for the delay; and especially is this the case if the amendment is not asked until the case has been submitted to the court and a decision adverse to him has been announced. *Bill v. Schilling*, 39 W. Va. 108.

Striking Out Amendment Which Meets Objection to Bill.—Where an amendment to a bill explains the delay of the complainant and is an answer to the charge of laches upon which a demurrer to the original bill had been sustained, it is the duty of the court to allow the complainant to file it; and having allowed the complainant to file it, it is error in the court to strike it from the files if it met the objection which had been found in the original bill. *Lant v. Manley*, 75 Fed. Rep. 627.

Appellate Presumption that Amendment Excused Laches.—In *Archer v. Meadows*, 33 Wis. 166, which had already been before the court in *Holden v. Meadows*, 31 Wis. 284, it was assumed for the purposes of the appeal that the additional averments contained in the amended complaint were sufficient to excuse the laches of the plaintiff, upon which point alone the decision in the case last cited was based.

3. Scruggs v. Decatur Mineral, etc., Co., 86 Ala. 173; *Philippi v. Philippi*, 61 Ala. 41; *Haggerty v. Elyton Land Co.*, 89 Ala. 428; *Hunt v. Forman*, 2 Dana (Ky.) 471; *Olden v. Hubbard*, 34 N. J. Eq. 85.

All the Facts and Circumstances must be averred by full, clear, positive, and distinct statements. *Scruggs v. Decatur Mineral, etc., Co.*, 86 Ala. 173; *Philippi v. Philippi*, 61 Ala. 41; *Naddo v. Bardon*, 4 U. S. App. 642, 51 Fed. Rep. 493, affirming 47 Fed. Rep. 782.

4. Insufficient Excuse.—The laches of the plaintiff in delaying for several years to bring suit to set aside a conveyance from his father to another party is not excused by allegations in the bill that he had always protested against such party's claim to title, and had negotiated with him for the settlement of the disputed matter, there being nothing to show that the party had acknowledged the rights of the plaintiff or had in any way encouraged such a hope. *Mackall v. Casilear*, 137 U. S. 556.

Mental Aberration of Defendant's Solicitor.—When a plaintiff to a bill for specific performance has allowed five months to elapse after the defendant has rescinded the contract before filing his bill, it is not a sufficient explanation of the delay to state that the defendant's solicitor was suffering from mental aberration. Leave to amend may,

pediment or a technical disability will not suffice.¹

Allegations Full, Specific, Positive, Certain, etc. — The allegation must be full, clear, and specific;² positive, definite, and distinct;³ not vague nor uncertain;⁴ and no mere generality of statement will meet the requirements.⁵

4. Avoidance upon Ground of Ignorance. — Where ignorance of rights or wrongs is relied on to account for laches, this fact must be plainly alleged in the bill.⁶ The plaintiff must also allege why he was so long in ignorance and the means used to keep him so,⁷ and must acquit himself of all knowledge of facts which would put him on inquiry.⁸ It is particularly necessary for him

however, be given. *Huxham v. Llewellyn*, 21 W. R. 776.

Pendency of Former Suit. — A bill alleged that in a suit in equity in which the present defendant was plaintiff, the conveyance under which the present plaintiff claimed had been decreed to be invalid, from which decree the present defendant appealed as to other matters involved; the bill also set up the pendency of the former suit as an excuse for delay in bringing the present suit. It was held that the plaintiff not having appealed from the decree in the first suit it was a bar in this suit, and that at any rate the bill furnished no satisfactory explanation of the complainant's laches in the present suit. *Mackall v. Casilear*, 137 U. S. 556.

1. A party guilty of laches cannot screen his title from the just imputation of staleness by the allegation of an imaginary impediment or a technical disability. *Wagner v. Baird*, 7 How. (U. S.) 234.

2. *Naddo v. Bardon*, 4 U. S. App. 642, 51 Fed. Rep. 493, *affirming* 47 Fed. Rep. 782; *Beaubien v. Beaubien*, 23 How. (U. S.) 190; *Harwood v. Cincinnati, etc., Air Line R. Co.*, 17 Wall. (U. S.) 78; *Godden v. Kimmell*, 99 U. S. 201.

3. *Scruggs v. Decatur Mineral, etc., Co.*, 86 Ala. 173; *Philippi v. Philippi*, 61 Ala. 41; *James v. James*, 55 Ala. 525; *Bliss v. Prichard*, 67 Mo. 189; *Fisher v. Boody*, 1 Curt. (U. S.) 206; *Stearns v. Page*, 7 How. (U. S.) 819; *Beaubien v. Beaubien*, 23 How. (U. S.) 190.

4. *Naddo v. Bardon*, 47 Fed. Rep. 782, *affirmed* 51 Fed. Rep. 493, 4 U. S. App. 642; *Jones v. Perkins*, 76 Fed. Rep. 82; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Fisher v. Boody*, 1 Curt. (U. S.) 206; *Stearns v. Page*, 7 How. (U. S.) 819; *Johnson v. Johnson*, 5 Ala. 90.

5. *Badger v. Badger*, 2 Cliff. (U. S.) 137; *McQuiddy v. Ware*, 20 Wall. (U. S.) 19; *Naddo v. Bardon*, 4 U. S. App. 642; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46; *In re Holden*, 37 Wis. 98; *Archer v. Meadows*, 33 Wis. 166; *Holden v. Meadows*, 31 Wis. 284; *Stettauer v. Dwight*, 54 Ill. App. 194; *Williams v. First Presb. Soc.*, 1 Ohio St. 478; *Haggerty v. Elyton Land Co.*, 89 Ala. 428.

6. *Hardt v. Heidweyer*, 152 U. S. 547.

Ignorance of Continuance of Acts. — In a suit in equity to obtain relief for stockholders against the acts of the managing officer of the corporation, the bill alleged that the stockholder by whom the suit was brought, being a director, had protested in writing against the acts complained of on first learning of them, but that nevertheless they were continued for two years thereafter. It was held that upon such a bill, showing laches on its face, no relief would be granted in the absence of an averment that the plaintiff was ignorant of the continuance of the acts. *Streight v. Junk*, 59 Fed. Rep. 321.

7. *Badger v. Badger*, 2 Wall. (U. S.) 87; *Godden v. Kimmell*, 99 U. S. 201; *Richards v. Mackall*, 124 U. S. 183; *Hardt v. Heidweyer*, 152 U. S. 547; *James v. James*, 55 Ala. 525; *Haggerty v. Elyton Land Co.*, 89 Ala. 428.

8. *James v. James*, 55 Ala. 525; *Hardt v. Heidweyer*, 152 U. S. 547.

Where Notice Exists Leading to Knowledge. — A general allegation will not suffice to provoke the interposition of a court of equity where there was notice sufficient to put the complainant on inquiry which would have led to positive knowledge, and where there is no reason given for the delay, nor any facts and circumstances alleged on

to allege positively and distinctly how and when knowledge of the matter first came to him.¹

5. Avoidance upon Ground of Fraud, Mistake, etc. — a. NECESSITY OF ALLEGATION IN BILL. — The foregoing rules are peculiarly applicable to cases where excuse for laches may be founded upon fraud, mistake, concealment, or misrepresentation, and in such case it is necessary to allege these facts in avoidance in the bill.²

b. ALLEGING THE FRAUD. — The particular acts of fraud or concealment should be set forth by specific and distinct averments, and it will not be sufficient to allege their occurrence in a general or vague way.³

which any satisfactory excuse could be predicated. *McQuiddy v. Ware*, 20 Wall. (U. S.) 19.

1. *James v. James*, 55 Ala. 525; *Haggerty v. Elyton Land Co.*, 89 Ala. 428; *Bliss v. Prichard*, 67 Mo. 189; *Badger v. Badger*, 2 Wall. (U. S.) 87; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *McQuiddy v. Ware*, 20 Wall. (U. S.) 19; *Godden v. Kimmell*, 99 U. S. 201; *Richards v. Mackall*, 124 U. S. 183; *Hardt v. Heidweyer*, 152 U. S. 547; *Jones v. Perkins*, 76 Fed. Rep. 82; *Naddo v. Bardon*, 47 Fed. Rep. 782, *affirmed* 51 Fed. Rep. 493, 4 U. S. App. 642.

General or Vague Allegations as to the time of acquiring knowledge will not suffice. Thus it is not sufficient to allege that the plaintiff was not aware of the facts upon which he relies until a long time after they occurred. *Bliss v. Prichard*, 67 Mo. 189. Nor that he had no knowledge of them till recently. *Badger v. Badger*, 2 Wall. (U. S.) 87; *McQuiddy v. Ware*, 20 Wall. (U. S.) 19; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Naddo v. Bardon*, 47 Fed. Rep. 782, *affirmed* 51 Fed. Rep. 493, 4 U. S. App. 642. Nor that the complainant "supposed until recently" that a promise could not be enforced. *Jones v. Perkins*, 76 Fed. Rep. 82.

2. *Richardson v. Walton*, 49 Fed. Rep. 888; *McLean v. Barton*, Harr. (Mich.) 279.

3. *Stearns v. Page*, 1 Story (U. S.) 204, *affirmed* 7 How. (U. S.) 819; *Wollensak v. Reiher*, 115 U. S. 96; *Beaubien v. Beaubien*, 23 How. (U. S.) 190; *Fisher v. Bbody*, 1 Curt. (U. S.) 206. See generally, as to pleading fraud, article FRAUD, vol. 9, p. 675.

Charges Reasonable, Definite, and Certain. — General allegations that there has been fraud or mistake or concealment or misrepresentation, are too loose for the purpose of avoiding

laches. The charges must be reasonable, definite, and certain as to time and occasion and subject-matter. *Stearns v. Page*, 1 Story (U. S.) 204, *affirmed* 7 How. (U. S.) 819.

What Constituted Fraudulent Representations. — Where a petition for an accounting shows laches upon its face, an allegation that the plaintiff was prevented from proceeding by reason of the representations, actions, and fraudulent conduct of the defendant does not excuse the laches where there is no allegation as to what the fraudulent representations, actions, or conduct were. *Goodson v. Goodson*, 140 Mo. 206.

General Allegation of Combination and Confederacy. — Where the injury complained of is the result of actual combination and fraud, they must be averred, not in a mere general manner, but with the same precision that is required in other averments of fact. The general allegation of combination and confederacy is not such an averment as will defeat the bar. *Williams v. First Presb. Soc.*, 1 Ohio St. 478.

General Allegation upon Information of Divers Persons. — Where a bill for an account shows the lapse of several years since the completion of the transaction involved, a general allegation of fraud, made upon the information of "divers persons," is too vague and indefinite to excuse the plaintiff's laches. *Stettauer v. Dwight*, 54 Ill. App. 194.

Bill for Discovery Charging All Known Facts. — Though a bill charging fraud and seeking to set aside conveyances and contracts must in general contain specific recitals and charges of the fraud complained of, with dates and other details, and must account for any delay in bringing the suit if there be apparent delay, yet if the bill be one for discovery, such a rule will not be

c. ALLEGING IGNORANCE OR CONCEALMENT OF FRAUD — *In General.* — In seeking to avoid the effect of laches on the ground of fraud the plaintiff must allege in his bill that he was ignorant of it or that it was concealed from him.¹

Ignorance Not Negligent. — He must aver that his ignorance was not the result of negligence and was without fault of his own.²

Reason of Long Ignorance. — The complainant should state how he came to be so long ignorant, and the means used by the respondent fraudulently to keep him in ignorance.³

d. ALLEGING THE DISCOVERY OF THE FRAUD. — As to the discovery of the fraud, the bill must show what the discovery was,⁴ and it is a requisite that the time of the discovery be distinctly alleged.⁵ It should also appear how the discovery was

insisted upon where, under the circumstances of the particular case, all is charged that could be known to the complainant, and where suit was brought within a year after the discovery of the clue to the fraud; it being a general rule that each case of this kind must be governed by its own peculiar circumstances. *Forbes v. Overby*, 4 Hughes (U. S.) 441.

1. *Badger v. Badger*, 2 Cliff. (U. S.) 137; *U. S. v. White*, 17 Fed. Rep. 561; *Leavenworth County v. Chicago, etc.*, R. Co., 18 Fed. Rep. 209.

A general allegation of ignorance of fraudulent acts at one time and knowledge at another is of no effect. *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46.

2. *Foster v. Mansfield, etc.*, R. Co., 36 Fed. Rep. 627, *affirmed* 146 U. S. 88.

In order to excuse laches or avoid the effect thereof in cases of concealed fraud, it must appear by the allegations of the bill that the fraud was one which concealed itself, or that the complainant could not, by exercising proper care and diligence, have known of the fraud sooner than he did, *Leavenworth County v. Chicago, etc.*, R. Co., 18 Fed. Rep. 209; or that he might not have known of it immediately after its consummation, *U. S. v. White*, 17 Fed. Rep. 561.

3. *Badger v. Badger*, 2 Wall. (U. S.) 87; *Jones v. Perkins*, 76 Fed. Rep. 82.

In *Kelly v. Walker*, 91 Ga. 199, the bill, having been filed more than ten years after a sale complained of as fraudulent and stating no facts to account for the alleged ignorance of fraud, was held to be properly dismissed on motion at the hearing for want of equity, though it had not been demurred to.

4. *Stearns v. Page*, 1 Story (U. S.) 204, *affirmed* 7 How. (U. S.) 819; *Fisher v. Boody*, 1 Curt. (U. S.) 206; *Melms v. Pabst Brewing Co.*, 93 Wis. 153.

5. *Alabama.* — *Johnson v. Johnson*, 5 Ala. 90.

Illinois. — *Stettauer v. Dwight*, 54 Ill. App. 194.

Wisconsin. — *Melms v. Pabst Brewing Co.*, 93 Wis. 153.

United States. — *Stearns v. Page*, 1 Story (U. S.) 204, *affirmed* 7 How. (U. S.) 819; *Badger v. Badger*, 2 Cliff. (U. S.) 137, 2 Wall. (U. S.) 87; *Fisher v. Boody*, 1 Curt. (U. S.) 206; *Beaubien v. Beaubien*, 23 How. (U. S.) 190; *Wollensak v. Reiher*, 115 U. S. 96; *Harwood v. Cincinnati, etc.*, Air Line R. Co., 17 Wall. (U. S.) 78; *Felix v. Patrick*, 145 U. S. 317; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46.

Insufficient Allegations as to Time of Discovery. — A statement that information as to the fraud had been recently obtained from divers persons is too vague and uncertain to excuse the plaintiff's laches. *Stettauer v. Dwight*, 54 Ill. App. 194.

And so is an allegation that the complainant was not advised until long after the settlement was made that a fraud had been practiced on him. The time of acquiring such knowledge should be stated. *Johnson v. Johnson*, 5 Ala. 90.

Bills Not Showing Laches. — In an action to set aside a fraudulent conveyance no laches is shown when the allegation of the bill states that the fraudulent transaction did not come to the complainant's knowledge until October, and the suit is brought in November of the same year. *Gross v. George W. Scott Mfg. Co.*, 48 Fed. Rep. 35.

made.¹ The court should be able to see from the averments why the discovery was not sooner made by the use of reasonable diligence.²

IV. DETERMINATION OF — 1. For Court in Its Discretion. — The question of laches is one to be determined by the court in the exercise of its sound discretion.³

2. Elements, Facts, and Circumstances. — This determination is in general to be governed by a consideration of all the elements, facts, and circumstances of each particular case,⁴ and upon the

In a suit to set aside fraudulent contracts and transactions made in ignorance of the frauds, allegations in the bills that the fraudulent acts were not discovered "until within a few weeks last past," or that complainant had no knowledge of the fraud "until within a few days last past," or that the discovery was made "within the three months last past," do not upon their face affirmatively show that the complainant has been guilty of laches. *Northern Pac. R. Co. v. Kindred*, 3 McCrary (U. S.) 627.

1. *Badger v. Badger*, 2 Cliff. (U. S.) 137; *Felix v. Patrick*, 145 U. S. 317; *Fisher v. Boody*, 1 Curt. (U. S.) 206; *Stearn v. Page*, 7 How. (U. S.) 819; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46.

2. *Fisher v. Boody*, 1 Curt. (U. S.) 206; *Stearns v. Page*, 7 How. (U. S.) 819, *affirming* 1 Story (U. S.) 204; *Beaubien v. Beaubien*, 23 How. (U. S.) 190; *Felix v. Patrick*, 145 U. S. 317; *Wollensak v. Reiher*, 115 U. S. 96; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46; *U. S. v. White*, 17 Fed. Rep. 561; *Leavenworth County v. Chicago, etc., R. Co.*, 18 Fed. Rep. 209; *Foster v. Mansfield, etc., R. Co.*, 36 Fed. Rep. 627, *affirmed* 146 U. S. 88; *Melms v. Pabst Brewing Co.*, 93 Wis. 153.

3. *Chapman v. State Bank*, 97 Cal. 155; *Bell v. Hudson*, 73 Cal. 285; *Meherin v. San Francisco Produce Exch.* 117 Cal. 215; *Amos v. Campbell*, 9 Fla. 187; *Landrum v. Union Bank*, 63 Mo. 56; *Pike v. Martindale*, 91 Mo. 268; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 586; *Neppach v. Jones*, 20 Oregon 491, 23 Am. St. Rep. 145; *Rogan v. Walker*, 1 Wis. 631; *Brown v. Buena Vista County*, 95 U. S. 160.

Being a Matter of Sound Discretion in the equitable forum, the determination of laches does not require the conviction of the court against the original justice of the claim, or of any other

specific ground of defense, but only its belief that under the circumstances of the case it is too late to ascertain the merits of the controversy. *Smith v. Thompson*, 7 Gratt. (Va.) 112.

On a Motion to Dismiss, predicated on the laches of the plaintiff, which the plaintiff endeavors to explain, it is a matter within the discretion of the court to determine whether such explanation is sufficient, and the conclusion reached will not ordinarily be disturbed. *Moffett, etc., Co. v. Peoria Water Co.*, 83 Hun (N. Y.) 73.

Question for Court, Not for Jury. — Laches being a question for the court it should not be submitted to a jury by instructions or otherwise. See *Charleston, etc., Bank v. Zorn*, 14 S. Car. 444; *Salt Springs Nat. Bank v. Sloan*, (Supreme Ct.) 39 N. Y. St. Rep. 771; *Raymond v. Flavel*, 27 Oregon 219.

Laches in Applying for Reissue of Patent. — In a bill for an injunction to restrain an alleged infringement of reissued letters patent, the question whether the plaintiff was guilty of laches, or had unreasonably delayed in applying for the reissue, is for the court upon the special circumstances brought to its attention; and the court cannot substitute the decision of the Patent Office upon that question for its own. *Wollensak v. Reiher*, 115 U. S. 96, *followed* in *Hoskin v. Fisher*, 125 U. S. 217.

4. *California.* — *Chapman v. State Bank*, 97 Cal. 155.

Connecticut. — *Jeffery v. Fitch*, 46 Conn. 601.

Florida. — *Amos v. Campbell*, 9 Fla. 187.

Maryland. — *Glenn v. Smith*, 17 Md. 260; *Robertson v. Mowell*, 66 Md. 530.

Missouri. — *Landrum v. Union Bank*, 63 Mo. 56; *Pike v. Martindale*, 91 Mo. 268.

Oregon. — *Neppach v. Jones*, 20 Oregon 491, 23 Am. St. Rep. 145.

Wisconsin. — *Rogan v. Walker*, 1 Wis. 631.

evidence adduced therein.¹

3. Appellate Review. — The decision of the court upon the subject of laches is so much a question of discretion, dependent on the evidence, that generally it will not be disturbed by an appellate court unless it is clearly against the evidence.²

V. DISPOSITION OF CASE — 1. Refusal of Relief and Dismissal of Bill. — Where a plaintiff's claim has been barred by his laches, a court of equity will generally refuse him the relief asked,³ and it is common practice for the court to dismiss the bill where the plaintiff has been guilty of laches and no excuse therefor is alleged or shown.⁴ But it is not every case of laches that will war-

United States. — *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

General Methods of Determining Laches.

— "Laches is an equitable defense, and there is no artificial, fixed, or determinate rule on this subject; but each case as it arises must be decided according to its own particular circumstances. Courts of equity never give encouragement to the enforcement of stale or antiquated demands. In certain cases a comparatively brief period will be sufficient to bar a claim on the ground of laches, whilst in others courts will not stop short of the time of the statute of limitations." *Landrum v. Union Bank*, 63 Mo. 56.

1. Determination on Evidence, Not on Demurrer. — Where a bill to restrain the obstruction of a highway avers notice and warning to the defendant, but is demurred to on the ground of laches, the question of laches must be determined on the facts developed by the evidence and not on demurrer. *Pennsylvania, etc., R. Co. v. Reading Paper Mills*, 149 Pa. St. 18.

2. *Murchison v. Payne*, 37 Tex. 305. And see *Stamper v. Roberts*, 90 Mo. 683; *Crum v. Hathaway*, 32 Mo. App. 555; *Chapman v. State Bank*, 97 Cal. 155; *Merherin v. San Francisco Produce Exch.*, 117 Cal. 215; *Moffett, etc., Co. v. Peoria Water Co.*, 83 Hun (N. Y.) 73.

3. Thus where the allegations of a bill show that the plaintiff's claim is barred by his laches, it is held that relief should not be granted therein, whatever the evidence may be; and if the court does grant the relief prayed for, the appellate court will reverse the decree. *Walker v. Ray*, 111 Ill. 315; *Gibboney v. Kent*, 82 Va. 383.

Independently of Any Statute of Limitations, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and un-

explained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will in such cases decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and will leave him to such remedies as he may have in a court of law. *Abraham v. Ordway*, 158 U. S. 416.

4. Kentucky. — *M'Dowell v. Logsdon*, 3 Bibb (Ky.) 229.

New Jersey. — *Barton v. Long*, 45 N. J. Eq. 846.

South Carolina. — *Howell v. Howell*, Harp. Eq. (S. Car.) 156.

Virginia. — *Harrison v. Gibson*, 23 Gratt. (Va.) 212; *Carr v. Chapman*, 5 Leigh (Va.) 164; *Stamper v. Garnett*, 31 Gratt. (Va.) 550; *Gibboney v. Kent*, 82 Va. 383; *Terry v. Fontaine*, 83 Va. 451.

West Virginia. — *Bill v. Schilling*, 39 W. Va. 108.

United States. — *Wagner v. Baird*, 7 How. (U. S.) 234; *Harwood v. Cincinnati, etc., Air-Line R. Co.*, 17 Wall. (U. S.) 78; *Hayward v. National Bank*, 96 U. S. 611.

Equity will not compel the removal of an extension of a party wall on the ground that it is a use of the party wall not contemplated by the agreement, where the plaintiff made no objection until the extension was completed; in such case he will be left to his remedy at law and the complaint will be dismissed. *Sebald v. Mulholland*, 6 Misc. Rep. (N. Y. Super. Ct.) 349.

Where a Complainant Has Suffered His Suit to Lie Without Prosecution for Six Years, and it appears that the case is one which must be proved and resisted mainly by oral evidence, his bill should be dismissed simply on the ground that he has, by his laches, rendered it difficult, if not impossible, for the court to ascertain what the truth is. *Sebring v. Sebring*, 43 N. J. Eq. 59.

rant the refusal of relief, or call for the dismissal of the bill.¹

2. Disposition of Other Questions. — It is not necessary for the court, on a motion to dismiss for laches, which motion is overruled, to dispose of other questions connected with the case.²

Bill of Revivor Stricken from Record. — After the lapse of twelve years of inaction, the court's final order in a suit will be considered as acquiesced in and the suit abandoned; and in such case a bill of revivor may be stricken from the record on motion. *Hubbell v. Lankenau*, 63 Fed. Rep. 881.

1. See in general Am. and Eng. Encyc. of Law, tit. *Laches*.

When Bill Will Be Dismissed. — A bill will not be dismissed on demurrer on the ground of laches, and prior to hearing the complainant, unless it appears on the face of the bill that the complainant has delayed suing for so long a time since his cause of action arose as to deprive the court of the power of ascertaining with reasonable certainty what the truth is respecting the matter on which he rests his right to a decree, or that he has by his delay placed himself in a position where he has gained an unfair advantage over his adversary. *Le Gendre v. Byrnes*, 44 N. J. Eq. 372.

Where the Delay in Bringing a Suit Is Explained in what should be a satisfactory manner, and does not constitute such laches as to deprive the complainant of a standing in a court of equity, it will be error to refuse to hear evidence on the merits of the case and to dismiss the bill. *Johnson v. Diversey*, 82 Ill. 446. See also *Caldwell v. Davis*, 10 Colo. 481.

Thus where a bill to set aside a contract as fraudulent is not filed until eighteen months after the alleged fraud occurred, but the time of the discovery of the fraud is alleged therein, and it is averred that the suit was brought as soon after such discovery as the nature of the case would admit, and there is no evidence to negative these averments, no such laches is shown as

will deprive the plaintiff of his relief. *Caldwell v. Davis*, 10 Colo. 481.

Bill for Injunction Where Other Relief Prayed. — Where a bill in equity charges a street railway company with constructing an embankment in front of the plaintiff's premises, in such a manner as seriously to obstruct access to his gates and house, rendering the approach thereto difficult and dangerous, and prays an injunction to restrain the operation of the road, and that the embankment be removed, and for general relief, the bill should not be dismissed on demurrer because it discloses delay on the part of the plaintiff in seeking relief. If it be conceded that upon final hearing he might be denied the injunction because of laches, he might yet be entitled to relief against the mode of construction adopted by the defendant, and to such restoration of the former grade as might be necessary to restore to him safe and convenient access to his own house. *Westhaeffer v. Lebanon, etc.*, St. R. Co., 163 Pa. St. 54, reversing 3 Pa. Dist. Rep. 56.

2. Question of Jurisdiction. — On a motion to dismiss predicated upon the laches of the plaintiff, until the court is in a position to know just what the action is about, and what objection may be made thereto, it is under no obligation, in the absence of the pleadings, to determine questions which properly arise thereon. Therefore, upon such a motion being overruled, in an action in which no complaint was duly served and all that was properly done was the service of a summons, the court does not err in refusing to consider whether it is without jurisdiction because both parties are foreign corporations. Code Civ. Pro. (N. Y.), § 1780. *Moffett, etc., Co. v. Peoria Water Co.*, 83 Hun (N. Y.) 73.

LANDLORD AND TENANT.

By S. B. FISHER.

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CROSS-REFERENCES.

As to *Distress for Rent*, see article *DISTRESS*, vol. 7, p. 20.
Interpleader Between Landlord and Tenant, see article *INTERPLEADER*, vol. 11, p. 451.
 And see generally articles *EJECTMENT*, vol. 7, p. 260;
FORCIBLE ENTRY AND DETAINER, vol. 9, p. 19.

1. LANDLORD'S ACTIONS — 1. To Recover Rent or Damages —
 a. **AT COMMON LAW — (1) Action for Use and Occupation —**
 (a) **For What Lies.** — Assumpsit for use and occupation¹ lies to recover compensation for the enjoyment not only of corporeal but of incorporeal hereditaments.
 (b) **When Maintainable — Relation of Landlord and Tenant.** — In order that an action for use and occupation may be maintained, the conventional relation of landlord and tenant must exist between

¹ As to use and occupation as one of the common counts in assumpsit, see article *ASSUMPSIT*, vol. 2, p. 1026; *C. 8, 10 E. C. L. 262; Ledyard v. Morey, 54 Mich. 77.*
Lies to Recover Interest. — In *Ten Eyck Bird v. Higginson, 2 Ad. & El. 696, 29 v. Houghtaling, 12 How. Pr. (N. Y. E. C. L. 177; Davis v. Morgan, 4 B. & Supreme Ct.) 523*, it was held that in-

the parties.¹ This element is indispensable both at common law

terest is recoverable on rent due in an action for use and occupation.

1. *Alabama*. — Lankford *v.* Green, 52 Ala. 103; Fielder *v.* Childs, 73 Ala. 567.

Arkansas. — Dell *v.* Gardner, 25 Ark. 134.

Delaware. — Redden *v.* Barker, 4 Harr. (Del.) 179.

Illinois. — Bailey *v.* Campbell, 2 Ill. 110; Dudding *v.* Hill, 15 Ill. 61; McNair *v.* Schwartz, 16 Ill. 24.

Indiana. — Newby *v.* Vestal, 6 Ind. 412; Nance *v.* Alexander, 49 Ind. 516; Pittsburgh, etc., *R. Co. v.* Thornburgh, 98 Ind. 201.

Kentucky. — Richmond, etc., Turnpike Road Co. *v.* Rogers, 7 Bush (Ky.) 532; Crouch *v.* Briles, 7 J. J. Marsh. (Ky.) 255.

Maine. — Porter *v.* Hooper, 11 Me. 170; Larrabee *v.* Lumbert, 34 Me. 79; Rogers *v.* Libbey, 35 Me. 200; Roxbury *v.* Huston, 39 Me. 312; Fox *v.* Corey, 41 Me. 81.

Maryland. — Anderson *v.* Critcher, 11 Gill & J. (Md.) 450.

Massachusetts. — Fletcher *v.* M'Farlane, 12 Mass. 46; Fitchburg Cotton Manufactory Corp. *v.* Melven, 15 Mass. 268; Central Mills Co. *v.* Hart, 124 Mass. 123; Sibley *v.* Brown, 4 Pick. (Mass.) 137.

Michigan. — Dalton *v.* Laudahn, 30 Mich. 349; Marquette, etc., *R. Co. v.* Harlow, 37 Mich. 554; Bates *v.* Phinney, 45 Mich. 388.

Minnesota. — Holmes *v.* Williams, 16 Minn. 164; Reed *v.* Lammel, 40 Minn. 397.

Missouri. — Edmonson *v.* Kite, 43 Mo. 176; Aull Sav. Bank *v.* Aull, 80 Mo. 199.

Nevada. — Dixon *v.* Ahern, 19 Nev. 422.

New Hampshire. — Wiggin *v.* Wiggin, 6 N. H. 298; Swift *v.* New Durham Lumber Co., 64 N. H. 53; Durrell *v.* Emery, 64 N. H. 223.

New Jersey. — Stewart *v.* Fitch, 31 N. J. L. 17; Chambers *v.* Ross, 25 N. J. L. 293; Brewer *v.* Craig, 18 N. J. L. 214.

New York. — Preston *v.* Hawley, 101 N. Y. 586; Journeay *v.* Brackley, 1 Hilt. (N. Y.) 447; Featherstonhaugh *v.* Bradshaw, 1 Wend. (N. Y.) 134; Griffin *v.* Porter, 3 Alb. L. J. 51; Vanderbilt *v.* Persse, 3 E. D. Smith (N. Y.) 428; Baxter *v.* West, 5 Daly (N. Y.) 460; Colt *v.* Planer, 7 Robt. (N. Y.) 413; Cros-

well *v.* Crane, 7 Barb. (N. Y.) 191; Hall *v.* Southmayd, 15 Barb. (N. Y.) 36; Pierce *v.* Pierce, 25 Barb. (N. Y.) 243; Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286; Thompson *v.* Bower, 60 Barb. (N. Y.) 463; Osgood *v.* Dewey, 13 Johns. (N. Y.) 240; Bancroft *v.* Wardwell, 13 Johns. (N. Y.) 489; Westlake *v.* De Graw, 25 Wend. (N. Y.) 669; Reynolds *v.* Lawton, (Supreme Ct.) 28 N. Y. St. Rep. 670, 8 N. Y. Supp. 403; Thompson *v.* Fox, 21 Misc. Rep. (N. Y. Supreme Ct.) 298.

Ohio. — Richey *v.* Hinde, 6 Ohio 371.

Oregon. — Espy *v.* Fenton, 5 Oregon 423.

Pennsylvania. — Brolasky *v.* Ferguson, 48 Pa. St. 434; Kline *v.* Jacobs, 68 Pa. St. 57; Grant *v.* Gill, 2 Whart. (Pa.) 42; Henwood *v.* Cheeseman, 3 S. & R. (Pa.) 500.

Vermont. — Voluntine *v.* Godfrey, 9 Vt. 186; Stacy *v.* Vermont Cent. R. Co., 32 Vt. 551; Graham *v.* Way, 38 Vt. 19; Moore *v.* Harvey, 50 Vt. 297; Clark *v.* Clark, 58 Vt. 527.

Wisconsin. — De Pere Co. *v.* Reynen, 65 Wis. 271.

The owner of premises is entitled to reasonable compensation for the use and occupation of the premises after the time mentioned in the notice to quit. Hogsett *v.* Ellis, 17 Mich. 351.

Where a person rents lands on condition of making repairs and fails to perform such condition, the owner may rescind the contract and recover for use and occupation. Tate *v.* McClure, 25 Ark. 168.

Where the plaintiff fails to recover on an alleged lease, yet if his evidence proves use and occupation he may recover. Silverstein *v.* Stern, 21 La. Ann. 743.

Where the tenant has not entered into possession, assumpsit for use and occupation will not lie, but the remedy is on the lease, and the landlord, if he choose, may let the premises lie idle for the whole term and recover his rent, or he may enter, re-rent, and recover damages on the lease. Tully *v.* Dunn, 42 Ala. 262.

Where a person takes possession and uses and occupies the land as tenant under another, the common law raises an assumption to pay for the use and occupation. Crouch *v.* Briles, 7 J. J. Marsh. (Ky.) 255.

Landlord's Actions. LANDLORD AND TENANT. To Recover Rent.

and under statute.¹

By Contract Express or Implied. — The relation of landlord and tenant necessary to the maintenance of the action need not be created by express contract; an implied agreement will support the action.² Thus, the action will lie in a case where the tenant

Defendant Has Burden of Proof to Disprove Relation. — In an action for use and occupation against one who has, previously to the period claimed for, occupied as the plaintiff's tenant, the burden is on the defendant to show a discontinuance of the relation. *Hill v. Goolsby*, 41 Ga. 289.

1. *Fielder v. Childs*, 73 Ala. 567; *Bailey v. Campbell*, 2 Ill. 110; *McNair v. Schwartz*, 16 Ill. 24.

2. *Georgia*. — *Williams v. Hollis*, 19 Ga. 313; *Lathrop v. Standard Oil Co.*, 83 Ga. 307.

Illinois. — *Dudding v. Hill*, 15 Ill. 61; *McNair v. Schwartz*, 16 Ill. 24; *Sanborn v. Hayner*, 26 Ill. App. 335.

Indiana. — *Newby v. Vestal*, 6 Ind. 412; *Tinder v. Davis*, 88 Ind. 99; *Pittsburgh, etc., R. Co. v. Thornburgh*, 98 Ind. 201.

Kentucky. — *Logan v. Lewis*, 7 J. J. Marsh. (Ky.) 3.

Maine. — *Cunningham v. Horton*, 57 Me. 420.

Maryland. — *Hoskins v. Rhodes*, 1 Gill & J. (Md.) 266; *Stockett v. Watkins*, 2 Gill & J. (Md.) 326; *De Young v. Buchanan*, 10 Gill & J. (Md.) 149; *Stodert v. Newman*, 7 Har. & J. (Md.) 251.

Massachusetts. — *Codman v. Jenkins*, 14 Mass. 93; *Hall v. Ryder*, 152 Mass. 528; *Boston v. Binney*, 11 Pick. (Mass.) 1.

Michigan. — *Dwight v. Cutler*, 3 Mich. 566; *Ward v. Warner*, 8 Mich. 508; *Dalton v. Laudahn*, 30 Mich. 349; *Wilmarth v. Palmer*, 34 Mich. 347; *Marquette, etc., R. Co. v. Harlow*, 37 Mich. 554; *Lockwood v. Thunder Bay River Boom Co.*, 42 Mich. 536; *Henderson v. Detroit*, 61 Mich. 378.

Missouri. — *Cohen v. Kyler*, 27 Mo. 122; *Aull Sav. Bank v. Aull*, 80 Mo. 199; *Ashbrook v. Dale*, 27 Mo. App. 649.

Nevada. — *Fitton v. Hamilton City*, 6 Nev. 196.

New Jersey. — *Chambers v. Ross*, 25 N. J. L. 293; *Andrews v. Andrews*, 14 N. J. L. 141; *Stewart v. Fitch*, 31 N. J. L. 17.

New York. — *McFarlan v. Watson*, 3 N. Y. 286; *Hunt v. Wolfe*, 2 Daly (N.

Y.) 298; *Peckham v. Leary*, 6 Duer (N. Y.) 494; *Smith v. Stewart*, 6 Johns. (N. Y.) 46; *Coit v. Planer*, 7 Robt. (N. Y.) 413; *Osgood v. Dewey*, 13 Johns. (N. Y.) 240; *Preston v. Hawley*, 101 N. Y. 586; *La Farge v. Park*, 1 Edm. Sel. Cas. (N. Y. Cir. Ct.) 223.

Pennsylvania. — *Brolasky v. Ferguson*, 48 Pa. St. 434; *Pott v. Leshner*, 1 Yeates (Pa.) 576.

Vermont. — *Hough v. Birge*, 11 Vt. 190; *Keyes v. Hill*, 30 Vt. 759; *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 551; *Watson v. Brainard*, 33 Vt. 88; *Chamberlain v. Donahue*, 44 Vt. 57; *Moore v. Harvey*, 50 Vt. 297; *Clark v. Clark*, 58 Vt. 527.

In *Codman v. Jenkins*, 14 Mass. 93, it was held that an action for use and occupation does not depend necessarily upon the validity of the plaintiff's title, but on a contract, express or implied. It will not lie in favor of one or two parties claiming the land to try title.

In *Stockett v. Watkins*, 2 Gill & J. (Md.) 326, it is held that to maintain the action for use and occupation it is not necessary for the plaintiff to prove an express contract with the tenant, when he first takes possession, nor an express reservation of a certain rent, nor that the tenant has paid rent. It may be maintained on an implied undertaking where the permissive holding is established; and if it appears that a certain rent was reserved, the reservation may be used to regulate the damages. But if one enters as a trespasser, the action for use and occupation cannot be maintained.

Lies Though Agreement Procured by Fraud. — In *Hall v. Ryder*, 152 Mass. 528, it was held that an action lies for the use and occupation of real estate under a parol agreement which the defendant has not rescinded or attempted to rescind, although induced by false representations on the part of the plaintiff.

Where Rent Is Not Expected. — In *Clark v. Clark*, 58 Vt. 527, it was held that no contract will be implied when neither party expects payment of rent.

is evicted, if while in possession he derived a substantial benefit from the use of the premises;¹ if the occupant takes possession under a lease to commence in the future which is void under the statute of frauds;² where a defendant is decreed to surrender possession and does not do so;³ or where a verbal lease is substituted for one under seal.⁴ But the action will not lie against the principal where the lease is to an agent in his own name;⁵ nor will it lie against a tenant holding over after his term and after proceedings have been commenced for possession,⁶ where the rent is payable in improvements which are not made,⁷ where

Originally Lay Only under Implied Contract.—Originally, at common law, an action for use and occupation could be maintained only under an implied contract, and proof of an actual demise was held to be fatal to the action. *Beverley v. Lincoln Gas Light, etc., Co.*, 6 Ad. & El. 829, note, 33 E. C. L. 222; *Churchward v. Ford*, 2 H. & N. 446. This, however, was altered by the statute of 11 Geo. II., c. 19, by which it was provided that proof of a demise, unless by deed, was no longer fatal to the action; but the terms of the demise might be used as evidence of the *quantum* of damages. *Dartnall v. Morgan*, Cro. Jac. 598; *Johnson v. May*, 3 Lev. 150; *Beverley v. Lincoln Gas Light, etc., Co.*, 6 Ad. & El. 829, note, 33 E. C. L. 222. See also *Fielder v. Childs*, 73 Ala. 567; Report of Judges, 3 Binn. (Pa.) 626.

In *Massachusetts*, in a few cases, it seems still to be held that no implied promise to pay for use and occupation is created by law where the tenancy is under the express agreement of parties. *Fuller v. Swett*, 6 Allen (Mass.) 219, note. See also *Mann v. Brewer*, 7 Allen (Mass.) 202; *Warren v. Ferdinand*, 9 Allen (Mass.) 357.

1. *Fitchburg Cotton Manufactory Corp. v. Melven*, 15 Mass. 268.

2. *Smith v. Kinkaid*, 1 Ill. App. 620.

A lease, though void under the statute of frauds, may yet be used as evidence in an action for use and occupation to show the character of the occupation and the amount agreed to be paid. *Crawford v. Jones*, 54 Ala. 459.

The fact that a lease may be void under the statute of frauds does not prevent the landlord from recovering for use and occupation. *Warner v. Hale*, 65 Ill. 395. See also *Smith v. Kinkaid*, 1 Ill. App. 620.

Measure of Compensation.—In an action for use and occupation a writing between the parties stipulating the amount of rent to be paid, though void as a lease, may be used to prove the value of the occupation as agreed and fixed upon by the defendant himself. *Wilson v. Section No. 16, etc.*, 8 Ohio 175.

Compensation Fixed by Void Lease.—Although a lease be void, the compensation named therein may be adopted as the measure of compensation in an action for use and occupation. *Stover v. Cadwallader*, 2 Penny. (Pa.) 117.

"The agreement under which the party enters may be invalid in part, and yet this action may be supported and the agreement used to prove the measure of damages." *Allen, P. J.*, in *Pierce v. Pierce*, 25 Barb. (N. Y.) 243.

What one person has paid for the use of premises is not, however, admissible in evidence in assumpsit for another's use and occupation. *Moore v. Harvey*, 50 Vt. 297.

3. *Hidden v. Jordan*, 57 Cal. 184.

4. *Sibley v. Brown*, 4 Pick. (Mass.) 137.

Where Landlord Has Accepted Note for Rent.—The fact that the landlord has received a note for the amount of rent will not prevent his maintaining the action upon delivery of the note for cancellation on the trial. *Cornell v. Lamb*, 20 Johns. (N. Y.) 407, holding that the acceptance of a bond for rent is not an extinguishment, and it makes no difference whether the rent is reserved by parol or by deed, for rent issuing out of the realty is of a higher nature than a simple contract.

5. *Kiersted v. Orange, etc., R. Co.*, 55 How. Pr. (N. Y. Ct. App.) 51.

6. *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.) 134.

7. *Raybourn v. Ramsdell*, 78 Ill. 622.

the tenant's entry was under a third party,¹ or where the landlord's title is disowned by the tenant.²

Where Enjoyment of Premises Has Ceased. — An action for use and occupation is not sustainable where the enjoyment of the premises has ceased.³

Remedy Barred by Eviction. — The eviction of a tenant by his landlord from a part of premises demised by a written lease for one entire rent is a bar to any claim for rent under the lease for use and occupation of the demised premises.⁴ There can be no apportionment in such cases, nor any recovery for the use and occupation of the remaining part thereof.⁵

Where Possession Is Adverse. — When a person occupies the land of another, not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, an action for use and occupation will not lie.⁶ The remedy in such case is trespass for mesne profits after a recovery in ejectment.⁷

Tortious Possession. — Since assumpsit for use and occupation can only be maintained by proof of a promise, express or implied, it follows that it cannot be maintained against a disseizor,⁸ a trespasser,⁹ nor against one whose possession is tortious.¹⁰

On Sealed Lease. — An action for use and occupation cannot be maintained where there is a lease under seal between the parties.¹¹

1. *Merrill v. Bullock*, 105 Mass. 486.

2. *Jackson v. Mowry*, 30 Ga. 143.

3. *Bates v. Phinney*, 45 Mich. 388.

4. *Leishman v. White*, 1 Allen (Mass.) 480.

5. *Christopher v. Austin*, 11 N. Y. 216. See also *Robinson v. Deering*, 56 Me. 357; *Farson v. Goodale*, 8 Allen (Mass.) 202; *Hall v. Burgess*, 5 B. & C. 332, 11 E. C. L. 246.

6. *Inman v. Morris*, 63 Miss. 347; *Cincinnati v. Walls*, 1 Ohio St. 222; *Butler v. Cowles*, 4 Ohio 213.

7. *Butler v. Cowles*, 4 Ohio 213.

8. *Goddard v. Hall*, 55 Me. 579.

9. *Weaver v. Jones*, 24 Ala. 420; *Goddard v. Hall*, 55 Me. 579; *Stockett v. Watkins*, 2 Gill & J. (Md.) 326; *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.) 135; *Hurd v. Miller*, 2 Hilt. (N. Y.) 540; *Richey v. Hinde*, 6 Ohio 371; *National Oil Refining Co. v. Bush*, 88 Pa. St. 335.

An action of assumpsit for use and occupation will not lie against a tenant who holds over after the expiration of his term where proceedings are instituted against him under the statute to turn him out of possession. *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.) 134.

10. *Smith v. Houston*, 16 Ala. 111;

Nance v. Alexander, 49 Ind. 516; *Wiggin v. Wiggin*, 6 N. H. 298; *McCloskey v. Miller*, 72 Pa. St. 151; *Henwood v. Cheeseman*, 3 S. & R. (Pa.) 500; *Ackerman v. Lyman*, 20 Wis. 455.

Landlord's Right to Waive Tort. — According to some decisions the tort will not be waived and use and occupation lie. *Edmonson v. Kite*, 43 Mo. 176; *Richey v. Hinde*, 6 Ohio 371. While in other cases it is held that such action is not necessarily founded on a specific contract, written or oral, but upon use of the premises. The occupant may be in fact a trespasser, but the owner may waive trespass and recover in assumpsit, and it does not lie with the trespasser to defeat him by introducing his own wrong. *National Oil Refining Co. v. Bush*, 88 Pa. St. 335. See also *Stockton's Appeal*, 64 Pa. St. 58.

11. *Gage v. Smith*, 14 Me. 466; *Codman v. Jenkins*, 14 Mass. 93; *Glover v. Wilson*, 2 Barb. (N. Y.) 264; *West v. Cartledge*, 5 Hill (N. Y.) 488; *Kiersted v. Orange, etc.*, R. Co., 69 N. Y. 343; *Blume v. McClurken*, 10 Watts (Pa.) 380; *Goshorn v. Steward*, 15 W. Va. 657.

Where there is a written lease of land for a stipulated time, an action of assumpsit for use and occupation can-

Debt or covenant is the remedy in such case.¹

Possession Essential. — It is, as a rule, held requisite to the maintenance of this action that the defendant should have had possession of the premises,² though according to some decisions it

not be maintained for rent accruing before the termination of the lease. *Gage v. Smith*, 14 Me. 466.

An action for use and occupation will not lie during the existence of an outstanding lease unless it appears that the defendant went into possession under some new and distinct agreement with the landlord, which is a question of fact for the jury. *Glover v. Wilson*, 2 Barb. (N. Y.) 264.

1. *Codman v. Jenkins*, 14 Mass. 93; *Kiersted v. Orange, etc.*, R. Co., 69 N. Y. 343.

Contra. — In *Michigan*, under statute, an action of assumpsit will lie for use and occupation on a lease under seal. *Dalton v. Laudahn*, 30 Mich. 349, where it was held that the only difference in substance between an action directly on the terms of a lease and an action for use and occupation is that in one the declaration is special and in the other general. The purposes of both actions are the same, and both are alike actions arising on contract. To same effect see *Beecher v. Duffield*, 97 Mich. 423.

2. *Alabama*. — *Tully v. Dunn*, 42 Ala. 262.

Connecticut. — *Franklin Tel. Co. v. Pewtress*, 43 Conn. 167.

Massachusetts. — *Currier v. Jordan*, 117 Mass. 260.

Minnesota. — *Sanford v. Johnson*, 26 Minn. 314.

New Hampshire. — *Currier v. Perley*, 24 N. H. 219.

New York. — *Moffatt v. Smith*, 4 N. Y. 126; *Hall v. Western Transp. Co.*, 34 N. Y. 284; *Wood v. Wilcox*, 1 Den. (N. Y.) 37; *Beach v. Gray*, 2 Den. (N. Y.) 84; *Seaman v. Ward*, 1 Hilt. (N. Y.) 52; *Little v. Martin*, 3 Wend. (N. Y.) 219; *Croswell v. Crane*, 7 Barb. (N. Y.) 191; *La Farge v. Mansfield*, 31 Barb. (N. Y.) 345.

England. — *Waring v. King*, 8 M. & W. 571.

Where lessees have never taken possession, they are only liable for rent upon their covenants as for a breach of an executory contract. *La Farge v. Mansfield*, 31 Barb. (N. Y.) 345.

Entry Essential. — Where the tenant has not entered into possession at all under the lease or agreement, either in

person or by an undertenant or agent, assumpsit for use and occupation will not lie, but the remedy is upon the lease or agreement. *Tully v. Dunn*, 42 Ala. 262.

Evidence of Actual and Continual Occupation Necessary. — In *Seaman v. Ward*, 1 Hilt. (N. Y.) 52, it was held that in order to maintain an action for use and occupation there must be evidence of an actual and continual occupation during the whole period for which the party is allowed to recover.

Presumption of Continuance. — The fact of occupation, when once established, will be presumed to continue until an interruption thereof is shown. *Seaman v. Ward*, 1 Hilt. (N. Y.) 52.

Former and Present English Doctrine as to Necessity of Occupation. — "Under the English statute of 11 Geo. II., c. 19, § 14, and the former statute of this state, which was substantially the same, it has been repeatedly held that where the tenant has entered into an agreement to take the premises for a definite period, and has acquired thereby the legal right to the possession, he is liable in an action for use and occupation for the whole period agreed upon, whether he actually occupies or not. *Whitehead v. Clifford*, 5 Taunt. 518; *Gibson v. Courthope*, 1 D. & R. 205, 16 E. C. L. 33; *Baker v. Holtzaffell*, 4 Taunt. 45; *Izon v. Gorton*, 5 Bing. N. Cas. 501, 35 E. C. L. 198; *Pinero v. Judson*, 6 Bing. 206, 19 E. C. L. 56; *Little v. Martin*, 3 Wend. (N. Y.) 219. In *Woolley v. Watling*, 7 C. & P. 610, 32 E. C. L. 653, it was held that where the agreement is to let from a future time, there must be an entry and some occupation under it, though in that case it was said that if the letting was immediate it might be different; and in *Jones v. Reynolds*, 7 C. & P. 335, 32 E. C. L. 531, it was intimated that a taking of possession was at least essential to charge a tenant for use and occupation under the agreement, and this appears to be the present English doctrine. *Edge v. Strafford*, 1 Crompt. & J. 391; *How v. Kennett*, 3 Ad. & El. 659, 30 E. C. L. 174; *Sullivan v. Jones*, 3 C. & P. 579, 14 E. C. L. 461; *Nation v. Tozer*, 1 C.

seems that actual occupation is not necessary to sustain the action, and it will be sufficient if the defendant had the right and power to occupy.¹

Constructive Possession Sufficient. — Even in those cases where possession by the tenant is held essential to the maintenance of this action, a constructive possession will be sufficient, as, for instance, by a subtenant² or by servants.³

(c) **By and Against Whom Maintainable — Legal Owner.** — One who is not the owner of the legal estate cannot maintain the action.⁴

Trustee. — A party to whom real estate is devised may maintain an action in his own name for the use and occupation of the premises, although he may hold the property as trustee.⁵

The Assignee of a Lease who has been recognized as such by the tenant may sue in his own name for the rent although he has no interest in the reversion.⁶

M. & R. 172." *Seaman v. Ward*, 1 Hilt. (N. Y.) 52.

1. *Hoffman v. Delihanty*, 13 Abb. Pr. (N. Y. Supreme Ct.) 388; *Westlake v. De Graw*, 25 Wend. (N. Y.) 669.

Lies Where Tenant Voluntarily Abstains from Occupation. — In *Westlake v. De Graw*, 25 Wend. (N. Y.) 669, it was held that an action lies for use and occupation if the tenant voluntarily abstains from the occupation of the premises.

Occupancy Need Not Be Proved. — In *Stier v. Surget*, 10 Smed. & M. (Miss.) 154, it was held that where there is an express agreement to pay rent, assumpsit will lie to recover it without proving occupancy of the premises leased.

2. *Currier v. Jordan*, 117 Mass. 260; *Moffatt v. Smith*, 4 N. Y. 126; *Hall v. Western Transp. Co.*, 34 N. Y. 284; *Waring v. King*, 8 M. & W. 571.

3. *Franklin Tel. Co. v. Pewtress*, 43 Conn. 167.

Proof that the defendant has paid rent to the plaintiff during the occupancy of a third person is presumptive evidence that such third person was the occupant by the defendant's permission. *Moffatt v. Smith*, 4 N. Y. 126.

Evidences of Occupancy. — Taking the key of the premises, without a continual occupation, has been held enough to entitle the landlord to sustain the action. *Little v. Martin*, 3 Wend. (N. Y.) 219.

Where the defendant, who had agreed to rent a house, sent workmen to clean and paper it, this was held sufficient evidence of occupancy to go

to the jury. *Smith v. Twoart*, 2 M. & G. 841, 40 E. C. L. 653.

4. *Evertsen v. Sawyer*, 2 Wend. (N. Y.) 507.

5. *Chapin v. Foss*, 75 Ill. 280.

The action is maintainable without attornment by the trustees of one of whose title the tenant had notice before he paid over his rent to his original landlord. *Lumley v. Hodgson*, 16 East 99.

6. *Moffatt v. Smith*, 4 N. Y. 126. See also *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Willard v. Tillman*, 2 Hill (N. Y.) 277; *Allen v. Bryan*, 5 B. & C. 512, 11 E. C. L. 292; *Ards v. Watkin*, Cro. Eliz. 637, 651.

The Assignee of a Term may maintain an action for use and occupation although there has been no attornment by the tenant. *Pendergast v. Young*, 21 N. H. 235; *Mussey v. Holt*, 24 N. H. 253.

Mortgagee of Reversion. — In *Rawson v. Eicke*, 7 Ad. & El. 451, 34 E. C. L. 142, it was held that an action for use and occupation might be maintained by a mortgagee of the reversion.

Purchaser under Execution. — In *Hayden v. Patterson*, 51 Pa. St. 261, it was held that where one person came into possession of land under a defendant in an execution, with an understanding that rent was to be paid, though no sum was fixed, and another person came into possession under the first, during whose possession the land was sold by the sheriff and deed delivered, the rent or sum payable for the occupancy of the land prior to the deed fell due afterwards, and the last occupier was liable for the rent to the purchaser.

Grantor of Entire Term. — Where a party entitled to a term in land demises such land for the whole of such term, and it is the intention to create the relation of landlord and tenant, although nothing be left in the party demising, he may, nevertheless, bring use and occupation.¹

Possession from Third Party. — The action cannot be maintained by one having title to the land against an occupant who has received possession from a third party.²

Cestui Que Trust. — Where the agreement is between the tenant and a trustee, a *cestui que trust* cannot maintain the action in his own name against the tenant as principal, treating the trustee as his agent.³

A Tenant in Common cannot maintain the action against a purchaser of the interest of another tenant in common.⁴

Mortgaged Premises. — The action will not lie at the suit of a purchaser of mortgaged premises sold under a decree in chancery against a tenant in possession under the mortgagor.⁵

Under Tenant. — No action can be maintained by the lessor against an under tenant upon the lessee's covenant to pay rent, nor for use and occupation, unless there is an agreement for the use of the premises, express or implied, between the plaintiff and the defendant,⁶ since there is neither privity of estate nor of contract between the lessor and the under tenant.⁷

Possession under Contract of Sale. — Although use and occupation will not lie against a person in possession under a contract of sale,⁸ he may nevertheless be liable in such an action after the

According to this case, wherever the owner could maintain an action for use and occupation, the purchaser of his title can do the same.

Grantee of an Annuity. — In *Birch v. Wright*, 1 T. R. 378, it was held that an action for use and occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee and down to the day of the demise in the ejectment, but not afterwards.

1. *Pollock v. Stacy*, 9 Q. B. 1033, 58 E. C. L. 1033.

2. *Cripps v. Blank*, 9 D. & R. 480, 22 E. C. L. 394.

3. *Morgell v. Paul*, 2 M. & R. 303, 17 E. C. L. 303.

4. A purchased lands at a sale by the administrator of the tenant in common, took possession of the entire premises under a deed purporting to convey the same, but really conveying only the deceased tenant's undivided interest, and appropri-

ated the rents to the entire premises. It was held that, his possession being adverse, assumpsit for use and occupation by the other tenants in common would not lie against him. *Fielder v. Childs*, 73 Ala. 567.

5. *Peters v. Elkins*, 14 Ohio 344, holding that the tenant holds in violation of the real owner's right, and that waiving the tort will not supply the contract which is necessary to support the action.

6. *Jennings v. Alexander*, 1 Hilt. (N. Y.) 154; *McFarlan v. Watson*, 3 N. Y. 286.

7. *McFarlan v. Watson*, 3 N. Y. 286.

Lessee May Be Sued as Though Actual Occupant. — Where lands are occupied by an under tenant of the lessee, the latter may be sued for use and occupation in the same manner as though he were himself the actual occupant. *Moffatt v. Smith*, 4 N. Y. 126.

8. *Vandenheuvel v. Storrs*, 3 Conn. 203; *McNair v. Schwartz*, 16 Ill. 24; *Dixon v. Haley*, 16 Ill. 145; *Jones v. Tipton*, 2 Dana (Ky.) 295; *Little v. Pearson*, 7 Pick. (Mass.) 301; *Smith*

contract has been rescinded.¹

(d) *Venue.* — The action for use and occupation, being founded on privity of contract, and not of estate, is not local but is transitory in its nature.² It may be laid in one county or state for use and occupation in another county or state.³

(e) *Declaration — Essential Averments — Permissive Occupation.* — A declaration in assumpsit for use and occupation must allege that the land was occupied by permission of the plaintiff or at the request of the defendant.⁴

Particulars of Demise. — The declaration need not, however, set forth the particulars of the demise,⁵ nor need it state where the premises in question are situated,⁶ though it would seem to be the common practice to do so.⁷

Under the Common Counts, but without a count for use and occupation, evidence of use and occupation is inadmissible.⁸

Plaintiff's Character. — It is not necessary to allege the character

v. Stewart, 6 Johns. (N. Y.) 46; *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489.

1. *Little v. Pearson*, 7 Pick. (Mass.) 301; *Dwight v. Cutler*, 3 Mich. 566; *Patterson v. Stoddard*, 47 Me. 355.

2. *New York Corp. v. Dawson*, 2 Johns. Cas. (N. Y.) 335; *Lowe v. Hallett*, 2 Cal. (N. Y.) 374. See also *Henwood v. Cheeseman*, 3 S. & R. (Pa.) 500; *King v. Fraser*, 6 East 348; *Kirtland v. Pounsett*, 1 Taunt. 570.

In *Lowe v. Hallett*, 2 Cal. (N. Y.) 374, it was held that in an action for use and occupation the court will change the venue to the county where the house is, if all the defendant's witnesses reside there and the plaintiff does not show that he has any, as the action is founded on privity of contract and is transitory in its nature.

3. *New York Corp. v. Dawson*, 2 Johns. Cas. (N. Y.) 335; *Henwood v. Cheeseman*, 3 S. & R. (Pa.) 500.

4. *Bradley v. Davenport*, 6 Conn. 1.

Complaint in Action in Nature of Use and Occupation. — If a complaint in an action in the nature of use and occupation fails to allege facts showing that the relation of landlord and tenant subsisted between the plaintiff and the defendant at the time of the alleged use and occupation, or any part thereof, it fails to state a cause of action and a demurrer will lie thereto. *Hurley v. Lamoreaux*, 29 Minn. 138.

5. *Wilkins v. Wingate*, 6 T. R. 62; *King v. Fraser*, 6 East 348.

6. *Situation of Premises.* — *King v. Fraser*, 6 East 348, wherein Lord Ellenborough, C. J., said: "When it was once established * * * that debt

for use and occupation would lie, it necessarily followed that the generality of the form of declaring for use and occupation in every respect might be adopted. And if this objection could prevail, it would apply as well to counts in debt for goods sold and delivered, and for work and labor; for the sale and delivery in the one case, and the work and labor in the other, must take place and be done in some given place; but the place not being essential to be stated in those cases, it has never been required; and there is no more reason in this case for saying that the place where the premises lie is material to be laid. And as to the inconveniences to the tenant which are pointed out by the causes of demurrer alleged, they may be gotten rid of by calling for the particulars of the plaintiff's demand, or, if another action for rent be brought, he may by proper averments in his plea show that the plaintiff had before recovered the same rent in an action for use and occupation of the same premises. It is sufficient, therefore, that there is as much particularity in this as in other cases to which I have alluded."

7. "It has been the common form of these counts to describe the place where the premises lie; but it would be sometimes inconvenient to require it, as if it be doubtful in what parish they are situated, where they are on the confines of two parishes. In that case the plaintiff might be turned round upon a false description." *Per Lawrence, J.*, in *King v. Fraser*, 6 East 348.

8. *Heyerman v. Kanter*, 36 Mich. 316.

in which the plaintiff sues,¹ as, for instance, whether he sues as assignee of the reversion or otherwise.²

Pleading and Proof. — Where, in an action for the recovery of rent, the plaintiff counts specially for rent due on a parol lease for one year from a specified date, the time of the commencement of the term is material and must be proved as alleged.³

(f) **Plea** — **Generally.** — In an action for use and occupation, the plea of *nil habuit tenementis* is not admissible.⁴

Evidence Admissible under General Issue. — The defendant may put in evidence under the general issue any matter which shows that the plaintiff never had a cause of action.⁵ Advantage may be taken under the general issue of most matters in discharge of the action which show that at the time of the commencement of the suit the plaintiff had no subsisting cause of action.⁶ For instance, under this plea the defendant may show payment,⁷ release,⁸ that before the rent became due the plaintiff evicted him from possession of the premises,⁹ or that it was afterwards agreed between the plaintiff and the defendant that another person, to whom the defendant gave up possession, should become tenant to the plaintiff.¹⁰ Should the tenant, however, wish to plead the statute of limitations¹¹ or a set-off,¹² a special plea, or at least notice, is essential.

(2) **Covenant** — (a) **When Lies.** — In order that the action of covenant may be maintained, there must be a covenant or agreement under seal.¹³

1. *Armstrong v. Clark*, 17 Ohio 495.
2. *Armstrong v. Clark*, 17 Ohio 495, where the court said: "There is but a single count, and this the usual common count in debt for use and occupation. It is one that has long been recognized and sanctioned in England and in this country. The counsel for the defendant insists that the plaintiff was in the character of an assignee and that the pleadings ought to show such character. If a special count on the lease had been proper and necessary, and actually inserted in the declaration, then the position would be correct. But a general count being good for the recovery of rent, the defendant cannot deny that it was suited to the plaintiff's case till the evidence is given or the case shown; then, if the evidence is not applicable or sufficient under the declaration, the record must be so made up as to point out the error."
3. *Pendill v. Neuberger*, 64 Mich. 220.
4. *Watertown v. White*, 13 Mass. 477.
5. 1 Chitty Pl. 472; *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Sill v. Rood*, 15 Johns. (N. Y.) 230.
6. *Wilt v. Ogden*, 13 Johns. (N. Y.) 56; *Sill v. Rood*, 15 Johns. (N. Y.) 230.
7. *Bird v. Caritat*, 2 Johns. (N. Y.) 346; *Drake v. Drake*, 11 Johns. (N. Y.) 531.
8. *Brennan v. Egan*, 4 Taunt. 165.
9. *Prentice v. Elliott*, 5 M. & W. 606.
10. *Turner v. Hardey*, 9 M. & W. 770.
11. *Wolcott v. Van Santvoord*, 17 Johns. (N. Y.) 253. See in general article LIMITATIONS.
12. *Drake v. Drake*, 11 Johns. (N. Y.) 531. See article SET-OFF AND COUNTERCLAIM.
13. *Gale v. Nixon*, 6 Cow. (N. Y.) 445; Section No. 16, etc., *v. Spencer*, 7 Ohio, pt. ii. 149, where the court said: "The general rule undoubtedly is that the action of covenant cannot be maintained except against a person who, by himself or some other person authorized by him, has executed a deed under seal." And see in general article COVENANT, vol. 5, p. 342.

8. *Brennan v. Egan*, 4 Taunt. 165.
9. *Prentice v. Elliott*, 5 M. & W. 606.
10. *Turner v. Hardey*, 9 M. & W. 770.
11. *Wolcott v. Van Santvoord*, 17 Johns. (N. Y.) 253. See in general article LIMITATIONS.
12. *Drake v. Drake*, 11 Johns. (N. Y.) 531. See article SET-OFF AND COUNTERCLAIM.
13. *Gale v. Nixon*, 6 Cow. (N. Y.) 445; Section No. 16, etc., *v. Spencer*, 7 Ohio, pt. ii. 149, where the court said: "The general rule undoubtedly is that the action of covenant cannot be maintained except against a person who, by himself or some other person authorized by him, has executed a deed under seal." And see in general article COVENANT, vol. 5, p. 342.

(b) **For What Maintainable.** — Covenant lies by a landlord against his tenant for the breach of a covenant to pay rent,¹ or for a breach of the covenant to repair, etc.² Covenant is the proper remedy by a lessor, after a re-entry by him, for arrears of rent which accrued previous to the re-entry.³ Where there is a lease under seal, the plaintiff may elect to sue on the covenant and thereby make the covenant his cause of action, or to sue for the debt (rent) and by so doing make the subsequent occupation his cause of action.⁴

(c) **Who May Maintain** — *aa.* **GENERALLY.** — In order that a party may maintain an action for a breach of covenant to pay rent or repair, he must, as a rule, have a legal and not merely a beneficial interest.⁵

Assignees of Reversion. — One to whom the reversion has been assigned may maintain the action for an express covenant for payment of rent,⁶ but not for rent which accrued prior to the assignment.⁷ The assignee of a reversion may bring covenant for arrears of rent due before he granted the reversion over

1. *New York.* — *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Ten Eyck v. Houghtaling*, 12 How. Pr. (N. Y. Supreme Ct.) 523; *Van Rensselaer v. Smith*, 27 Barb. (N. Y.) 104.

Ohio. — *Worthington v. Hewes*, 19 Ohio St. 66; *Taylor v. De Bus*, 31 Ohio St. 468.

Pennsylvania. — *Newbold v. Comfort*, 4 Pa. L. J. 117.

United States. — *Hurst v. Rodney*, 1 Wash. (U. S.) 375; *Kunkle v. Wynick*, 1 Dall. (U. S.) 305.

England. — *Marsh v. Brace*, Cro. Jac. 334; *Thursby v. Plant*, 1 Saund. 241, note 5; *Ludford v. Barber*, 1 T. R. 92; *Twynam v. Pickard*, 2 B. & Ald. 105; *Stevenson v. Lambard*, 2 East 575; *Cardwell v. Lucas*, 2 M. & W. 111; *Kinlyside v. Thornton*, 2 W. Bl. 1111; *Flight v. Bentley*, 7 Sim. 149; *Wadham v. Marlow*, 4 Doug. 54, 26 E. C. L. 222.

On Lease under Seal to Pay a "Reasonable Rent." — Where the consideration is to pay a reasonable rent named in the lease under seal, covenant is the proper remedy, but account is not. *Hall v. Stewart*, 12 Pa. St. 211.

Instalment of Rent. — Where rent is payable at different times, a new action lies for each instalment remaining unpaid; and where judgment is taken for unpaid instalments and other instalments are not yet due, such judgment will be no bar to a suit on such subsequent instalments if not paid

when due. *Cross v. U. S.*, 14 Wall. (U. S.) 479.

2. *Montague v. Smith*, 13 Mass. 396; *Barnard v. Godscall*, Cro. Jac. 309; *Ludford v. Barber*, 1 T. R. 92; *Stevenson v. Lambard*, 2 East 575; *Congham v. King*, Cro. Car. 222; *Southampton v. Brown*, 6 B. & C. 718, 13 E. C. L. 303; *Vivian v. Campion*, 1 Salk. 141.

Case as Alternative Remedy. — Although it is true as a general rule that where a plaintiff may maintain covenant, case will not lie, there are exceptions. The true distinction is that where covenant creates liability, action can only be maintained on the covenant; but where the law creates the liability independent of covenant, the appropriate remedy may be sought *dehors* the covenant. *Luckey v. Rowzee*, 1 A. K. Marsh. (Ky.) 295, where it was held that an action of case in the nature of waste as well as an action of covenant would lie against a tenant for years after the expiration of his term.

3. *Hartshorne v. Watson*, 5 Scott, 506.

4. *Ten Eyck v. Houghtaling*, 12 How. Pr. (N. Y. Supreme Ct.) 523.

5. *Montague v. Smith*, 13 Mass. 396; *Berkeley v. Hardy*, 5 B. & C. 355, 11 E. C. L. 251; *Southampton v. Brown*, 6 B. & C. 718, 13 E. C. L. 303.

6. *Newbold v. Comfort*, 4 Pa. L. J. 117; *Midgley v. Lovelace*, 12 Mod. 45.

7. *Newbold v. Comfort*, 4 Pa. L. J. 117.

against the assignee of a term.¹ The action may also be maintained by the assignee of the reversion for failure to repair according to the covenants.² The assignor, however, and not the assignee of the reversion, must sue for rent or breach of covenant prior to the assignment of the reversion.³

Heirs. — Heirs may maintain covenant for breach of a covenant to repair, occurring or continuing after the decease of the ancestor.⁴

Owner of Undivided Moiety. — The owner of one undivided moiety, jointly with the mortgagor and mortgagee of the other joining in demise, the covenants being with all three (though the reddendum was general and indefinite), is entitled to sue the assignees in bankruptcy of the lessee for the rent.⁵

bb. SEVERAL AND JOINT PLAINTIFFS. — The general rule is that on a covenant which runs to two or more persons jointly, all the covenantees must be named as plaintiffs in an action for a breach thereof; but when the benefit of the covenant runs to several covenantees as a certain and distinct duty to each, then each has a separate cause of action upon a failure to perform the covenant.⁶ If a lessee covenant with several lessors jointly that he will pay to each lessor severally a specified portion of the rent, although the covenant be in terms joint, the interest of each lessor will be several, and each may maintain a separate action for his part of the rent.⁷

1. *Midgleys v. Lovelace*, 12 Mod. 45.

In *Cardwell v. Lucas*, 2 M. & W. 111, it was held that the action by the assignee of a reversion cannot be maintained unless he be the assignee of the reversion to which the covenants in the instrument declared on are annexed. See also *Cooch v. Goodman*, 2 Q. B. 580, 42 E. C. L. 817.

Must Be a Party to Covenant. — In *Berkeley v. Hardy*, 5 B. & C. 355, 11 E. C. L. 251, the indenture of demise was made between "A for and on behalf of B on the one part, and C of the other part," A being authorized to do so by writing under B's hand but not under seal. A executed the deed in his own name. It was held that B could not maintain covenant on the deed, though covenants were expressed to be made by C to and with B. See also *Southampton v. Brown*, 6 B. & C. 718, 13 E. C. L. 303.

2. *Twynam v. Pickard*, 2 B. & Ald. 105.

3. *Lewes v. Ridge*, Cro. Eliz. 863. See also *Flight v. Bentley*, 7 Sim. 149.

4. *Vivian v. Campion*, 1 Salk. 141. See also article **HEIRS AND DEVISEES**, vol. 10, p. 53.

5. *Magnay v. Edwards*, 13 C. B. 479, 76 E. C. L. 479.

6. *Ford v. Bronaugh*, 11 B. Mon. (Ky.) 14; *Mitchell v. Kendall*, 45 Me. 234; *Seymour v. Western R. Co.*, 106 U. S. 320; *Farni v. Tesson*, 1 Black (U. S.) 309; *Jewett v. Cunard*, 3 Woodb. & M. (U. S.) 277; *Withers v. Bircham*, 3 B. & C. 254, 10 E. C. L. 68. See generally article **COVENANT**, vol. 5, p. 352.

Where several owners of a house leased it and reserved the rent to each one in proportion to his interest, and the lessee had covenanted in the lease to keep the premises in repair, etc., it was held that an action for the breach thereof could not be maintained by one of the lessors alone, because the covenant was joint as to them. *Calvert v. Bradley*, 16 How. (U. S.) 580.

7. *Gray v. Johnson*, 14 N. H. 414, where the court said: "The rule is well settled by the decisions that though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be several, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of

(d) **Against Whom Maintainable** — *aa. GENERALLY.* — In order that an action of covenant may be sustained against a person, evidence of some privity of contract is essential.¹

Against Assignee. — The action is maintainable not only against the lessee but against his assignee,² for the lessee expressly covenants for himself and assigns.³ An action of covenant for nonpayment of rent lies against one who takes an assignment of a lease by way of mortgage security, although he has never entered or taken actual possession.⁴ The action will not, however, lie against a person occupying the demised premises as assignee unless he has actually received an assignment of the lease.⁵

the covenant be joint" [*citing* *Eccleston v. Clipsham*, 1 Saund. 153; *James v. Emery*, 8 Taunt. 245, 4 E. C. L. 89; *Windham's Case*, 5 Coke 7].

1. *Howard v. Ramsay*, 7 Har. & J. (Md.) 113; *Adams v. French*, 2 N. H. 387; *Port v. Jackson*, 17 Johns. (N. Y.) 239; *Williams v. Bosanquet*, 1 Brod. & B. 238, 5 E. C. L. 72. And see generally article COVENANT, vol. 5, p. 358 *et seq.*

2. *Adams v. French*, 2 N. H. 387; *Port v. Jackson*, 17 Johns. (N. Y.) 239; *Ludford v. Barber*, 1 T. R. 92; *Stevenson v. Lambard*, 2 East 575; *Congham v. King*, Cro. Car. 222; *Burnett v. Lynch*, 5 B. & C. 589, 12 E. C. L. 327. See also article COVENANT, vol. 5, p. 361.

3. *Ludford v. Barber*, 1 T. R. 92.

Against Assignee for Not Repairing. — The action of covenant will lie against the assignee of part of the estate for breach of covenant to repair. *Stevenson v. Lambard*, 2 East 575.

Against Assignee for Part of Rent. — An action of covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect to the land, and not on a personal contract; and in case of eviction the rent may be apportioned as in debt or replevin. It is otherwise in covenant against the lessee himself, who is liable on his personal contract. *Stevenson v. Lambard*, 2 East 575.

Assignee of Lease by Deed-poll. — An action in a covenant for rent will not lie against a lessee where the lease is a deed-poll signed by the lessor only, although the lessee may have accepted the lease and occupied and held under it during the full term without paying the rent reserved. *Johnson v. Muzzy*, 45 Vt. 419.

4. *M'Murphy v. Minot*, 4 N. H. 251;

Williams v. Bosanquet, 3 Moo. 500; *Walker v. Reeves*, 2 Doug. 461, note 1.

Assignee of Leases in Trust as Security.

— A trustee to whom two leases were assigned in trust for securing an annuity having said to the occupier of one of the demised houses, "You must pay the rent to me; I am become landlord for my client who has the annuity, and you must pay the ground rents for me," it was held that the trustee was liable in covenant to the lessor, as assignee of both leases, for nonpayment of rent and failure to repair. *Gretton v. Diggles*, 4 Taunt. 766.

5. *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88; *Williams v. Woodard*, 2 Wend. (N. Y.) 487; *Quackenboss v. Clarke*, 12 Wend. (N. Y.) 555; *Van Alstyne v. Van Slyck*, 10 Barb. (N. Y.) 383.

May Prove Termination of Lease Before Entry. — Though the execution of a lease and the possession of the defendant constitute evidence sufficient *prima facie* to charge a defendant in an action of covenant as assignee for the nonpayment of rent, the defendant may prove that he is not assignee, as by showing that the estate created by the lease declared on ceased before his entry. *Williams v. Woodard*, 2 Wend. (N. Y.) 487.

May Terminate Liability by Assigning to Another. — An assignee is liable for covenants broken only where he continues assignee, and he may discharge himself of liability for any subsequent breaches by assigning to another. *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88.

The assignee of a term, declared against as such, is not liable for rent accruing after he has assigned over, though it is stated that the lessor was a party executing the assignment and agreed thereby that the term, which was determinable at his option, should

Against Lessee After Assignment by Him. — On an express covenant to pay rent, the action lies against the lessee for rent in arrear after assignment by him,¹ as also on an express covenant to repair.²

bb. JOINT DEFENDANTS. — When the covenant is joint and not several, the action must be brought against all of the covenantors jointly.³ If, however, the covenant be joint and several, the plaintiff may have his option whether he will bring action against all of the covenantors or against any one of them.⁴

(e) When to Be Brought. — An action on a covenant in a lease to pay rent, brought before the rent is due, is premature and will be dismissed.⁵

(f) Venue. — When the action of covenant is founded upon privity of contract, it is transitory.⁶ Where, however, the action is founded merely upon privity of estate, it is local, and the venue must be laid in the county where the estate lies.⁷

be absolute. *Chancellor v. Poole*, 2 Doug. 764.

Devisee of Equity of Redemption. — The devisee of the equity of redemption (the legal fee being in the mortgagee) is not liable as assignee of all the estate, right, title, and interest of the original covenantor. *Carlisle v. Blamire*, 8 East 487.

1. *Ludford v. Barber*, 1 T. R. 92; *Thursby v. Plant*, 1 Saund. 241, note 5.

2. *Barnard v. Godscall*, Cro. Jac. 309; *Ludford v. Barber*, 1 T. R. 92.

When Debt Alternative Remedy. — The lessor may maintain either covenant or debt against a lessee after assignment by him, if he has not accepted such assignee as tenant. *Thursby v. Plant*, 1 Saund. 241, note 5.

If, however, he has accepted such assignee as tenant, he cannot maintain the action of debt against the lessee, since the privity of contract is destroyed by the assignment; but he may still have action of covenant upon the express covenant for payment of rent. *Thursby v. Plant*, 1 Saund. 241, note 5; *Ludford v. Barber*, 1 T. R. 92; *Marsh v. Brace*, Cro. Jac. 334.

3. *Montague v. Smith*, 13 Mass. 405; *Tileston v. Newell*, 13 Mass. 406; *Philadelphia v. Reeves*, 48 Pa. St. 472. See also article COVENANT, vol. 5, p. 361.

Lessee and Sureties. — When a lessee and his sureties covenant to pay rent, the covenant is joint, and an action for rent which accrued under the lease cannot be maintained against the sureties alone. *Philadelphia v. Reeves*, 48 Pa. St. 472.

Presumption that Covenant Is Joint. —

The covenant is always joint unless declared to be otherwise. *Philadelphia v. Reeves*, 48 Pa. St. 472.

4. *Enys v. Donnithorne*, 2 Burr. 1190; *Eccleston v. Clipsham*, 1 Saund. 153.

A covenant with two tenants and with every one of them is joint though the two are several parties to the deed. *Southcote v. Hoare*, 3 Taunt. 87.

5. *Duryee v. Turner*, 20 Mo. App. 34.

6. In covenant as between lessor and lessee, where the action is personal and upon a mere privity of contract, it is on that account transitory as in the case of any other personal contract. *Stevenson v. Lambard*, 2 East 575. And see in general article COVENANT, vol. 5, p. 362.

May Be Brought in Any County. — The assignee of the reversion may bring covenant against the lessee in any county upon such express covenants in the lease as run with the estate in land demised, such as nonpayment of rent, and not repairs. *Thursby v. Plant*, 1 Saund. 241 b, note 6. See also *Thrale v. Cornwall*, 1 Wils. 165.

7. *Thursby v. Plant*, 1 Saund. 241 b, note 6; *Webb v. Russell*, 3 T. R. 394; *Walker's Case*, 3 Coke 23; *Lienow v. Ellis*, 6 Mass. 331; *White v. Sanborn*, 6 N. H. 220.

Against Assignee. — "An action of covenant against an assignee differs essentially from a mere covenant personal. It is in such case properly a real contract in respect of the land; it is local in its nature, and not transitory." *Stevenson v. Lambard*, 2 East 575.

(g) **Declaration — Requisites Generally.** — As to the allegations requisite in declarations upon covenants generally, that the plaintiff is entitled to bring the action, the averment of the promise, and of the breach of the covenant, see article COVENANT, vol. 5, p. 366 *et seq.*

Possession. — In an action on a lease for years to recover rent thereby reserved, it is not necessary to aver in the declaration that the defendant entered upon or took possession of the premises,¹ though, indeed, this seems to be the usual practice.²

Demand of Rent. — Where the action is to recover rent due under a lease in which is a covenant giving a right of entry for nonpayment of rent without demand, no averment of demand is necessary.³

Nonpayment of Rent. — Where the action is for rent against the assignee of a lessee, the plaintiff need not aver in his declaration that the lessee has not paid the rent.⁴ It is sufficient if he states that the rent accrued after the assignment to the defendant and that the sum is due and owing.⁵

Description of Premises. — It is sufficient in a covenant for rent reserved by deed to refer to the premises as "particularly described in the said last-mentioned indenture."⁶

Assignment of Breaches. — In an action of covenant each assignment of a breach may be referred to as a separate declaration and may be severally traversed.⁷

Pleading and Proof. — In an action of covenant the special breach proven must be the breach alleged.⁸

1. *Douglass v. Branch Bank*, 19 Ala. 659.

2. *Douglass v. Branch Bank*, 19 Ala. 659, where the court said: "The precedents, it is true, all contain this averment; but I have found no case that holds such an averment indispensably necessary, except in the case of a tenancy at will. In actions on leases for years, the declaration is good without the averment that the defendant entered upon or took possession of the land. The reason of this distinction is that in the latter case the rent is due by the contract, but in the former it is due by the occupation. In cases of leases for years, the tenant has the right to enter by virtue of his contract, and the law will presume that he exercised that right, or could have done so at his pleasure. He must therefore pay rent, unless he can show that he was prevented from taking possession by some act or fault of the lessor."

3. *Cincinnati v. Fitzgerald*, 2 Cinc. Super. Ct. Rep. 61. See also *Sweeney v. Garrett*, 2 Disney (Ohio) 601.

4. *Dubois v. Van Orden*, 6 Johns. (N. Y.) 105; *Van Rensselaer v. Bradley*, 3 Den. (N. Y.) 135, where an averment that a certain amount of rent for a particular time for that portion of the premises of which the defendant was assignee had accrued and become due and was in arrear was held sufficient; but a count stating that a certain sum was due for "the said demised premises" was held bad.

5. *Dubois v. Van Orden*, 6 Johns. (N. Y.) 105.

6. *Van Rensselaer v. Bradley*, 3 Den. (N. Y.) 135.

7. *Burroughs v. Clancey*, 53 Ill. 30, in which case nonpayment of rent and failure to keep in repair were assigned as breaches of the covenant of the lease. And see generally article COVENANT, vol. 5, p. 369 *et seq.*

8. In covenant against the assignee of the lessee for nonpayment of rent, the declaration alleged that all the estate of the lessee in the premises leased had come to and vested in the defendant by assignment. Issue being

(h) *Pleas — No Plea of General Issue.* — Though, strictly speaking, there is in an action of covenant no plea of general issue,¹ yet it is no objection to a special plea in covenant that it amounts to a plea of the general issue.²

Plea Nil Habuit in Tenementis. — The plea of *nil habuit in tenementis*, in an action of covenant for rent reserved by deed of indenture, is bad on general demurrer.³

Plea of Eviction. — Eviction of the whole or any part of the demised premises is a good plea in bar to an action in covenant for rent.⁴

Plea of Payment. — Where the declaration is in covenant for condition broken for rent, the defendant must, in order to be able to show payment, plead the payment specially or the general issue with a brief statement of the facts.⁵

(i) *Replication.* — The general rules relating to replications in actions of debt apply where a replication is required in an action of covenant.⁶

(3) *Debt* — (a) *When Lies.* — The action of debt is maintainable for rent, for an agreed certain sum,⁷ whether the demise be by

joined upon this averment, it was held that the point of such issue was whether the defendant was assignee of the whole estate of the lessee in any part of the land; it being proved that he was lessee of the whole estate in a part only of the land, it was held further that there was no variance, and that the plaintiffs could recover such part of the rent reserved as the defendant was liable to pay in respect to the part of the premises held by him. *Van Rensselaer v. Gallup*, 5 Den. (N. Y.) 454.

1. *Longley v. Norvall*, 2 Ill. 389; *Smith v. Justice*, 6 Phila. (Pa.) 234. And see article COVENANT, vol. 5, p. 377.

2. *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71; *Hebberd v. Delaplaine*, 3 Hill (N. Y.) 187; *Provost v. Calder*, 2 Wend. (N. Y.) 517; *Smith v. Justice*, 6 Phila. (Pa.) 234.

3. *Naglee v. Ingersoll*, 7 Pa. St. 185.

4. *Smith v. Shepard*, 15 Pick. (Mass.) 147; *Pendleton v. Dyett*, 4 Cow. (N. Y.) 581.

5. *Russell v. Fabyan*, 28 N. H. 543.

6. 1 Chitty's Pl. 584.

Departure. — In an action for nonpayment of rent, against the assignee of the lease, a plea was interposed that, before the rent became due, he assigned all his estate and interest in the premises to A and B; to which the plaintiff alleged, by way of replication, that in and by the indenture the lessee,

for himself, his executors, administrators, and assigns, covenanted that he, his executors and administrators, should not assign the premises without the consent of the lessor, and that no consent was given. The court held, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign did not stop the assignee from setting up the assignment; and secondly, that the action being founded on privity of the estate, the liability of the assignee ceased as soon as the privity of estate was destroyed. *Paul v. Nurse*, 8 B. & C. 486, 15 E. C. L. 273. See also as to departure, *Green v. James*, 6 M. & W. 656.

7. *Trapnall v. Merrick*, 21 Ark. 503; *McEwen v. Joy*, 7 Rich. L. (S. Car.) 33; *McKeon v. Whitney*, 3 Den. (N. Y.) 452; *Robins v. Cox*, T. Raym. 12; *Thursby v. Plant*, 1 Saund. 233, note 1; *Mounson v. Redshaw*, 1 Saund. 201a; *Gibson v. Kirk*, 1 Q. B. 850, 41 E. C. L. 807; *Salmon v. Smith*, 1 Saund. 206; *Windsor v. Gover*, 2 Saund. 302; *Ards v. Watkin*, Cro. Eliz. 637; *Macdonel v. Weldon*, 8 Mod. 54; *Winton v. Pinkney*, T. Raym. 222; *Loyd v. Langford*, 2 Mod. 174; *Mildmay's Case*, 6 Coke 40; *Walker's Case*, 3 Coke 22; *Prattle v. King*, 1 Mod. 185; *Varley v. Leigh*, 2 Exch. 446; *Lillington's Case*, 7 Coke 396.

Debt on Simple Contract. — See the article DEBT, vol. 5, p. 900, where it is said: "Although rent may be reserved

deed, by an unsealed writing, or by word of mouth.¹

Assignment of Lease. — Debt for rent cannot be maintained against a lessee who has assigned after acceptance of rent from the assignee.²

(b) **By and Against Whom Maintainable.** — Not only the lessor, but one to whom the rent has been assigned, may maintain the action.³

By Survivor of Tenants in Common. — Upon a lease by tenants in common the survivor may sue for the whole rent though the reservation is to the lessors according to their respective interests.⁴

Against Assignee of Lessee. — Debt lies by the lessor not only against the lessee but against the assignee of such lessee.⁵

by a demise under seal, yet, in actions of debt to recover the same, it forms a rather unique exception, in that the action is uniformly held to be debt on simple contract; and doubtless, owing to the fixed and determinate character of all rent charges, the action of debt has always been peculiarly appropriate as a means of recovery."

1. *Trapnall v. Merrick*, 21 Ark. 503; *McEwen v. Joy*, 7 Rich. L. (S. Car.) 33.

Lease for Life. — At common law a lease for life would not support an action of debt. *Robins v. Cox*, T. Raym. 11. See, however, *Duppa v. Mayo*, 1 Saund. 281. But this was changed by Stat. 8 Anne, c. 14, which enacted that it should be lawful for any person having any rent in arrear, or due upon any lease or demise for life or lives, to bring an action of debt for such arrears of rent, in the same manner as might have been done in case such rent were due or reserved upon a lease for years. *Windsor v. Gover*, 2 Saund. 304, note 8. See also *Winchester v. Wright*, 2 Ld. Raym. 1056.

At Common Law Lease Must Have Expired. — At common law before debt would lie on a lease it was essential that the lease must have expired. *Bush v. Redgeley*, Cro. Eliz. 264; *Thursby v. Plant*, 1 Saund. 233, note 1; *Broom v. Hore*, Cro. Eliz. 633. See also *Norton v. Vultee*, 1 Hall (N. Y.) 384.

Privity of Estate Sufficient. — In *Howland v. Coffin*, 9 Pick. (Mass.) 52, 12 Pick. (Mass.) 125, it was held that where there is no privity of contract, which is ordinarily essential to the action, privity of estate is sufficient to maintain the action.

Enjoyment by Tenant Essential. — Rent does not accrue to the lessor as a debt until the lessee has enjoyed the use of the land. *Bordman v. Osborn*, 23 Pick. (Mass.) 295.

2. *Fletcher v. M'Farlane*, 12 Mass. 43.

3. *Allen v. Bryan*, 5 B. & C. 512, 11 E. C. L. 292; *Howland v. Coffin*, 12 Pick. (Mass.) 125; *Patten v. Deshon*, 1 Gray (Mass.) 325.

By Mortgagee. — In *Burden v. Thayer*, 3 Met. (Mass.) 76, it was held that where the owner of land which he had leased for years granted the reversion by absolute deed or mortgage, the grantee was entitled to all rents that subsequently became due, and might maintain an action against the lessee to recover them. *Obiter* of rents that were due and in arrear at the time of the grant of the reversion. See also *M'Kircher v. Hawley*, 16 Johns. (N. Y.) 290.

Contra — Where Lease Subsequent to Mortgage. — Where a mortgagor in possession subsequently to the mortgage leases the land, the mortgagee cannot bring an action against the tenant for the rent, there being no privity of contract or estate between the mortgagee and the tenant. *M'Kircher v. Hawley*, 16 Johns. (N. Y.) 290.

4. "It is a well-known rule that the action for rent by tenants in common is in its nature a joint action, and consequently the survivors may sue for the whole." *Wallace v. McLaren*, 1 M. & R. 516, 17 E. C. L. 273.

5. *Norton v. Vultee*, 1 Hall (N. Y.) 384; *McKeon v. Whitney*, 3 Den. (N. Y.) 452; *Howland v. Coffin*, 12 Pick. (Mass.) 125; *Thursby v. Plant*, 1 Saund. 241 b; *Walker's Case*, 3 Coke 22.

Landlord's Actions. *LANDLORD AND TENANT.* To Recover Rent.

Administrator. — It also lies against the administrator of a deceased lessee.¹

Forfeiture of Lease. — The landlord, after a re-entry for a forfeiture of the lease, may recover, in an action of debt, the rent which accrued previous to such forfeiture.² For rent which became due subsequent to that time, he cannot, however, recover as a landlord; his only remedy is to proceed for the mesne profits against the one who has held possession of the premises adversely to his claim.³

(c) **Venue.** — When the action is founded on privity of contract it is transitory.⁴ Where, however, the action is founded on privity of estate merely, it is local.⁵

(d) **Declaration.** — In a declaration in debt for rent the plaintiff may state merely the substance of the demise, without declaring on the deed;⁶ and where it is doubtful whether the lease was by indenture or by parol, it is usual to do so, adding a count for use and occupation by way of further precaution.⁷ An entry or occupation by the defendant need not be set out in the declaration.⁸

By Assignee of Lessor Against Lessee's Assignee. — An action of debt for rent reserved by an indenture of lease may be maintained by the assignee of the lessor against the assignee of the lessee, and evidence to show that the annual value of the leased premises is less than the rent reserved is inadmissible. *Howland v. Coffin*, 12 Pick. (Mass.) 125.

1. *McEwen v. Joy*, 7 Rich. L. (S. Car.) 33.

2. *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427.

3. *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427.

4. As between lessor and lessee, see *Bracket v. Alvord*, 5 Cow. (N. Y.) 18. See also *Thursby v. Plant*, 1 Saund. 240.

In Ohio the division of personal actions into local and transitory is not known. It is held that it is the person of the defendant which gives a court jurisdiction in a particular case, so far as locality is concerned, and that since the defendant cannot be compelled to answer in any other county than the one in which he is served with process, except in some few specified cases, he must be held to answer there, provided the action be personal. Such actions are in that state considered as transitory. *Genin v. Grier*, 10 Ohio 209.

5. As where assignee of lessor or lessee is a party. *Bracket v. Alvord*, 5 Cow. (N. Y.) 18; *Genin v. Grier*, 10 Ohio

209. See also *Whitaker v. Forbes*, 33 L. T. 258; *Walker's Case*, cited in *Thursby v. Plant*, 1 Saund. 240; *Mills v. Auriol*, 1 H. Bl. 433.

Must Be Laid in County. — When the action is founded on privity of estate merely, and not on privity of contract, the venue is local and must be laid in the county where the lands are situated. *Whitaker v. Forbes*, 33 L. T. 258.

Where Premises Situated Abroad. — If the lands in question are situated abroad the action must be brought in that country. *Whitaker v. Forbes*, 33 L. T. 258.

6. *Davis v. Shoemaker*, 1 Rawle (Pa.) 135.

7. *Davis v. Shoemaker*, 1 Rawle (Pa.) 135.

8. *Bellasis v. Burbriche*, 1 Ld. Raym. 170; *Mayer v. Lawrence*, 58 Ill. App. 194.

Averment of Enjoyment — When Essential. — In *Mulford v. Young*, 6 Ohio 294, it was held that where a contract of lease recited that "in consideration of the rents hereinafter mentioned and agreed to be paid" the lessor leased a farm, and stipulated that the lessee might use timber for certain purposes, and might seed certain grounds, "in consideration whereof" the lessee agreed to pay certain rents, the lessor must aver that the defendant enjoyed the premises or that the lessor tendered him the enjoyment, or the declaration would be bad.

(3) *Pleas.* — In an action of debt for rent reserved by indenture the defendant may, under a plea of *nil debet* to a declaration stating a demise generally, give the statute of limitations in evidence.¹ *Nil habuit in tenementis* is not a good plea to an action of debt founded upon an indenture.²

(4) *Distress.* — For proceedings by the landlord against the tenant to recover rent in the action of distress, see article DISTRESS, vol. 7, p. 20.

(5) *Waste.* — As to the remedy by action of waste by the landlord against the tenant, see article WASTE.

(6) *Actions for Rent by Tenants in Common or Joint Tenants.* — One tenant in common or joint tenant cannot maintain a suit for rent by himself when the contract is joint and the rent is reserved to the tenants jointly.³ In such a case the law affords no different remedy on an agreement to pay rent to two joint tenants if the rent is behind from that on strictly personal obligations executed to two jointly other than for rent.⁴ On the other hand, it is held that if there has been no express contract or joint reservation of rent, tenants in common may sue jointly for use and occupation.⁵

1. *Davis v. Shoemaker*, 1 Rawle (Pa.) 135.

2. *Fletcher v. M'Farlane*, 12 Mass. 43.

3. *Dorsett v. Gray*, 98 Ind. 273; *Churchill v. Lammers*, 60 Mo. App. 251; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Griffin v. Clark*, 33 Barb. (N. Y.) 46; *Wilkinson v. Hall*, 1 Bing. N. Cas. 713, 27 E. C. L. 555; *Weinstein v. Harrison*, 66 Tex. 546; *Cobb v. Kidd*, 19 Blatchf. (U. S.) 561; *Foley v. Addenbrooke*, 12 L. J. Q. B. 163, cited in *Clapp v. Pawtucket Sav. Inst.*, 15 R. I. 489.

In 1 Coke Inst., § 316, it is stated that "if two tenants in common make a lease of their tenement to another for a term of years, rendering to them a certain yearly rent during the term, if the rent be behind, * * * the tenants in common shall have their action of debt against the lessee, and not divers actions, for that the action is in the personalty."

On Lease of Undivided Portion. — A tenant in common in possession may let out his share of the common property and receive the rent for it, and therefore the cotenant need not be joined in an action to recover the rent from the lessee of his fellow. *Hayden v. Patterson*, 51 Pa. St. 261.

4. *Churchill v. Lammers*, 60 Mo. App. 252.

5. *Cobb v. Kidd*, 19 Blatchf. (U. S.) 561; *Porter v. Bleiler*, 17 Barb. (N. Y.) 149.

Joint Lease with Provision for Separate Payment. — Where it appears that tenants executed a joint lease, their interest in the subject-matter of the contract must be joint; and although the rent is to be paid in moieties separately, still they have each a joint interest in the rent until it is severed by a several payment. *Kemble v. Wallis*, 10 Wend. (N. Y.) 374.

Tenants in common may maintain a joint action for the rent due under a sealed lease of the joint estate all the covenants in which are with them jointly, although by an agreement annexed to the lease, and made part thereof, it is stipulated that half of the rent shall be paid to each. *Wall v. Hinds*, 4 Gray (Mass.) 256.

Money Had and Received. — Assumpsit by a tenant in common for money had and received has been held to be proper. *Price v. Pickett*, 21 Ala. 741.

Where There Is No Express Contract reserving rent to tenants in common jointly, each may sue an administrator or guardian who received the whole rent for his proper share. *Smith v. Wiley*, 22 Ala. 405.

Joint Distress. — On the other hand, it is said that there can be no joint distress for rent by tenants in common.

Apportionment Among Heirs. — Heirs of a lessor may each recover his proper share of rent reserved to the ancestor under the lease without joining his coheirs.¹

Assignee of Part of Rent. — Where an aliquot part of the rent is assigned there is no injustice to the tenant in permitting the holder of the part to maintain his action on the covenant to pay it.²

Use and Occupation Inter Sece. — Assumpsit for use and occupation on an implied promise will not lie by one tenant in common against his cotenant.³

Dutcher v. Culver, 24 Minn. 592, citing Taylor on Landlord and Tenant, § 569.

One Tenant in Common Cannot Recover the Whole. — In *Naugher v. Patterson*, 9 Tex. Civ. App. 168, while the suit contained all of the material allegations of trespass to try title, it was in the nature of a bill in equity for discovery, accounting, and recovery of the property of the estate of a decedent converted by the defendant to his own use. The trial court permitted a recovery of all the land sued for and of all the money on hand belonging to the estate and for all the rents received by the defendant arising from the lands in controversy, upon the theory that a part of the tenants in common are entitled to the entire estate against a trespasser or one without title. This was held to be the correct doctrine as to the possession of the real estate, but as to rents arising from it or moneys due the tenants in common, it was held that the tenants suing could recover only the share to which they were entitled. See also, in an action for rent by one tenant, *Muller v. Boggs*, 25 Cal. 175.

1. *Bowser v. Cox*, 3 Ind. App. 309; *Crosby v. Loop*, 13 Ill. 625; *Farley v. Craig*, 11 N. J. L. 273; *Ryerson v. Quackenbush*, 26 N. J. L. 250; *Cole v. Patterson*, 25 Wend. (N. Y.) 456; *Jones v. Felch*, 3 Bosw. (N. Y.) 63; *Cruger v. McClaughry*, 51 Barb. (N. Y.) 644; *Reed v. Ward*, 22 Pa. St. 149; *Rivis v. Watson*, 5 M. & W. 255.

2. *Cook v. Brightly*, 46 Pa. St. 439.

Suit Without Attornment. — "But the statute 4 Anne, c. 16, § 9, gives to the assignee an action for use and occupation, in case of a demise without deed, though there has been no attornment of the tenant. *Lumley v. Hodgson*, 16 East 99; *Standen v. Christmas*, 10 Q. B. 139, 59 E. C. L. 139; *Peck v. Northrop*, 17 Conn. 217. The provisions of these statutes have been adopted in this state. *Pendergast v. Young*, 21 N. H.

234. The facts in *Standen v. Christmas*, 10 Q. B. 139, 59 E. C. L. 139, were much like those of the present case. *Standen* and one *Richardson* were tenants in common, and on the 18th of March, 1844, *Richardson*, without the knowledge of the plaintiff, leased the premises to the defendant *Christmas*, by writing, not under seal, for one year. In the first half of the year *Richardson* sold his interest in the premises to the plaintiff. The action was assumpsit, for use and occupation, and the court held that in point of law, under statute 11 Geo. II., c. 19, § 14, which has been adopted in this state, the occupation was by permission of the plaintiff. *Alton v. Pickering*, 9 N. H. 496. We are of opinion that the case shows evidence competent for the jury to find that the share of *Ebenezer Stevens* in the premises was assigned during the term to *William Stevens*, one of the plaintiffs; that in such case the plaintiffs might recover the rent due under the lease without attornment, in this form of action, and that on this point the ruling of the court was incorrect." *Mussey v. Holt*, 24 N. H. 253.

3. *Gowen v. Shaw*, 40 Me. 56.

In *Illinois*, assumpsit will lie by one cotenant against another for rent for use and occupation, and it is said that while there must be something more than the mere occupancy of the estate by one and a forbearance to occupy by the other, yet the liability for rent may be incurred without any express agreement, and that the only difference between cotenants and other parties in this regard is that the relation of landlord and tenant will not be so readily inferred from an occupation by a cotenant as in the case of a stranger. "If the conduct of the cotenants towards each other in relation to the occupancy of the premises has been such that an agreement to use each a particular part of the premises can be reasonably implied, then either, on being disturbed

Under Express Contract. — If tenants in common contract with each other for the exclusive right to use and occupation on the part of one, the other is entitled to an action for rent under such contract.¹

b. UNDER THE CODES² — (1) *In General.* — As a general rule, it may be said that the provisions of the different codes as to actions by landlords against their tenants change the common-law remedies only as to their form. They do not abolish the original causes of action, nor do they necessarily confound them.

(2) *Who May Maintain* — *Generally.* — A landlord suing to recover rent, in order to establish his title, need only show occupancy by the defendant as his tenant.³

Heirs. — Heirs may maintain an action for rent accruing after the death of the lessor.⁴

Personal Representatives. — An action for rent accruing previous to the death of the lessor must be maintained by the personal representatives of the lessor.⁵

(3) *Against Whom Lies* — *Assignee of Lease.* — The assignee of a lease who enters into possession of demised premises thereunder is liable for the rent while he occupies the premises.⁶

Joint Defendants. — A joint action against several defendants may be brought to recover rent reserved upon several pieces of land owned by them in severalty.⁷ Under the general rule that per-

in his occupation by the other, is entitled to the same remedies as though no relation of cotenancy existed." *Boley v. Barutio*, 120 Ill. 192 [citing *Illinois Cent. R. Co. v. Thompson*, 116 Ill. 159; *Oakes v. Oakes*, 16 Ill. 106; *Chapin v. Foss*, 75 Ill. 280].

Law of Liability. — This is a question of substantive right rather than a question of pleading, as at common law one tenant in common or joint tenant is not liable to his cotenant for a mere use and occupation under an implied contract, and therefore in the absence of an express contract an action will not lie. See article *Joint Tenants and Tenants in Common*, Am. and Eng. Encyc. of Law. See also the article bearing the same title in this work, vol. 11, p. 757.

1. *Cahoon v. Kinen*, 42 Ohio St. 190.

2. **Use and Occupation.** — For code cases concerning the action for use and occupation, see *supra*, I. 1, a. (1) *Action for Use and Occupation.* Ten Eyck v. Houghtaling, 12 How. Pr. (N. Y. Supreme Ct.) 523.

All material facts must be averred. It is not intended by the code to dispense with the necessity of averring every fact essential to a complete cause

of action. *La Dow v. Arnold*, 14 Wis. 458.

3. *Kiernan v. Terry*, 26 Oregon 494.

4. *King v. Anderson*, 20 Ind. 385.

5. *King v. Anderson*, 20 Ind. 385.

Action for Rent After Termination of Trust. — Where a trust has been terminated by the death of the *cestui que trust*, and a power of sale for distribution is defeated by an election of the remaindermen to take the land, the executor has no authority to collect rents and may not maintain an action for such rents. *Smith v. Farmer Type Founding Co.*, 17 Misc. Rep. (N. Y. City Ct.) 311.

6. *Clark v. Aldrich*, 4 N. Y. App. Div. 523.

Liability Terminated by Assignment. — If, however, the assignee of a lease assigns his interest and ceases to occupy the premises, his liability for rent is terminated. *Clark v. Aldrich*, 4 N. Y. App. Div. 523.

7. *Van Rensselaer v. Layman*, 39 How. Pr. (N. Y. Supreme Ct.) 9.

Several Judgment May Be Rendered. — Where such joint action against several defendants is brought, a several judgment against them may be rendered for their respective proportions

sons severally liable on the same instrument may be joined as defendants, a principal and a surety in a lease may be joined.¹

(4) *Complaint*—(a) *Construction of.*—Where a complaint in an action to recover rent is demurred to on the ground that it does not state facts sufficient to constitute a cause of action, the court will only inquire whether it can gather from the pleadings the requisite facts, ignoring all immaterial matter and unnecessary allegations.²

(b) *Allegations.*—A complaint is not bad for failure to aver the contract relation of landlord and tenant where from the facts stated the law will imply the existence of such relation.³ Where the complaint is on an express covenant to pay rent, it need not allege ownership of the premises,⁴ or that the plaintiff performed any conditions except those required by the contract as set forth;⁵ nor need the plaintiff, where the action is brought on an express covenant to pay rent, allege or prove that the defendant occupied or enjoyed the premises.⁶ The complaint will not be

of the rent, where an apportionment of the whole rent claimed is necessary. *Van Rensselaer v. Layman*, 39 How. Pr. (N. Y. Supreme Ct.) 9.

Judgment Against One of Several Joint Lessees.—In *Look Ding v. Kennedy*, 7 Colo. App. 72, which was an action for rent, the different firms and persons who executed the lease on which the action was brought executed it jointly. It was held that as to them it was consequently joint and several, and that judgment could be taken against any firm or person who was a party to it, though not against an individual of a firm.

Joint Occupation by Subtenants Necessary.—In *Pierce v. Minturn*, 1 Cal. 470, it was held that a joint action cannot be sustained by a lessor against two subtenants of the lessee who did not occupy jointly.

1. *Carman v. Plass*, 23 N. Y. 286; *Lucy v. Wilkins*, 33 Minn. 21, where it was held that a guarantor of the payment of rent accruing on a written lease, whose undertaking is indorsed thereon, may be sued jointly with the principal debtors.

Contra Where Guaranty Is by Separate Instrument.—In *Tibbits v. Percy*, 24 Barb. (N. Y.) 39, it was held that the obligation of a lessee for the payment of the rent reserved in the lease, and the obligation of a third person who, by a separate instrument executed at the time of the lease, guarantees the payment of the rent by the lessee, are separate and not joint obligations, and will not support a joint action by the

lessor against the lessee and the guarantor, in which case the obligation of the lessee is primary and absolute, while that of the guarantor is secondary and conditional.

Failure to Object to Such Misjoinder.—Though the obligations of the lessee and the guarantor are separate and not joint, yet where a misjoinder is not objected to in the court below, such objection cannot be raised on appeal. *Tibbits v. Percy*, 24 Barb. (N. Y.) 39.

2. *Marix v. Stevens*, 10 Colo. 261.

3. *Betts v. Quick*, 114 Ind. 165. In this case the complaint charged that the defendant was indebted to the plaintiff in a certain sum for the rent of described real estate. It was held that the law would imply from such statement the existence of the contract relation of landlord and tenant, and that the complaint was not bad for failure to aver such fact; and that even though the averments of the complaint were indefinite and uncertain, the remedy was by a motion to make more specific, and not by demurrer.

Action on Note for Rent.—In *Simpson v. Earle*, 87 Ga. 215, which was an action by the payee of a note stating on its face that it was given for rent, it was held that the declaration need not allege the relation of landlord and tenant.

4. *Havemeyer v. Switzer*, 15 Misc. Rep. (N. Y. City Ct.) 629.

5. *Havemeyer v. Switzer*, 15 Misc. Rep. (N. Y. City Ct.) 629.

6. *Weston v. Ryley*, 15 Misc. Rep. (N. Y. City Ct.) 638; *Havemeyer v.*

bad where the duration and commencement of the term can be inferred therefrom with reasonable certainty.¹ In a suit by the alienee of the lessor, he need not file with or make part of his complaint either his deed from the lessor² or his assignment of the lease or copies thereof.³ A complaint against the assignee of a lease by deed-poll should aver that the defendant took and held possession by virtue of the assignment.⁴

Where the Heirs of a Lessor Sue to recover rent, their interests being different, the complaint should show the relative interests of the different heirs.⁵

(6) *Description of Premises.* — The premises are sufficiently described if they can be ascertained and located from the allegations of the complaint.⁶

(5) *Answer.* — In an action for rent or breach of covenant therefor, the tenant may plead eviction⁷ or a surrender by opera-

Switzer, 15 Misc. Rep. (N. Y. City Ct.) 629. See also *Gilhooley v. Washington*, 4 N. Y. 217; *Marix v. Stevens*, 10 Colo. 261.

Where, in an action to recover two months' rent, the defendant denies only the allegation that he occupied the rented premises, the plaintiff's cause of action is thereby admitted. *Weston v. Ryley*, 15 Misc. Rep. (N. Y. City Ct.) 638.

1. *Havemeyer v. Switzer*, 15 Misc. Rep. (N. Y. City Ct.) 629.

2. *Kennard v. Harvey*, 80 Ind. 37.

3. *Kennard v. Harvey*, 80 Ind. 37, where the court said: "There can be no doubt, therefore, in regard to the right of the appellant, as the alienee of Polk, to maintain this action in her own name, without making her grantor or assignor a party to the action. Nor was it necessary that the appellant should make either her deed from Polk or his assignment of the lease to her a part of her complaint. The deed and the assignment of the lease would be proper and, perhaps, necessary items of evidence on the trial of the cause; but neither of them was, in any sense, a part of the appellant's cause of action, as stated in each paragraph of her complaint. In this respect the case before us is similar to that of a suit by the assignee of a promissory note against the makers thereof."

4. *La Dow v. Arnold*, 14 Wis. 458; *Turner v. Richardson*, 7 East 335.

In *La Dow v. Arnold*, 14 Wis. 458, the complaint for rent alleged that the defendant was the assignee of a lease by deed-poll, and that after the assign-

ment he entered into the premises and took and retained possession, etc. Upon demurrer the complaint was held defective for failure to aver that the defendant took and held possession by virtue of the assignment.

Inference that the assignee entered by virtue of the assignment is not necessary; and if a material allegation can ever be made by inference, it can only be where such inference follows necessarily from facts stated. *La Dow v. Arnold*, 14 Wis. 458.

5. *King v. Anderson*, 20 Ind. 385, holding that where some of the heirs by whom the suit was brought were the children of the lessor, and some his grandchildren, the complaint should show the relative interests of the different heirs, and that if it does not, and the deficiency be not supplied by proof, a decree of the lower court fixing the sums due to the different plaintiffs must be set aside.

6. *Kiernan v. Terry*, 26 Oregon 494, where the court said: "It is not an uncommon thing in practice to describe premises leased as those certain premises situated (giving the county and state), now in the possession of, or now occupied by, some certain person (naming him); and no question is made of the sufficiency of such a description."

7. *Jennings v. Bond*, 14 Ind. App. 282. In this case the answer was held substantially to aver a constructive eviction by showing that the lessor brought an action to oust the tenant, and that thereupon both the tenant and his subtenant removed from the premises and turned the keys over to the lessor. It was not necessary to allege

tion of law or by agreement of the parties.¹

Counterclaim. — Where a tenant has a cause of action against his landlord for wrongfully interfering with his enjoyment of the premises rented, such cause of action is a counterclaim in an action against the tenant by the landlord to recover rent for a period including that of such interference.²

General Denial. — Where in an action to recover rent the defendant interposes a general denial, he cannot show under such general denial that prior to the termination of the lease the plaintiff had conveyed the premises without reserving the rent.³

Misrepresentation. — Where the answer alleges misrepresentation as to the premises, it must state the time of the misrepresentation, whether it was wilful, or made as an inducement to the hiring, and that it was relied upon by the tenant.⁴

2. To Recover Possession — *a.* AT COMMON LAW — EJECTMENT. — For the procedure in the common-law action of ejectment by

further that the tenant had not had possession of the premises since then. When a surrender is once pleaded, the presumption is that the status thus established continues until the contrary is made to appear.

1. *Lafferty v. Hawes*, 63 Minn. 13.

When Defense of Surrender Not Available. — In *Weston v. Ryley*, 15 Misc. Rep. (N. Y. City Ct.) 638, it was held that the defense of surrender and acceptance is not available in an action for rent payable in advance where the facts pleaded as a defense occurred after the rent was due.

2. *Goebel v. Hough*, 26 Minn. 252.

In an action for rent, the tenant may set up as a counterclaim damages arising from a landlord's breach of a collateral agreement not amounting to an eviction. *Walker v. Shoemaker*, 4 Hun (N. Y.) 579. In this case a landlord, being desirous of repairing the roof of his building, agreed with the tenant that if he were allowed to enter upon and repair the premises, he would do the work with diligence, care, and caution. This he failed to do, whereby the tenant was injured. It was held that the damages sustained thereby might be set up by the tenant as a counterclaim in an action brought by the landlord to recover rent.

In *Lansing v. Thompson*, 8 N. Y. App. Div. 54, it was held that a counterclaim in an action for rent, which alleges that after the premises became untenable the landlord promised the tenant a sum of money if he would remain in possession, must also show

that the tenant had a right to vacate and must allege a consideration to sustain the promise of the landlord.

Wilful Trespass of Landlord. — Damages for wilful trespass of a landlord upon demised premises are not a subject of set-off against rent due upon lease; and damages for trespass as such, and not in itself constituting a breach of the covenant declared on, cannot be proved for the purpose of recoupment. *Levy v. Bend*, 1 E. D. Smith (N. Y.) 169.

Failure of Lessor Fully to Perform No Defense. — In *Kelsey v. Ward*, 38 N. Y. 83, it was held that an action for rent is not barred by the failure of the lessor fully to perform his contract, where the lessees entered into possession and occupied the premises. The remedy in such case is by recouping their damages from the rent or by a separate action to recover damages.

3. *Wilbur v. Collin*, 4 N. Y. App. Div. 417.

4. *Levy v. Bend*, 1 E. D. Smith (N. Y.) 169.

Effect of Delay in Alleging Misrepresentation. — Although a tenant may defend on the ground of misrepresentation in the lease, the rule applies that one electing to disaffirm a contract for fraud must act promptly after discovery of such fraud. *Bell v. Baker*, 43 Minn. 86, holding that where a tenant who has leased for three years occupies for two years or more, he cannot set up as a defense for the remaining rent the false representations of the plaintiff in inducing the lease.

a landlord against his tenant to recover possession of demised premises, see article EJECTMENT, vol. 7, p. 260.

b. SUMMARY PROCEEDINGS UNDER STATUTES—(1) Generally.

— By statute in almost all the states a remedy is provided in the nature of a summary proceeding by which the landlord may regain possession of premises wrongfully retained by a tenant.¹

Purpose. — The sole purpose of the proceeding under such statutes is to determine the immediate possession of the demised premises as between the landlord and the tenant wrongfully in possession.² If any other question than such as relates to the tenancy and the holding over is to be litigated between the parties, recourse must be had to an action instead of this summary proceeding.³

(2) *In What Cases.* — The statutory provisions as to summary proceedings are in the main similar in the different states. They differ, however, more or less as to the cases in which such proceedings are properly resorted to. Thus it is held that a landlord is entitled to such proceedings to dispossess his tenant where such tenant or lessee holds over beyond the expiration of his term without permission;⁴ where a tenant at will or at sufferance holds over

1. These statutes are based upon the stat. 11 Geo. II., § 19.

In most of the states of this country, the right of the landlord to recover possession by summary proceedings, though it exists, is not given by a separate statute, but is included in statutes authorizing proceedings for forcible entry and detainer. Where this is the case, however, the landlord's action where the entry is lawful and the detainer is without force, and unlawful only by reason of the expiration of the tenant's estate, or the violation by him of the agreement between himself and his landlord, is clearly distinguished from the action of forcible entry and detainer proper. In a few states, however, summary proceedings are expressly provided for by a separate statute. In this article proceedings by the landlord to regain immediate possession of premises wrongfully held by the tenant will be treated of as summary proceedings, whether authorized expressly as such or under the statutes governing the action of forcible entry and detainer.

2. The requirement of the recognition provided by law to pay rent and damages in a case where the defendant in landlord process pleads title, should the plaintiff prevail, does not estop the plaintiff in such process to deny the existence of the defendant's tenancy or

to assert his own right of possession. *Robinson v. Morgan*, 58 N. H. 412.

3. *Benjamin v. Benjamin*, 5 N. Y. 383.

4. *Alabama.* — Civ. Code (1886), vol. 1, § 3382; *Espalla v. Gottschalk*, 95 Ala. 254; *Nicrosi v. Phillipi*, 91 Ala. 299; *King v. Bolling*, 77 Ala. 594; *Beck v. Glenn* 69 Ala. 121.

Arkansas. — *Parker v. Geary*, 57 Ark. 301; *James v. Miles*, 54 Ark. 460; *Johnson v. West*, 41 Ark. 535; *Buckner v. Warren*, 41 Ark. 532; *Miller v. Turney*, 13 Ark. 385; *Thorn v. Reed*, 1 Ark. 480.

California. — *Deering's Code Civ. Pro.*, § 1161; *Ray v. Armstrong*, 4 Cal. 208; *Rogers v. Hackett*, 49 Cal. 121; *Jones v. Durrer*, 96 Cal. 95; *Pico v. Cuyas*, 48 Cal. 639; *McCarthy v. Yale*, 39 Cal. 585; *Silva v. Campbell*, 84 Cal. 420.

Colorado. — *Klopper v. Keller*, 1 Colo. 410.

Connecticut. — *Gen. Stat.* (1888), § 1355; *Colt v. Eves*, 12 Conn. 243; *White v. Bailey*, 14 Conn. 271; *Du Bouchet v. Wharton*, 12 Conn. 533; *Fox v. Nathans*, 32 Conn. 348; *Peck v. Peck*, 35 Conn. 390.

Georgia. — *Code* (1895), § 4813; *Huff v. Markham*, 70 Ga. 284.

Illinois. — *Rev. Stat.* (1893), p. 1973, par. 2; *Doran v. Gillespie*, 54 Ill. 366; *Reed v. Hawley*, 45 Ill. 40; *Webb v.*

after the determination of his estate by notice to quit; ¹ where he continues in possession of the premises after default in payment of rent for the prescribed time after such rent is payable; ² where he fails to perform other covenants or conditions of the lease by

Heyman, 40 Ill. App. 335; Patterson v. Graham, 40 Ill. App. 399; Ball v. Peck, 43 Ill. 482; Phelps v. Randolph, 147 Ill. 335; Leary v. Pattison, 66 Ill. 203.

Indiana. — Rev. Stat. (1894), § 7106.
Iowa. — Code (1888), § 3611; McLain v. Calkins, 77 Iowa 468.

Louisiana. — Godchaux v. Bauman, 44 La. Ann. 253.

Maine. — Rev. Stat. (1883), p. 786.

Massachusetts. — Pub. Stat. (1882), p. 1024; Borden v. Sackett, 113 Mass. 214.

Michigan. — Rev. Stat. (1882), § 8295; Judd v. Fairs, 53 Mich. 518.

Minnesota. — Wright v. Gribble, 26 Minn. 99.

New Hampshire. — Pub. Stat. (1891), p. 673.

New Jersey. — Gen. Stat. (1709-1895), vol. 1, p. 1596.

New York. — Code Civ. Pro., § 2231; Smith v. Littlefield, 51 N. Y. 539; Miller v. Levi, 44 N. Y. 489; Barry v. Smith, 69 Hun (N. Y.) 88; Sims v. Humphrey, 4 Den. (N. Y.) 185; Manhattan L. Ins. Co. v. Gosford, 3 Misc. Rep. (N. Y. C. Pl.) 509.

Ohio. — Rev. Stat. (1897), § 6600.

Pennsylvania. — Bright. Purd. Dig. (12th ed.), p. 1163.

South Dakota. — Williams v. Wait, 2 S. Dak. 210.

Vermont. — Rev. Stat. (1894), § 1560; Middlebury College v. Lawton, 23 Vt. 688; Barton v. Learned, 26 Vt. 192; Davis v. Hemenway, 27 Vt. 589; Baldwin v. Skeels, 51 Vt. 121; Pitkin v. Burch, 48 Vt. 521; Horan v. Thomas, 60 Vt. 325.

Wisconsin. — Sanb. & B. Annot. Stat., § 3358.

1. This is the case in all the states whose statutes are cited in the preceding note save *Connecticut*, *Ohio*, and *Vermont*.

Massachusetts. — Howard v. Merriam, 5 Cush. (Mass.) 563; Hildreth v. Conant, 10 Met. (Mass.) 298; Dakin v. Allen, 8 Cush. (Mass.) 33; Kinsley v. Ames, 2 Met. (Mass.) 29.

Michigan. — Huyser v. Chase, 13 Mich. 98; Raynor v. Haggard, 18 Mich. 72; Rawson v. Babcock, 40 Mich. 332; Wilson v. Merrill, 38 Mich. 707; Allen v. Carpenter, 15 Mich. 25; Benfey v. Congdon, 40 Mich. 285.

New York. — Barry v. Smith, 1 Misc. Rep. (N. Y. County Ct.) 240.

2. *California.* — Skaggs v. Emerson, 50 Cal. 6; Gage v. Bates, 40 Cal. 385; Roussel v. Kelly, 41 Cal. 360.

Illinois. — Cone v. Woodward, 65 Ill. 477; Woodward v. Cone, 73 Ill. 241; Patchell v. Johnston, 64 Ill. 305.

Massachusetts. — Borden v. Sackett, 113 Mass. 214.

Michigan. — Chamberlin v. Brown, 2 Dougl. (Mich.) 120; McSloy v. Ryan, 27 Mich. 110; Moody v. Seaman, 46 Mich. 74; Bennett v. Robinson, 27 Mich. 26.

New York. — People v. Keteltas, 12 Hun (N. Y.) 67; Lang v. Everling, 3 Misc. Rep. (N. Y. C. Pl.) 530; Burnett v. Scribner, 16 Barb. (N. Y.) 621; Durrant Land Imp. Co. v. Thompson-Houston Electric Co., 23 Civ. Pro. Rep. (N. Y. C. Pl.) 29, 2 Misc. Rep. (N. Y.) 182; Griffin v. Clark, 33 Barb. (N. Y.) 46; Paine v. Trinity Church, 7 Hun (N. Y.) 89; Bostwick v. Frankfield, 11 Hun (N. Y.) 475; Posson v. Dean, 8 Civ. Pro. Rep. (Orleans County Ct.) 177; Armstrong v. Cummings, 20 Hun (N. Y.) 313; People v. Bennett, 14 Hun (N. Y.) 58; Johnson v. Oppenheim, 55 N. Y. 280; People v. Kelsey, 14 Abb. Pr. (N. Y. Supreme Ct.) 372; Witty v. Acton, (Supreme Ct.) 9 N. Y. Supp. 247; Hasbrouck v. Stokes, (C. Pl.) 13 N. Y. Supp. 333; Burrell v. Do Sim, 10 Misc. Rep. (N. Y. C. Pl.) 745; Stover v. Chasse, 9 Misc. Rep. (N. Y. C. Pl.) 45; Horton v. New York Cent., etc., R. Co., 12 Abb. N. Cas. (N. Y. Supreme Ct.) 30; Hartley v. Meyer, 2 Misc. Rep. (N. Y. C. Pl.) 56; Matter of Hosley, 56 Hun (N. Y.) 240; Gregg v. Boyd, 69 Hun (N. Y.) 588; Brown v. New York, 66 N. Y. 385; People v. Dudley, 58 N. Y. 323.

Pennsylvania. — Mohan v. Butler, 112 Pa. St. 590.

Lessee of Furnished House. — In *New York* the provisions of the Revised Statutes authorizing the dispossession of a tenant by summary proceedings for nonpayment of rent are applicable to a lessee of a furnished house at a gross rent. The furniture in such a case is but an incident, and the rent issues out of the land only. *Armstrong v. Cummings*, 20 Hun (N. Y.) 313.

which the property is held than the one for the payment;¹ where he has used the demised premises for some illegal or immoral purpose;² or where he fraudulently removes from the premises without leaving sufficient property thereon to secure at least three months' rent, or refuses to give security for the payment of the same.³

(3) *Requisites to Maintain* — *Relation of Landlord and Tenant Essential*. — To authorize summary proceedings the conventional relation of landlord and tenant must be shown to exist between the parties.⁴ It is not sufficient to sustain the action that such relation

1. Cal. Code Civ. Pro., § 1161; *Opera House, etc., Assoc. v. Bert*, 52 Cal. 471; *Kelly v. Teague*, 63 Cal. 68.

In Vermont such summary process for possession of premises held by a lessee after breach of stipulation of lease lies only where ejectment would lie for breach of such stipulation. *Hadley v. Havens*, 24 Vt. 520.

2. Gen. Stat. Conn. (1888), § 1363; *Prescott v. Kyle*, 103 Mass. 381; *Stearns v. Hemmens*, 21 Abb. N. Cas. (N. Y. C. Pl.) 312; *Shaw v. McCarty*, 2 Civ. Pro. Rep. (N. Y. C. Pl.) 23; *Goelet v. Lawlor*, 16 Misc. Rep. (N. Y. Supreme Ct.) 59; *McGarvey v. Puckett*, 27 Ohio St. 669; *Justice v. Lowe*, 26 Ohio St. 372.

Where the violation of the law has ceased prior to the application for the warrant, no proceedings for the summary removal of the tenant can be taken. *Shaw v. McCarty*, 2 Civ. Pro. Rep. (N. Y. C. Pl.) 23.

3. Bright, *Purd. Dig. Pa.* (12th ed.), p. 1169; *Geisenberger v. Cerf*, 1 Phila. (Pa.) 17; *Grider v. McIntyre*, 6 Phila. (Pa.) 112; *Freytag v. Anderson*, 1 Rawle (Pa.) 73, 1 Ashm. (Pa.) 98; *Black v. Alberson*, 1 Ashm. (Pa.) 127.

In New York it is held that the proceedings will also lie where the lessee, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States. N. Y. Code Civ. Pro., § 2231, as amended by Laws of 1885, c. 13, § 1, and Laws of 1894, c. 333.

4. *California*. — *Walls v. Preston*, 28 Cal. 225; *Reay v. Cotter*, 29 Cal. 168.

Connecticut. — *Richmond v. Stahle*, 43 Conn. 22.

District of Columbia. — *Jennings v. Webb*, (D. C.) 20 Wash. L. Rep. 146.

Georgia. — *Sykes v. Benton*, 90 Ga. 402; *Morrow v. Sawyer*, 82 Ga. 226; *Sloat v. Rountree*, 87 Ga. 470; *Sutton v. Hiram Lodge*, 83 Ga. 772.

Indiana. — *Burgett v. Bothwell*, 86 Ind. 149; *Hamline v. Engle*, 14 Ind. App. 685; *Blair v. Porter*, 12 Ind. App. 296.

Kentucky. — *Sale v. Crutchfield*, 8 Bush (Ky.) 642.

Massachusetts. — *Hart v. Bouton*, 152 Mass. 440.

Michigan. — *Kusterer v. Wise*, 59 Mich. 382; *Hill v. Olin*, 82 Mich. 643.

New Hampshire. — *Stockbridge v. Nute*, 20 N. H. 271; *Leavitt v. Wallace*, 12 N. H. 489.

New Jersey. — *State v. Staiger*, 52 N. J. L. 350; *State v. Jersey City Forge Co.*, 38 N. J. L. 74; *State v. Idler*, 54 N. J. L. 467.

New York. — *Matthews v. Matthews*, 49 Hun (N. Y.) 346; *People v. Simpson*, 28 N. Y. 55; *Birdsall v. Phillips*, 17 Wend. (N. Y.) 464; *Kelly v. Smith*, (C. Pl.) 16 N. Y. Supp. 521; *Goelet v. Roe*, 14 Misc. Rep. (N. Y. C. Pl.) 28; *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74; *People v. Annis*, 45 Barb. (N. Y.) 304; *Haywood v. Miller*, 3 Hill (N. Y.) 90; *Russell v. Russell*, 32 How. Pr. (N. Y. Supreme Ct.) 400; *People v. Bigelow*, 11 How. Pr. (N. Y. Supreme Ct.) 83; *Sims v. Humphrey*, 4 Den. (N. Y.) 185; *Ward v. Burgher*, 90 Hun (N. Y.) 540; *Boyd v. Sametz*, 17 Misc. Rep. (N. Y. Second Dist. Ct.) 728.

North Carolina. — *Hughes v. Mason*, 84 N. Car. 472; *McCombs v. Wallace*, 66 N. Car. 481; *McMillan v. Love*, 72 N. Car. 18; *Greer v. Wilbar*, 72 N. Car. 592; *Forsythe v. Bullock*, 74 N. Car. 135; *Medlin v. Steele*, 75 N. Car. 154; *Riley v. Jordan*, 75 N. Car. 180; *Foster v. Penry*, 77 N. Car. 160; *Sanders v. Ellington*, 77 N. Car. 255; *Meroney v. Wright*, 81 N. Car. 390; *Johnson v. Hauser*, 82 N. Car. 375; *Parker v. Allen*, 84 N. Car. 466; *Credle v. Gibbs*, 65 N. Car. 192; *Hahn v. Guilford*, 87 N. Car. 172.

Pennsylvania. — *White v. Arthurs*, 24 Pa. St. 96.

has arisen by operation of law.¹ It is also necessary that such conventional relation should exist at the time of the institution of the proceedings.²

Holding Hostile to Landlord. — Where the entry is under a claim of title hostile to the landlord, and not under or by virtue of his demise, there can be no such privity between the parties as will sustain the proceeding.³ In such case the remedy is by an

Wisconsin. — *Hunter v. Maanum*, 78 Wis. 656; *Nightingale v. Barends*, 47 Wis. 389; *Diggle v. Boulden*, 48 Wis. 477.

The cases are numerous in which this summary remedy has been refused because the contract or circumstances under which the owner of premises permitted another to take possession of them contemplated some condition or consideration apart from rent, or a tenancy at the mere sufferance or will of the owner." *Matthews v. Matthews*, 49 Hun (N. Y.) 346 [*citing Dolittle v. Eddy*, 7 Barb. (N. Y.) 74; *People v. Annis*, 45 Barb. (N. Y.) 304; *Haywood v. Miller*, 3 Hill (N. Y.) 90; *Russell v. Russell*, 32 How. Pr. (N. Y. Supreme Ct.) 400; *People v. Bigelow*, 11 How. Pr. (N. Y. Supreme Ct.) 83; *Sims v. Humphrey*, 4 Den. (N. Y.) 185].

An action under Rev. Stat. Wis., § 3358, providing that any "tenant or lessee" may, under certain circumstances, be summarily dispossessed by an action before a justice, cannot be maintained unless the relation of landlord and tenant exists. *Hunter v. Maanum*, 78 Wis. 656.

In *Matthews v. Matthews*, 49 Hun (N. Y.) 346, it was held that summary proceedings cannot be maintained where the relation is not strictly that of landlord and tenant.

"The action of summary process cannot be maintained unless the relation of landlord and tenant exists between the parties; nor unless the tenant is holding over the term of his tenancy." *Richmond v. Stahle*, 48 Conn. 22.

Each Party Claiming Paramount Title. — Where each party claims to have the paramount title to the premises, summary proceedings cannot be maintained for their possession, under How. Mich. Stat., § 8295.

Tenant Discharged under Insolvent Law. — In *Roach v. Cosine*, 9 Wend. (N. Y.) 228, it was said that the authority to maintain such action was also extended to the case of a tenant who has been

discharged under the insolvent law or the act for the relief of his person from imprisonment.

1. *Birdsall v. Phillips*, 17 Wend. (N. Y.) 475; *Evertson v. Sutton*, 5 Wend. (N. Y.) 281; *People v. Simpson*, 28 N. Y. 55; *Benjamin v. Benjamin*, 5 N. Y. 383; *Roach v. Cosine*, 9 Wend. (N. Y.) 227; *Sims v. Humphrey*, 4 Den. (N. Y.) 185; *People v. Bigelow*, 11 How. Pr. (N. Y. Supreme Ct.) 83.

"By the construction given to the statute, it must appear that the relation of landlord and tenant existed by agreement, and not by mere operation of law — that the relation was conventional." *Marvin, J.*, in *People v. Simpson*, 28 N. Y. 55.

In *Burgett v. Bothwell*, 86 Ind. 149, it was held that where a complaint for the recovery of real estate fails to show the relation of landlord and tenant to exist between the parties, which relation alone would confer jurisdiction, it will be insufficient on motion in arrest of judgment in the Circuit Court.

Assignee of Rent Cannot Maintain. — In *Chamberlin v. Brown*, 2 Dougl. (Mich.) 120, it was held that a suit against a lessee to recover possession of the demised premises on account of the nonpayment of rent, etc., was properly brought by the lessor in his own name, although he had previously assigned to a third person the rents to accrue under the lease.

2. *Burnett v. Scribner*, 16 Barb. (N. Y.) 621; *Benjamin v. Benjamin*, 5 N. Y. 388, note.

In *Maine*, however, it is held that it is not necessary to allege or prove that the relation of landlord and tenant existed between the parties at the time of the service of notice to quit. *Dunning v. Finson*, 46 Me. 546.

3. *Carlisle v. McCall*, 1 Hilt. (N. Y.) 399, in which case the evidence showed that the defendants entered upon the premises immediately before the expiration of the term of the plaintiff's tenant, but the tenant testified that she never gave them permission to come in,

action of ejectment, where the entry is unaccompanied by such force as to warrant proceedings for forcible entry and detainer.^{1a}

Employee Occupying Premises. — Nor will the action lie against servant or employee occupying premises belonging to his employer as part of his remuneration, after the expiration of his term of service.³

Grantor Retaining Possession. — It will not lie against the grantor of premises who has conveyed them to the plaintiff by a deed containing a clause providing that possession is to be retained by said grantor until a certain date and who holds over after such date, since the relation of lessor and lessee cannot be said ever to have existed between the parties.³

Possession under Agreement to Purchase. — Nor will such proceedings lie against one in possession of premises, under an agreement to purchase, who has defaulted in payment after demand.⁴

Necessity of Reservation of Rent. — This remedy is, as a rule, only

nor sold nor assigned her lease to them; that they came in as she was moving out, claiming that the premises were theirs. It was held that there was no relation of landlord and tenant between the plaintiff and the defendants which could support summary proceedings. See also *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 226.

Entry After Abandonment by Tenant. — Where the defendant abandons the demised premises before his lease has expired, and another takes possession without the tenant's privity or consent, the occupancy of such third party creates no such relation of landlord and tenant between him and the lessor as will authorize his removal by summary proceedings, even though, at the time of taking possession, the intruder declares to the lessor that he does so under the tenant. *People v. Hovey*, 4 Lans. (N. Y.) 86.

1. *Carlisle v. McCall*, 1 Hilt. (N. Y.) 399.

2. *McQuade v. Emmons*, 38 N. J. L. 397. In this case the defendant, who was employed by the month as a workman, occupied a tenement of his employer, having the use thereof as a partial remuneration for service. It was held that the relation was one of master and servant, and not of landlord and tenant, and that proceedings under the Landlord and Tenant Act would not lie upon his holding possession of the tenement after his term of service was ended. The removal of such a one could be accomplished by the act of the master, without the aid of any judicial tribunal.

Possession as Custodian. — In *Reeder v. Bell*, 7 Bush (Ky.) 255, it was held that a party in possession under an agreement to occupy and take care of the land for six years, with the understanding that he might secure the title by purchase when he should become able, was not a tenant in the sense of the statute providing the summary action of forcible entry and detainer against a tenant holding beyond his term.

3. *Sims v. Humphrey*, 4 Den. (N. Y.) 185.

4. *People v. Bigelow*, 11 How. Pr. (N. Y. Supreme Ct.) 84; *Johnson v. Hauser*, 82 N. Car. 375.

Does Not Lie Against Mortgagor. — The Landlord and Tenant Act does not apply to a mortgagor who is allowed to retain possession, and on demand after default refuses to surrender possession. The provisions of that act cannot be extended by any contrivance so as to give to the mortgagee the benefit of summary proceedings, as against a lessee for a term of years. *Greer v. Wilbur*, 72 N. Car. 502.

In *Roach v. Cosine*, 9 Wend. (N. Y.) 228, the court said: "It cannot be contended that the statute under which these proceedings were had was intended to afford an expeditious mode of foreclosing a mortgage. It was intended to apply to the cases of landlord and tenant strictly, and the other cases specified. It has often been said that a mortgagor, after forfeiture, is *quasi*-tenant to the mortgagee; but he is so only for the purpose of receiving notice to quit. * * * He is not that kind

available in the case of leases on which a certain rent is clearly and distinctly reserved,¹ and is not applicable to cases where the rent reserved cannot be rendered certain without the intervention of a jury.²

Term Must Expire by Lapse of Time.—Summary proceedings for holding over after expiration of the tenant's term cannot be brought on the ground of the expiration of such term by forfeiture.³

(4) *Who May Maintain*—**In General.**—As a general rule, the right of the landlord to maintain summary proceedings is held to extend to any purchaser from him, irrespective of such purchaser's prior actual possession,⁴ though in some states it seems

of tenant who is to be dispossessed in the summary manner contemplated by this statute."

May be Shown that Instrument Is a Mortgage.—In *People v. Howlett*, 76 N. Y. 574, 13 Hun (N. Y.) 138, it was held that the party in possession may show that the instrument which purports to create the relation of landlord and tenant between the parties constitutes in fact a mortgage to secure the repayment of a loan, and that such mortgage was void for usury. The rule that a tenant cannot dispute the title of his landlord does not apply to such case.

1. *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 228; *McGee v. Fessler*, 1 Pa. St. 126; *Graver v. Fehr*, 89 Pa. St. 460; *Blashford v. Duncan*, 2 S. & R. (Pa.) 480; *Scott v. Fuller*, 3 P. & W. (Pa.) 55.

2. *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 228; *McGee v. Fessler*, 1 Pa. St. 126.

Agreement to Work on Shares Insufficient.—When, instead of a reservation in a lease of a certain rent or of what may be rendered certain, the tenant is only bound to yield a proportion of the grain raised by him, or, in other words, is to work the farm on shares, the landlord, upon a noncompliance with the terms of the lease, cannot remove the tenant from the possession of the demised premises by availing himself of the statute authorizing summary proceedings. *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 228; *Roach v. Cosine*, 9 Wend. (N. Y.) 227.

3. *Oakley v. Schoonmaker*, 15 Wend. (N. Y.) 228. See also *Benjamin v. Benjamin*, 5 N. Y. 383.

In *Penoyer v. Brown*, 13 Abb. N. Cas. (N. Y. City Ct.) 82, it was held that a provision in an apartment lease

declaring that the lease was granted "upon the express condition" that the landlord, if he should deem the conduct of the tenant objectionable, might re-enter either with or without legal process and repaying rent, and that in the event of the tenant's violation of any condition, the lease should cease at the landlord's option, was a condition subsequent, and not a conditional limitation, and hence the landlord could not dispossess the tenant under such a clause by summary proceedings, his remedy being by action.

4. *Arkansas*.—*Ish v. Morgan*, 48 Ark. 413; *Mason v. Delancy*, 44 Ark. 444; *Johnson v. West*, 41 Ark. 535; *Brockway v. Thomas*, 36 Ark. 518; *Halliburton v. Sumner*, 27 Ark. 460; *Bradley v. Hume*, 18 Ark. 284; *Frank v. Hedrick*, 18 Ark. 304.

Kentucky.—*Goldsberry v. Bishop*, 2 Duv. (Ky.) 143; *Goodlet v. Cleaveland*, 12 B. Mon. (Ky.) 430; *Mason v. Bascom*, 3 B. Mon. (Ky.) 269; *Herndon v. Bascom*, 8 Dana (Ky.) 113; *Lewis v. Stith*, 2 Litt. (Ky.) 295; *Allison v. Thompson*, 1 Litt. (Ky.) 32; *Mattingly v. Lancaster*, 2 A. K. Marsh. (Ky.) 30; *Nelson v. Cox*, 2 A. K. Marsh. (Ky.) 151.

Nebraska.—*Smith v. Kaiser*, 17 Neb. 184.

Vendee under Contract to Purchase.—The purchaser from the landlord must have the legal title. An equitable interest under a contract to purchase is insufficient. *Sullivan v. Enders*, 3 Dana (Ky.) 66.

Purchaser at Judicial Sale.—In *Kentucky* the action may be brought by one who succeeds to the title of the landlord by virtue of a judicial sale, where the tenant has attorned to him and holds over his term. *McMurtry v. Adams*, 3 Bush (Ky.) 70.

that the right of action exists in the landlord alone¹ until it is granted to his successor in estate by statute.²

Assignees of Lease or Reversion. — Not only the original lessor, but also the assignee of the lease or of the reversion, may maintain the action to remove the lessee.³

Heirs, devisees, and grantees. — So heirs,⁴ devisees,⁵ and grantees⁶

1. *Dwine v. Brown*, 35 Ala. 596; *Mounger v. Burks*, 17 Ala. 48; *Reay v. Cotter*, 29 Cal. 169; *Blue v. Sayre*, 2 Dana (Ky.) 214; *Hoskins v. Helm*, 4 Litt. (Ky.) 309.

2. *McDonald v. Hanlon*, 79 Cal. 442; *Thomasson v. Wilson*, 146 Ill. 384.

In California, "prior to an amendment of the statute by the insertion of the words 'or the successor in estate of his landlord,' it was held that the right to remove a tenant by summary proceeding like the present was conferred upon the conventional landlord alone, and not upon his successor in the estate." *Martel v. Meehan*, 63 Cal. 47. See also *McDonald v. Hanlon*, 79 Cal. 442.

3. *Alabama*. — *Stinson v. Gosset*, 4 Ala. 170.

Connecticut. — Gen. Stat. (1888), § 1355; *Peck v. Peck*, 35 Conn. 390.

Illinois. — Stat. Feb. 16, 1865, § 4; *Ball v. Chadwick*, 46 Ill. 28; *Dudley v. Lee*, 39 Ill. 339; *Howland v. White*, 48 Ill. App. 236.

Indiana. — 2 G. & H. Stat., p. 358, §§ 7, 10; *Avery v. Smith*, 8 Blackf. (Ind.) 223.

Kentucky. — Rev. Code, § 501; *McMurtry v. Adams*, 3 Bush (Ky.) 70; *Mason v. Bascom*, 3 B. Mon. (Ky.) 269; *Herndon v. Bascom*, 8 Dana (Ky.) 113. Compare *Helm v. Slader*, 1 A. K. Marsh. (Ky.) 320.

Louisiana. — *Walker v. Vanwinkle*, 8 Martin N. S. (La.) 560.

Missouri. — Rev. Stat. (1889), § 6402. *New Jersey*. — *State v. Idler*, 54 N. J. L. 467.

New York. — *Birdsall v. Phillips*, 17 Wend. (N. Y.) 463.

Pennsylvania. — *Purd. Dig.* (1861) p. 613, § 18; *De Coursey v. Guarantee Trust, etc., Deposit Co.*, 81 Pa. St. 217; *McKeon v. King*, 9 Pa. St. 213; *Duff v. Fitzwater*, 54 Pa. St. 224; *White v. Arthurs*, 24 Pa. St. 96. But see *Cook v. McDevitt*, 6 Phila. (Pa.) 131; *May v. Kendall*, 8 Phila. (Pa.) 244.

Wisconsin. — *Savage v. Carney*, 8 Wis. 162.

Contra. — *Reay v. Cotter*, 29 Cal. 169.

By Lessee Against Former Lessee. — In

Gardner v. Keteltas, 3 Hill (N. Y.) 330, a dictum of Nelson, C. J., is to the effect that the statute authorizes proceedings by a lessee against a former lessee in possession, as an assignee of the landlord.

Attornment Unnecessary. — By the statute of 4 Anne, c. 16, § 9, which has been embodied in the statutes of a number of the states of the United States, an attornment is not essential to the validity of an assignment of the reversion by the landlord, *Kellum v. Berkshire L. Ins. Co.*, 101 Ind. 455; *Burden v. Thayer*, 3 Met. (Mass.) 76; *Marsters v. Cling*, 163 Mass. 477; *Wetterer v. Soubirous*, 22 Misc. Rep. (N. Y. Supreme Ct.) 739; *Tilford v. Fleming*, 64 Pa. St. 300; *Mortimer v. O'Reagan*, 10 Phila. (Pa.) 500; *Howland v. White*, 48 Ill. App. 236; compare *Fisher v. Deering*, 60 Ill. 114; and an alienee of the landlord may, without any attornment, institute proceedings to recover possession of the premises let by his alienor. *Tilford v. Fleming*, 64 Pa. St. 300; *Mortimer v. O'Reagan*, 10 Phila. (Pa.) 500.

4. *Howland v. White*, 48 Ill. App. 236; *Avery v. Smith*, 8 Blackf. (Ind.) 223; *Turly v. Foster*, 2 A. K. Marsh. (Ky.) 204; *Young v. Smith*, 28 Mo. 65; *Pentz v. Kuester*, 41 Mo. 449.

5. *Avery v. Smith*, 8 Blackf. (Ind.) 223; *Young v. Smith*, 28 Mo. 65; *Pentz v. Kuester*, 41 Mo. 449.

6. *White v. Bailey*, 14 Conn. 271; *Hildreth v. Conant*, 10 Met. (Mass.) 298; *Hollis v. Pool*, 3 Met. (Mass.) 350. *Bennett v. Robinson*, 27 Mich. 32; *Wallace v. Bahlhorn*, 68 Mich. 87; *Vos v. Dykema*, 26 Mich. 399; *Young v. Smith*, 28 Mo. 65; *Pentz v. Kuester*, 41 Mo. 449; *White v. Arthurs*, 24 Pa. St. 96.

Assignee of Landlord's Grantee. — In *Duff v. Fitzwater*, 54 Pa. St. 224, it was held that where a lessor, after giving notice to quit, aliens the premises, and his grantee conveys them to another, the latter is an assignee within the meaning of the Act of 1772, and may recover possession under it, such act not being repealed by the Act of 1863.

may maintain the action, since as to the tenant they occupy the relation, and are entitled to all the rights, of the original landlord.¹

Purchaser at Execution Sale. — Where a landlord whose interest in an estate has been sold under an execution executes a quitclaim to the purchaser, who subsequently obtains title under the sheriff's sale, a tenancy at will of the premises is not so far determined but that the purchaser may maintain summary proceedings to recover possession.²

Landlord Conveying All Interest. — Summary proceedings cannot, of course, be maintained in the name of the original landlord after he has conveyed all his interest in the property.³ He may, however, maintain such proceedings after the expiration of the term, although he has given a lease to a third party which is to commence at once upon the expiration of the lease to the tenant in possession.⁴

(5) *Against Whom* — **Tenants at Will or by Sufferance.** — Summary proceedings are proper not only against tenants for a definite term,

In Missouri it was formerly held that the assignee or vendee of a landlord could not maintain such action against the tenant. *Holland v. Reed*, 11 Mo. 605; *Picot v. Masterson*, 12 Mo. 303. This rule, however, was changed by Rev. Code Mo. (1855), p. 794, § 36, and now heirs, devisees, grantees, and assigns may maintain the action. *Young v. Smith*, 28 Mo. 65; *Pentz v. Kuester*, 41 Mo. 449.

Grantee for Life of Landlord's Estate. — In *White v. Arthurs*, 24 Pa. St. 96, it was held that the grantee for life of the landlord's estate may maintain summary proceedings to recover possession as assignee of the reversion.

1. *Howland v. White*, 48 Ill. App. 236; *Young v. Smith*, 28 Mo. 65; *Pentz v. Kuester*, 41 Mo. 449.

2. *Birdsall v. Phillips*, 17 Wend. (N. Y.) 463. See also *Brown v. Betts*, 13 Wend. (N. Y.) 30; *Hallenbeck v. Garner*, 20 Wend. (N. Y.) 22.

Sheriff's Vendee. — In *McKeon v. King*, 9 Pa. St. 213, it was held that a sheriff's vendee may maintain the action.

Lessee of Purchaser at Execution Sale. — In *Marsters v. Cling*, 163 Mass. 477, it was held that the lessee under a written lease of the purchaser at an execution sale of lands may, after written notice to the tenant at will of the original owner to quit and deliver up the premises, maintain an action on Pub. Stat. Mass., c. 175, against such tenant at will to recover possession of the

lands without showing forcible entry or forcible detainer; and it is immaterial that the defendant never held under nor attorned to the plaintiff.

3. *Boyd v. Sarnetz*, 17 Misc. Rep. (N. Y. Second Dist. Ct.) 728.

4. *Goelet v. Roe*, 14 Misc. Rep. (N. Y. C. Pl.) 28; *Imbert v. Hallock*, 23 How. Pr. (N. Y. C. Pl.) 456.

Has Equal Right with Second Lessee. — In *Goelet v. Roe*, 14 Misc. Rep. (N. Y. C. Pl.) 28, the court said: "Neither does the dictum of Nelson, C. J., in *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, help the ruling made below in the case at bar. It is to the effect that the statute authorizes proceedings by a lessee against a former lessee in possession, as an assignee of the landlord, but it is not to be concluded therefrom that the learned judge meant to be understood as entertaining the view that the landlord or lessor could not also maintain such proceedings."

Right of Landlord After Conveyance. — In *Logan v. Woolwine*, 56 Mo. App. 453, it was held that the landlord's right to sue his tenant for the premises let, at the end of the term, will not be terminated by a conveyance by the landlord to a stranger without an attornment by the tenant, if it be stipulated at the time between the landlord and his grantee that the former should deliver possession of the premises to the latter at the end of the term, and should then dispossess the tenant if necessary.

but also against tenants or lessees at will or by sufferance,¹ as well as against tenants from year to year.²

Judgment Debtor. — A summary proceeding will lie against a judgment debtor who continues in the possession of real estate after title thereto has been perfected under a sale on execution against him. Such a judgment debtor is a tenant within the meaning of the statute.³

(6) *Jurisdiction — Justices' and Other Courts.* — Application for the removal of a tenant or lessee may, it seems, in all the states, be made by the landlord before justices of the peace for the town or county in which the premises or a portion thereof are situated.⁴

1. *Prouty v. Prouty*, 5 How. Pr. (Ontario County Ct.) 81.

In *Roach v. Cosine*, 9 Wend. (N. Y.) 228, it was held that summary proceedings are authorized by statute against a tenant by sufferance.

Lease Without Reservation of Rent. — Where the landlord permits another to enter and occupy without any agreement as to the continuance of such occupation, or any provision as to payment of rent, a tenancy at will or by sufferance is thereby created, and there is such relation of landlord and tenant as will authorize summary proceedings. *Peer v. O'Leary*, 8 N. Y. Misc. Rep. (Buffalo Super. Ct.) 350, where the court said: "It is true that the conventional relation of landlord and tenant must exist to enable the landlord to institute these proceedings; but that simply means that the occupancy of the premises must be by agreement between them as landlord and tenant, but it does not follow that the landlord must exact rent."

2. *Prouty v. Prouty*, 5 How. Pr. (Ontario County Ct.) 81, holding that tenants from year to year may be removed by "summary proceedings" under the Landlord and Tenant Acts of 1830 and 1849, notwithstanding the omission from those acts of the phrase "from year to year," which was employed in the statute of 1820.

3. *Spraker v. Cook*, 16 N. Y. 567.

Purchaser of Occupied Premises. — An action will lie at the suit of a purchaser of land which at the time of the purchase was in the possession of a tenant under a lease from the vendor, upon demand, etc., after the expiration of the term for which it was leased. *Bradley v. Hume*, 18 Ark. 284; *Morrow v. Sawyer*, 82 Ga. 226; *Green v. Sternberg*, 12 Mo. App. 578.

4. *Alabama.* — *Ward v. Lewis*, 1

Stew. (Ala.) 26; *Beck v. Glenn*, 69 Ala. 121.

California. — *Julian v. Gallen*, 2 Cal. 358; *Howard v. Valentine*, 20 Cal. 282; *O'Callaghan v. Booth*, 6 Cal. 63; *Hart v. Moon*, 6 Cal. 161; *Freeman v. Powers*, 7 Cal. 104.

Connecticut. — *White v. Bailey*, 14 Conn. 271; *Du Bouchet v. Wharton*, 12 Conn. 533; *Fox v. Nathans*, 32 Conn. 348.

Colorado. — *Reynolds v. Larkens*, 10 Colo. 129.

Georgia. — *Du Bignon v. Tufts*, 66 Ga. 59.

Indiana. — *Poffenberger v. Blackstone*, 57 Ind. 288; *Burgett v. Bothwell*, 86 Ind. 149; *Sturgeon v. Hitchens*, 22 Ind. 107; *Goodwine v. Barnett*, 2 Ind. App. 16; *O'Connell v. Gillespie*, 17 Ind. 459; *Short v. Bridwell*, 15 Ind. 211; *Scott v. Willis*, 122 Ind. 1.

Iowa. — *Easton v. Fleming*, 51 Iowa 305; *Dicks v. Hatch*, 10 Iowa 380; *Kuhn v. Kuhn*, 70 Iowa 682.

Massachusetts. — *Hastings v. Pratt*, 8 Cush. (Mass.) 121.

New York. — *Brown v. Cassady*, 34 Hun (N. Y.) 55; *People v. McAdam*, 28 Hun (N. Y.) 284; *People v. Willis*, 5 Abb. Pr. (N. Y. Supreme Ct.) 205; *Campbell v. Mallory*, 22 How. Pr. (Yates County Ct.) 183. And see generally as to where, under various statutes, the application might be made, *People v. Russell*, 19 Abb. Pr. (N. Y. Supreme Ct.) 136; *Marry v. James*, 37 How. Pr. (N. Y. C. Pl.) 52; *Hasler v. Johnston*, 59 How. Pr. (N. Y. Marine Ct.) 432; *Cain v. Flood*, 21 Civ. Pro. Rep. (N. Y. C. Pl.) 116; *Sperling v. Isaacs*, 13 Daly (N. Y.) 277; *People v. Willis*, 5 Abb. Pr. (N. Y. Supreme Ct.) 205; *McIntyre v. Hernandez*, 7 Abb. Pr. N. S. (N. Y. Super. Ct.) 214; *Roach v. Cosine*, 9 Wend. (N. Y.) 228.

North Carolina. — *Hughes v. Mason*,

Jurisdiction of such proceedings is not, however, confined entirely to justices of the peace, but the statutes of the various states differ in their provisions as to the other courts which may assume it.¹

Strict Compliance with Statute Necessary. — Jurisdiction in summary proceedings must be taken and exercised in strict conformity to the statute conferring it.²

84 N. Car. 472; *Credle v. Gibbs*, 65 N. Car. 192; *McCombs v. Wallace*, 66 N. Car. 481; *Forsythe v. Bullock*, 74 N. Car. 135.

Ohio. — *Brown v. Burdick*, 25 Ohio St. 260; *Murphy v. Lucas*, 2 Ohio 255. *Pennsylvania*. — *Graver v. Fehr*, 89 Pa. St. 460.

South Carolina. — *State v. Marshall*, 24 S. Car. 507.

Vermont. — *Middlebury College v. Lawton*, 23 Vt. 688; *Barton v. Learned*, 26 Vt. 192; *Davis v. Hemenway*, 27 Vt. 589; *Baldwin v. Skeels*, 51 Vt. 121; *Pitkin v. Burch*, 48 Vt. 521; *Horan v. Thomas*, 60 Vt. 325.

Wisconsin. — *Newton v. Leary*, 64 Wis. 190; *Conley v. Conley*, 78 Wis. 665; *Conley v. McGarey*, 78 Wis. 669.

Exception to General Rule. — "Justices of the peace have no jurisdiction to hear and determine an action for the recovery of real estate, as a general rule. This belongs to the Circuit Court. They have, however, where the relation of landlord and tenant exists between the parties." *Best, C.*, in *Burgett v. Bothwell*, 86 Ind. 149.

Coextensive with County. — The jurisdiction of a justice of the peace in summary proceedings is coextensive territorially with the county, and complaint may be made before any justice of the peace of the county in which the lands are situated. *Scott v. Willis*, 122 Ind. 1; *Sturgeon v. Hitchens*, 22 Ind. 107.

Justice of Another County. — In *Du Bignon v. Tufts*, 66 Ga. 59, it was held that a justice of the peace of one county may administer oath and issue warrant necessary to dispossess a tenant holding over in another county.

Justice of Adjacent Precinct. — Under the Civil Code of *Alabama* (1886), § 3385, which holds that the complaint shall be exhibited to and tried before a justice of the peace for the precinct where the land or tenement is situated, and if in city or corporate town, before the mayor, intendant, or any justice of the peace thereof, the justice of the adjoining precinct has jurisdiction if

the office is vacant, or the justice, mayor, or intendant is disqualified.

1. In *Indiana* Circuit Courts have concurrent jurisdiction with justices of the peace in such actions. *Poffenberger v. Blackstone*, 57 Ind. 288. See also *Du Bignon v. Tufts*, 66 Ga. 59.

Such actions could formerly, in *Indiana*, be commenced only before a justice of the peace of the county in which the land lay, but by an act approved March 6, 1853, it was provided that in all such actions the Court of Common Pleas should have concurrent jurisdiction with justices of the peace. When by the Act of March 6, 1873 (§ 79), Courts of Common Pleas were abolished, the same jurisdiction was conferred on Circuit Courts as had before been exercised by Courts of Common Pleas (1 Rev. Stat. 1876, p. 390). *Poffenberger v. Blackstone*, 57 Ind. 288.

In *California* jurisdiction is conferred upon County Courts in actions to recover the possession of premises held over by tenants against the consent of the landlord. *Stoppelkamp v. Mangeot*, 42 Cal. 316; *Caulfield v. Stevens*, 28 Cal. 118; *Courtwright v. Bear River, etc.*, Min. Co., 30 Cal. 573.

In *Iowa* District and Superior Courts within the county have jurisdiction. *Iowa Code* (1897), § 4211.

In *Maine* trial justices and judges of municipal and police courts have jurisdiction. *Rev. Stat. Maine* (1883), p. 787; *Baker v. Cooper*, 57 Me. 390; *Dunning v. Finson*, 46 Me. 546; *Lithgow v. Moody*, 35 Me. 214.

In *Massachusetts* a landlord may take the writ from a police, district, or municipal court, or from a trial justice. *Mass. Pub. Stat.* (1882), p. 1025.

In *Arkansas* the Circuit Court of the county has jurisdiction. *Ark. Stat.* (1894), § 3447; *Brockway v. Thomas*, 36 Ark. 518; *Buckner v. Warren*, 41 Ark. 532; *Mason v. Delancy*, 44 Ark. 444; *Necklace v. West*, 33 Ark. 682.

2. *Campbell v. Mallory*, 22 How. Pr. (Yates County Ct.) 183; *Colt v. Eves*, 12 Conn. 259.

Cannot be Conferred by Covenant. — In

Jurisdiction Must Appear on Record. — Such a proceeding is in derogation of the common law, and where advantage is taken of this remedy the necessary jurisdiction must appear on the record, or the proceeding is *coram non judice* and is utterly void.¹

Raising Question of Title. — As to the effect of raising the question of title in summary proceedings, see article JUSTICES OF THE PEACE, *ante*, p. 664.

(7) **Affidavit** — (a) **Necessity For.** — Where a landlord is entitled, for any of the causes previously stated, to dispossess a tenant, he may, after having given proper notice to the tenant, where such notice is required,² institute summary proceedings by affidavit or verified complaint before the proper judge or justice or other officer having jurisdiction of such proceedings, setting out therein the reasons justifying the removal of the tenant.³

Beach v. Nixon, 9 N. Y. 35, it was held that the law, and not the consent of parties, confers jurisdiction, and that therefore it is not competent for the parties to provide by their lease that in case of the violation of any of its provisions the term shall cease, and the landlord shall be entitled to recover possession by summary proceedings. See also *Burns v. Nash*, 23 Ill. App. 552; *Hughes v. Mason*, 84 N. Car. 472.

Sufficient Affidavit Essential. — Unless the magistrate acquires jurisdiction by virtue of preliminary affidavit, his subsequent acts are without authority, and jurisdiction cannot be conferred in such a case by a general appearance of the tenant without objecting to the insufficiency of the affidavit. *Campbell v. Mallory*, 22 How. Pr. (Yates County Ct.) 183.

Judge Acting Without Authority a Trespasser. — In *Evertson v. Sutton*, 5 Wend. (N. Y.) 281, it was held that a judge who issues a warrant under the statute authorizing summary process, without having obtained jurisdiction of the matter, is a trespasser, and an action lies against him by the person dispossessed, although such person came illegally into possession.

1. *Graver v. Fehr*, 89 Pa. St. 460.

2. As to the necessity of giving notice to the tenant, and the manner in which this should be done, see the title *Landlord and Tenant*, Am. and Eng. Encyc. of Law.

3. *Connecticut.* — *Miller v. Lampson*, 66 Conn. 432.

Georgia. — *Moody v. Ronaldson*, 38 Ga. 652; *Thompson v. Chapman*, 57 Ga. 16; *Du Bignon v. Tufts*, 66 Ga. 59; *Hitch v. Frasier*, 75 Ga. 880; *Lamar v. Sheppard*, 84 Ga. 561.

Illinois. — *Dunne v. School Trustees*, 39 Ill. 578.

Maryland. — *Burrell v. Lamm*, 67 Md. 580; *Mears v. Remare*, 33 Md. 246.

Minnesota. — *Engels v. Mitchell*, 30 Minn. 122.

Missouri. — *Ish v. Chilton*, 26 Mo. 256; *Mooers v. Martin*, 23 Mo. App. 654; *Alexander v. Westcott*, 37 Mo. 109; *State v. Allen*, 45 Mo. App. 551.

New Jersey. — *Scheifele v. Irving*, 53 N. J. L. 180; *State v. Idler*, 54 N. J. L. 467; *State v. Lane*, 51 N. J. L. 504; *Schuyler v. Trefren*, 26 N. J. L. 213; *Stanley v. Horner*, 24 N. J. L. 511; *State v. Smith*, 56 N. J. L. 446; *Lloyd v. Richman*, 57 N. J. L. 385; *Morris Canal, etc., Co. v. Mitchell*, 31 N. J. L. 100; *Shepherd v. Sliker*, 31 N. J. L. 432; *Steffens v. Earl*, 40 N. J. L. 128; *State v. Dennis*, 43 N. J. L. 380; *State v. Warner*, (N. J. 1898) 39 Atl. Rep. 697.

New York. — *People v. Teed*, 48 Barb. (N. Y.) 424; *Wiggin v. Woodruff*, 16 Barb. (N. Y.) 474; *Deuel v. Rust*, 24 Barb. (N. Y.) 438; *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *People v. Platt*, 43 Barb. (N. Y.) 116; *Benjamin v. Benjamin*, 5 N. Y. 383; *People v. Matthews*, 38 N. Y. 451; *Cunningham v. Goellet*, 4 Den. (N. Y.) 71; *Hallenbeck v. Garner*, 20 Wend. (N. Y.) 22; *Rogers v. Lynds*, 14 Wend. (N. Y.) 173; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; *Hill v. Stocking*, 6 Hill (N. Y.) 314; *Drummond v. Fisher* (C. Pl.) 16 N. Y. Supp. 867; *Ward v. Burgher*, 90 Hun (N. Y.) 540; *Earle v. McGoldrick*, 15 Misc. Rep. (N. Y. C. Pl.) 135; *Ash v. Purnell*, 16 Daly (N. Y.) 189, 26 Abb. N. Cas. (N. Y.) 92, 19 Civ. Pro. Rep. (N. Y.) 234; *Goellet v. Lawlor*, 16 Misc. Rep. (N. Y. Supreme Ct.) 59; *Mar-*

(b) **Requisites — Generally.** — The affidavit or complaint should not be uncertain or contradictory, and should state all the facts necessary to give jurisdiction.¹ It must set out the facts authorizing the removal; a statement of the maker's conclusions from facts

chand v. Haber, 16 Misc. Rep. (N. Y. Supreme Ct.) 319; *Brown v. New York*, 66 N. Y. 385; *Jarvis v. Driggs*, 69 N. Y. 143.

Pennsylvania. — *Cunningham v. Gardner*, 4 W. & S. (Pa.) 120; *Fisher v. Bailey*, 1 Ashm. (Pa.) 209.

Wisconsin. — *Rains v. Oshkosh*, 14 Wis. 373; *Conley v. Conley*, 78 Wis. 665; *Conley v. McGarey*, 78 Wis. 669.

Essential to Confer Jurisdiction. — In *Conley v. Conley*, 78 Wis. 665, the court said: "The first step in the action is the filing of a complaint with the justice in which must be stated, among other things, 'the facts which authorize the removal of the person in possession.' Such a complaint must be so filed before the justice can lawfully issue process to bring in the tenant. If any material fact is omitted from the complaint which the statute requires to be stated therein, the justice has no jurisdiction to issue a summons, and because the action is entirely statutory, such want of jurisdiction goes to the subject-matter and is not cured by a general appearance of the tenant."

Begun by Writ. — In at least three states, Massachusetts, New Hampshire, and Vermont, process is begun by writ from the magistrate. *Hastings v. Pratt*, 8 Cush. (Mass.) 121; *Pray v. Wasdell*, 146 Mass. 324; *Rooney v. Gillespie*, 6 Allen (Mass.) 74; N. H. Pub. Stat. (1881), c. 246, § 8; Vermont Stat. (1894), § 1560; *Barnes v. Tenney*, 52 Vt. 557.

Complaint Substitute for Declaration. — No declaration is necessary in such suits, the complaint standing in lieu of a declaration. *Caswell v. Ward*, 2 Dougl. (Mich.) 374.

Landlord's Affidavit Sufficient Foundation. — In *Cunningham v. Gardner*, 4 W. & S. (Pa.) 120, it was held that no other proof is necessary to found a proceeding by a landlord to dispossess his tenant than the affidavit of the landlord himself.

Affidavit Not Amendable. — In *Cardin v. Standly*, 20 Ga. 105, it was held that the affidavits in a proceeding of this sort are not what constitutes the plead-

ings and are therefore not amendable. See also *Beall v. Blake*, 13 Ga. 217; *Perry v. Martin*, 26 Ga. 436.

Affidavit by Agent. — Where the affidavit is made by an agent of the landlord, it is not sufficient that the deponent be described as agent, but such fact must be directly sworn to. *Cunningham v. Goelet*, 4 Den. (N. Y.) 71. See also *People v. Johnson*, 1 Thomp. & C. (N. Y.) 578.

Omission of Affiant's Name. — If the name of the affiant be omitted it will be a clerical error and may be corrected by the insertion of the proper name. *Johnson v. Tuggle*, 27 Miss. 836.

1. *Michigan.* — *Bryan v. Smith*, 10 Mich. 229; *Caswell v. Ward*, 2 Dougl. (Mich.) 374; *Royce v. Bradburn*, 2 Dougl. (Mich.) 377.

New Jersey. — *Hopper v. Chamberlain*, 34 N. J. L. 221; *State v. Dennis*, 43 N. J. L. 380.

New York. — *People v. Matthews*, 38 N. Y. 451; *Hill v. Stocking*, 6 Hill (N. Y.) 317; *Wiggin v. Woodruff*, 16 Barb. (N. Y.) 474; *Hallenbeck v. Garner*, 20 Wend. (N. Y.) 22; *People v. De Camp*, 12 Hun (N. Y.) 378; *People v. Stuyvesant*, 1 Hun (N. Y.) 102; *People v. Boardman*, 4 Keyes (N. Y.) 59.

Pennsylvania. — *McDermott v. McIlwain*, 75 Pa. St. 341; *Uber v. Hickson*, 6 Phila. (Pa.) 132; *McGinnis v. Vernon*, 67 Pa. St. 149; *Erety v. Wiltbank*, 8 Phila. (Pa.) 300.

Wisconsin. — *Conley v. Conley*, 78 Wis. 665.

Landlord's Duty to Make Out a Case. — In *People v. Matthews*, 38 N. Y. 451, the court said: "In these summary proceedings it is the duty of the landlord to make a case, and if he fails so to do, the court cannot help him out by reading his affidavit otherwise than he has himself made it."

Sufficient Facts Set Out but Not Proved. — If sufficient facts are set out in the affidavit, but not proved, the jurisdiction fails. *Fowler v. Roe*, 25 N. J. L. 549.

Omission of Venue. — The omission of a venue in the affidavit is a jurisdictional defect. *People v. De Camp*, 12 Hun (N. Y.) 378.

not set out will not suffice.¹

Allegation of Relation of Landlord and Tenant. — The affidavit or complaint should show that the person intended to be removed is in the occupation of the premises,² and it should also establish the fact of the conventional relationship of landlord and tenant.³ It should distinctly allege how the defendants are in possession, in

1. *Jolly v. Ghering*, 40 Ind. 139; *State v. Lane*, 51 N. J. L. 504; *State v. Warner*, (N. J. 1898) 39 Atl. Rep. 697.

In *Fowler v. Roe*, 25 N. J. L. 549, it was held that an affidavit in which the affiant states that the defendant is "her tenant" and holds over premises "heretofore leased to him," his term "having expired," is insufficient, such allegations being but the claimant's conclusions from facts which are not disclosed.

Affidavit of Assigns. — An affidavit in which it is stated that the original lessor "sold and conveyed the said house and lot to deponent, together with the appurtenances and the rents, issues, and profits thereof, by deed of conveyance," giving the date of the same and the time and place of recording, is not void as being a mere conclusion of law. It sufficiently avers that the claimant is the "assign" of the lessor. *Lloyd v. Richman*, 57 N. J. L. 385.

Must Not Be of Doubtful Construction. — The affiant in such proceedings must not only intend to swear to the facts necessary under the statute to make a case, but the facts must be so stated that there can be no doubt that he does so swear to them. If they are so stated as to admit of two different constructions, upon neither of which the affiant could be convicted of perjury, because he may allege that the other was what he swore to, the affidavit is insufficient to support the proceedings. *People v. Matthews*, 38 N. Y. 451.

2. *Hill v. Stocking*, 6 Hill (N. Y.) 314; *Rains v. Oshkosh*, 14 Wis. 372.

In *Smith v. Huestis*, Hill & D. Supp. (N. Y.) 236, the affidavit merely set forth a demise to H., and that he or his undertenants held over and continued in possession, thus leaving it equivocal whether H. or his undertenants held over. It was held that such affidavit was clearly defective in not showing with reasonable certainty that the tenant was in possession of the premises.

3. *California*. — *Reed v. Grant*, 4 Cal. 177.

Illinois. — *Dunne v. School Trustees*, 39 Ill. 578; and see *Wells v. Hogan*, 1 Ill. 337; *Beel v. Pierce*, 11 Ill. 92; *Smith v. Killeck*, 10 Ill. 293.

Kentucky. — *Taylor v. Monohan*, 8 Bush (Ky.) 238; *Powers v. Sutherland*, 1 Duv. (Ky.) 151; *Goldsberry v. Bishop*, 2 Duv. (Ky.) 143.

Maine. — *Woodman v. Ranger*, 30 Me. 180.

New Jersey. — *State v. Staiger*, 52 N. J. L. 350.

New York. — *Matter of Robinson*, 1 How. Pr. (N. Y.) 213; *Wiggin v. Woodruff*, 16 Barb. (N. Y.) 474; *Deuel v. Rust*, 24 Barb. (N. Y.) 438; *Birdsall v. Phillips*, 17 Wend. (N. Y.) 473; *Hill v. Stocking*, 6 Hill (N. Y.) 314; *Evertson v. Sutton*, 5 Wend. (N. Y.) 281; *Cunningham v. Goelet*, 4 Den. (N. Y.) 71; *Benjamin v. Benjamin*, 5 N. Y. 388; *People v. Matthews*, 38 N. Y. 451; *Earle v. McGoldrick*, 15 Misc. Rep. (N. Y. C. Pl.) 135; *People v. Lamb*, 10 Hun (N. Y.) 348; *Russell v. Russell*, 32 How. Pr. (N. Y. Supreme Ct.) 400.

Sufficient Statement of Tenancy. — In *Steffens v. Earl*, 40 N. J. L. 128, it was held that an affidavit that "deponent leased said premises to said S. by the month, to commence on the 1st day of May last, at the monthly rent of \$10," sufficiently states a tenancy.

Against Tenant by Sufferance. — In *Wiggin v. Woodruff*, 16 Barb. (N. Y.) 474, it was held that an affidavit to dispossess a tenant by sufferance should allege the expiration of the term, the holding over and continuing in possession without the permission of the landlord after the expiration, and the termination of the tenancy by sufferance thus created, by the month's notice, in writing, to quit, having been given as required by the statute.

In *Maine*, however, it is held that in a complaint against a tenant at will it is not necessary to allege that the relation of landlord and tenant existed between the parties at the time of the service of notice to quit. *Dunning v. Finson*, 46 Me. 546.

order that the officer before whom the proceedings are had may judge whether they come within the statutory description.¹ It should state that the maker is the owner of the premises or entitled to the possession thereof,² and also that he let the premises to the defendant, or, at least, that he is the landlord of the defendant with respect to the premises in question.³ The date or duration of the lease need not be stated in the affidavit.⁴

Allegation of Wrongful Detainer. — Where the tenant wrongfully holds over after his term has expired, the affidavit or complaint should show in substance, if not directly, that the tenant holds over and continues in possession after his term has expired, without the landlord's permission.⁵ So, also, where the holding over

1. *Wiggin v. Woodruff*, 16 Barb. (N. Y.) 474; *People v. Matthews*, 38 N. Y. 451.

2. *Michigan*. — *Bryan v. Smith*, 10 Mich. 229; *Allen v. Carpenter*, 15 Mich. 32; *Bennett v. Robinson*, 27 Mich. 28.

Missouri. — *Alexander v. Westcott*, 37 Mo. 109.

New York. — *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *People v. Andrews*, 52 N. Y. 445. See also *Hallenbeck v. Garner*, 20 Wend. (N. Y.) 22; *Hill v. Stocking*, 6 Hill (N. Y.) 314; *Ward v. Burgher*, 90 Hun (N. Y.) 540.

In *Minnesota* it is held that the complaint need not state that the plaintiff is the owner or that he is entitled to the possession of the demised premises if it shows a leasing by him to the defendant and an entry and possession by the latter under such lease. *Engels v. Mitchell*, 30 Minn. 122.

3. *Burrell v. Lamm*, 67 Md. 580; *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *People v. Matthews*, 38 N. Y. 451; *Alexander v. Westcott*, 37 Mo. 109; *Rains v. Oshkosh*, 14 Wis. 372.

In *Evans v. Muller*, 25 Mo. 195, an affidavit in a proceeding under the "Act concerning landlords and tenants in the county of St. Louis" (Rev. Code 1845, App., p. 1101), which stated that a certain lot was let to M., the defendant, for a term of twenty years at a certain rent; that the sum of \$695.50 was then due for the said rent; that the same had been demanded and payment had not been made, but which did not state of whom the defendant leased the lot, or who was his landlord or to whom he owed the debt due for rent. It was held that such affidavit was defective, and that such defect might be taken advantage of by a motion in arrest of judgment.

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Complaints by Reversioners. — A complaint which averred that the complainants were "interested in the reversion" of such estate, and prayed that judgment might be rendered "for the complainants, as such reversioners, to recover possession," was held on demurrer sufficiently to show that the complainants were entitled to the reversion of leased premises. *Peck v. Peck*, 35 Conn. 390.

4. *People v. Teed*, 48 Barb. (N. Y.) 424. In this case it was objected that the affidavit was defective in not stating when the hiring was made, and the duration of the lease, but the court held that "the statute does not prescribe that the landlord shall state in the affidavit the date or duration of the lease. * * * If the nature of the hiring was such that the landlord could not take the remedy by summary proceedings, the tenant must set up that defense." See also *Norsworthy v. Bryan*, 33 Barb. (N. Y.) 153.

5. *Uridias v. Morrell*, 25 Cal. 31; *Dunne v. School Trustees*, 39 Ill. 578; *Smith v. Killeck*, 10 Ill. 293; *Jackson v. Adams*, 1 Wilson (Ind.) 398; *Burrell v. Lamm*, 67 Md. 580; *Alexander v. Westcott*, 37 Mo. 109; *Prouty v. Prouty*, 5 How. Pr. (Ontario County Ct.) 81; *Campbell v. Mallory*, 22 How. Pr. (Yates County Ct.) 183; *Simpson v. Rhinelanders*, 20 Wend. (N. Y.) 103.

Omission Ground for Reversal. — In *Prouty v. Prouty*, 5 How. Pr. (Ontario County Ct.) 81, it was held that if the affidavit fails to allege that the tenant is holding over "without the permission of the landlord," and the objection is taken at the return of the summons and overruled, it is error for which the proceedings will be reversed.

Contra. — In *State v. Smith*, 56 N. J. L. 446, it is held that the affidavit need

is after default in payment of rent, it should be alleged that the holding over is without permission.¹

Where the Proceeding Is for the Nonpayment of Rent the affidavit must, in certain jurisdictions, state as a fact that satisfaction for the rent cannot be obtained by distress. Stating it merely as belief will not suffice.²

Allegation of Notice. — Where the tenant holds over without permission after default in the payment of rent and after notice has been given demanding either the payment of rent or the possession of the premises, the complaint should allege the serving of such notice³ and the tenant's failure to pay such rent.⁴ Where the tenancy is at will or by sufferance it should be shown that it has been terminated by the giving of the necessary notice.⁵

Description of Premises. — In order to confer jurisdiction the affidavit must give a particular description of the premises of which

not allege that the tenant holds over without the permission of the landlord.

In *Georgia* it is not required that the landlord shall make oath that the possession had been demanded and the tenant refused to deliver. If the affidavit states that the tenant refuses to deliver possession, it is sufficient after reciting the other necessary facts. *Werner v. Footman*, 54 Ga. 128.

1. *Conley v. Conley*, 78 Wis. 665.

2. *Schuyler v. Trefren*, 26 N. J. L. 213, where the court said: "It is not sufficient that the landlord believes that it cannot be obtained; he must be possessed of such knowledge as will enable him to swear to it as a fact. That knowledge he may obtain from the tenant, or from estimating the value of the goods subject to distress, or by the attempt to distrain, or in some other way. But unless he possess such knowledge, so as to be able properly to make oath of it, he cannot establish it as the fact required. It is not necessary to set forth the means of his knowledge, but he must be able to swear to the fact, and not merely to the belief, that satisfaction cannot be made."

3. *State v. Allen*, 45 Mo. App. 551; *Conley v. Conley*, 78 Wis. 665; *Conley v. McGarey*, 78 Wis. 669.

Need Not Specify Amount of Rent. — The affidavit for a warrant in summary proceedings to dispossess a tenant for failure to pay rent when due need not specify the amount of rent unpaid. *Lamar v. Sheppard*, 84 Ga. 561.

Need Not Allege Manner of Serving. —

In *Knowles v. Murphy*, 107 Cal. 107, it was held that while the fact of the service of notice to pay rent or surrender possession should be alleged, it is not necessary to allege the manner in which such notice was served.

Sufficient Statement of Service. — In *Morris Canal, etc., Co. v. Mitchell*, 31 N. J. L. 100, it was held that the affidavit of the plaintiffs stating that they caused a written notice to be served on the defendant (of which a copy was annexed) is sufficient, although it does not state by whom it was served.

4. *Knowles v. Murphy*, 107 Cal. 107; *State v. Allen*, 45 Mo. App. 551.

5. *McDonald v. McLaury*, (Supreme Ct.) 17 N. Y. Supp. 574; *Smith v. Littlefield*, 51 N. Y. 539; *People v. Stuyvesant*, 1 Hun (N. Y.) 102; *Post v. Post*, 14 Barb. (N. Y.) 253; *Nichols v. Williams*, 8 Cow. (N. Y.) 13.

Oath of Third Person Required. — In *Stanley v. Horner*, 24 N. J. L. 511, it was held that to give jurisdiction to a justice to remove a tenant by summary proceedings in cases of uncertain tenancy, as at will or by sufferance, proof is required by the oath of some person other than the landlord that such tenancy has been duly terminated.

Affidavit Need Not be Attached. — In *Simpson v. Masson*, 11 Misc. Rep. (N. Y. C. Pl.) 351, it was held that affidavit of service of notice to quit in the case of a tenancy from month to month need not be attached to the petition to recover possession of the premises, but that service must be proved by parol evidence.

it is intended to dispossess the occupant.¹

Naming Defendant.—The person or persons against whom the proceeding is instituted must, if not named, be intelligibly designated.²

1. *Alabama.*—Wright v. Lyle, 4 Ala. 112; Spear v. Lomax, 42 Ala. 576; Snoddy v. Watt, 9 Ala. 609; Beck v. Glenn, 69 Ala. 121.

Illinois.—Cairo, etc., R. Co. v. Wiggins Ferry Co., 82 Ill. 230; Atkinson v. Lester, 2 Ill. 407.

Indiana.—Allen v. Shannon, 74 Ind. 164; Jolly v. Ghering, 40 Ind. 139; Leary v. Langsdale, 35 Ind. 74.

Kentucky.—Smith v. White, 5 Dana (Ky.) 376.

Mississippi.—Torrey v. Cook, 3 Smed. & M. (Miss.) 60; Johnson v. Tuggle, 27 Miss. 836.

Missouri.—State v. Allen, 45 Mo. App. 551.

New York.—Campbell v. Mallory, 22 How. Pr. (Yates County Ct.) 183; Deuel v. Rust, 24 Barb. (N. Y.) 438; People v. Platt, 43 Barb. (N. Y.) 116; Schneider v. Leizman, 57 Hun (N. Y.) 561; People v. Boardman, 4 Keyes (N. Y.) 59.

Wisconsin.—Conley v. Conley, 78 Wis. 665; Conley v. McGarey, 78 Wis. 669.

Essential to Valid Summons.—The reason underlying this requirement is that upon the affidavit the magistrate predicates his jurisdiction and action in issuing his summons. Such summons must describe the premises, and the description therein cannot differ from that in the affidavit. The magistrate is not at liberty to go outside of the record made by the affidavit in his description of the premises. Campbell v. Mallory, 22 How. Pr. (Yates County Ct.) 183.

County and State.—In Leary v. Langsdale, 35 Ind. 74, it was held that the complaint must designate the county and state in which the premises are situated.

Language of Lease Sufficient.—In Duff v. Fitzwater, 54 Pa. St. 224, the court, in holding that it is sufficient to describe the premises in the language of the lease, said: "If the tenants knew what to take and enjoy by the description in the lease, they knew what to surrender."

Misdescription in Name of Street.—In Pray v. Wasdell, 146 Mass. 324, it was held that a misdescription in the writ as to the name of the street on which

the premises in question are situated will not invalidate the writ if such premises are clearly described.

Sufficient Description.—The following descriptions of the premises in the affidavit have been held sufficient:

"A house and lot at East Point, in said county and state, it being the place where J. D. T. [the tenant] now resides." Thompson v. Chapman, 57 Ga. 16.

"Three hundred and twenty acres, it being the same on which the [defendant] now resides and did reside last year." Snoddy v. Watt, 9 Ala. 609.

In Atkinson v. Lester, 2 Ill. 407, the following description, though rather general, was held sufficient: "Of the premises, enclosed by us, situate in the county of Cook, and state of Illinois, being the same on which you now reside, containing about one hundred acres of land, more or less, and commonly called North Grove."

Insufficient Description.—In Campbell v. Mallory, 22 How. Pr. (Yates County Ct.) 183, an affidavit describing the premises as being "a certain house and lot situate in the village of Penn Yan, in the town of Milo and county of Yates," was held to be too general and not to meet the requirements of the statute.

2. Ash v. Purnell, 16 Daly (N. Y.) 189, 26 Abb. N. Cas. (N. Y.) 92, 19 Civ. Pro. Rep. (N. Y.) 234.

This is required by section 2235 of the *New York Code*, providing for "naming or otherwise intelligibly designating the person or persons against whom the special proceeding is instituted, and if there are two or more such persons, and some are undertenants or assigns, specifying who are principals or tenants and who are undertenants or assigns."

Failure to Name Person of Whom Rent Demanded.—In Rogers v. Lynds, 14 Wend. (N. Y.) 173, it was held that in summary proceedings against tenants for nonpayment of rent the affidavit should name the person of whom rent is demanded; but though defective in this particular, if it is stated that the demand was made upon the land it is sufficient to give jurisdiction to the officer, and the defect cannot be ob-

(a) *Verification*. — The affidavit may be taken before any officer authorized by law to take affidavits.¹ Although a landlord may institute new proceedings upon a new affidavit, the original affidavit again presented to the judge, but not sworn to anew, cannot be used as the foundation of a new proceeding.²

(8) *Summons* — (a) *Issuance*. — Upon a proper affidavit, the magistrate receiving it issues a summons to the tenant requiring him to remove from the premises in question or to appear before such magistrate within a certain time and show cause for not doing so.³ In *Georgia*, however, it seems that no summons is necessary. When the proper affidavit has been made, the officer before whom it was made immediately issues a warrant, directed to the proper officer, to deliver possession of the premises to the owner.⁴

(b) *Requisites*. — The summons should contain a description of the

jected to collaterally; the remedy if any is by certiorari.

Need Not be Named. — In *Ash v. Purnell*, 16 Daly (N. Y.) 189, 26 Abb. N. Cas. (N. Y.) 92, 19 Civ. Pro. Rep. (N. Y.) 234, the phrase "John Doe and Richard Roe, undertenants," was used, and such fictitious names were held sufficiently to comply with the statute.

1. *Brown v. New York*, 66 N. Y. 385, holding that an affidavit sworn to before a notary public is properly verified.

Defective Verification Fatal. — A judgment of dispossession entered in a proceeding, instituted upon a petition which was defective by reason of a failure of the notary to sign the jurat, in which there was no appearance by the tenant, is void and furnishes no protection to the landlord; nor can the justice by amending the proceeding acquire jurisdiction *nunc pro tunc*. *Marchand v. Haber*, 16 Misc. Rep. (N. Y. Supreme Ct.) 319.

2. "It would seem * * * that the affidavit of the landlord, when once made and presented to the magistrate, ceases to be under the control of the landlord; and whatever may be the issue of the cause, whether the verdict may be for him or for the tenants, the affidavits, as pleadings, are a part of the proceeding in that cause which it is the duty of the magistrate to preserve, and which cannot again be used by the landlord as the foundation of a new suit or proceeding under the act." *McCoy v. Hyde*, 8 Cow. (N. Y.) 68.

3. *Connecticut*. — *Miller v. Lampson*, 66 Conn. 432; *Colt v. Eves*, 12 Conn. 243.

Michigan. — *Sallee v. Ireland*, 9 Mich. 154.

Missouri. — *Westerhold v. Boese*, 2 Mo. App. Rep. 1000; *Barrett v. Field*, 10 Mo. App. 590; *State v. Allen*, 45 Mo. App. 551.

New Hampshire. — *Smith v. Smith*, 15 N. H. 56.

New Jersey. — *State v. Idler*, 54 N. J. L. 467.

New York. — *Campbell v. Mallory*, 22 How. Pr. (Yates County Ct.) 185; *Russell v. Ostrander*, 30 How. Pr. (N. Y. County Ct.) 93; *Sims v. Humphrey*, 4 Den. (N. Y.) 185; *Cunningham v. Goelet*, 4 Den. (N. Y.) 71; *Hill v. Stocking*, 6 Hill (N. Y.) 314; *Luhrs v. Commoos*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 88; *Ludwig v. Lazarus*, 10 N. Y. App. Div. 62.

Pennsylvania. — *Horver v. Krider*, 15 S. & R. (Pa.) 43; *Watts v. Fox*, 64 Pa. St. 336; *Berrill v. Flynn*, 8 Phila. (Pa.) 239; *Snyder v. Carfrey*, 54 Pa. St. 90; *McGinnis v. Vernon*, 67 Pa. St. 149; *S'roup v. M'Clure*, 4 Yeates (Pa.) 523; *Quigney v. Quigney*, 1 Northam L. Rep. (Pa.) 20.

South Carolina. — *State v. Marshall*, 24 S. Car. 507.

In *California*, before the amendment of the Code of Civil Procedure, which took effect July 1, 1874, the summons in an action of unlawful detainer was required to be served within the time directed by the order of the judge indorsed on the summons. *Kent v. West*, 50 Cal. 185.

4. Code (1895), § 4814; *Latham v. Perryman*, 77 Ga. 579; *Werner v. Footman*, 54 Ga. 128; *Mothershead v. De Give*, 82 Ga. 193.

premises of which the landlord claims possession,¹ and in some jurisdictions should contain a brief statement of the grounds of its issuance.²

(c) *Direction.* — The summons should be directed to the tenant by name.³

(d) *Service.* — The summons, when issued, must be served without any avoidable delay by the party to whom it is delivered, upon the person to whom it is directed, either by delivery to the person to whom directed, by leaving a copy at his residence, in his absence, with some one of discretion, by leaving a copy with some person of discretion residing or employed on the premises sought to be recovered, or by affixing a copy upon a conspicuous part of the premises.⁴ Where the summons is directed to

1. *Russell v. Ostrander*, 30 How. Pr. (N. Y. County Ct.) 93; *Rathburn v. Weber*, 13 Civ. Pro. Rep. (Buffalo Super. Ct.) 50; *Quigney v. Quigney*, 1 Northam L. Rep. (Pa.) 20, P. & L. Dig. 2651.

Identifying Premises. — In *Quigney v. Quigney*, 1 Northam L. Rep. (Pa.) 20, it was held that a description in the summons which will identify the premises is sufficient.

Judicial District. — Where summary proceedings to dispossess a tenant for nonpayment of rent are instituted in one of the District Courts of the city of New York, it is not necessary to state in the summons that the premises are situate within the judicial district in which the said proceedings are instituted. *People v. Kelly*, 20 Hun (N. Y.) 549.

2. *McGinnis v. Vernon*, 67 Pa. St. 149.

Signature by Justice. — In *Smith v. Smith*, 15 N. H. 56, it is held that the summons to the tenant must be signed by a magistrate.

3. *State v. Allen*, 45 Mo. App. 551; *Hill v. Stocking*, 6 Hill (N. Y.) 314; *Cunningham v. Goelet*, 4 Den. (N. Y.) 71; *Rathburn v. Weber*, 13 Civ. Pro. Rep. (Buffalo Super. Ct.) 51.

Blank Direction. — Where the direction was left blank, the proceedings are defective even though service is made on the proper party. *Cunningham v. Goelet*, 4 Den. (N. Y.) 71.

In Michigan it is held that the summons must be issued directed to the sheriff or any constable of the same county, commanding him to summon the defendant to be and appear before the magistrate issuing it at the time and place therein specified. *Sallee v. Ireland*, 9 Mich. 154.

Defect Cured by Appearance of Both. — In *Sims v. Humphreys*, 4 Den. (N. Y.) 185, it was held that where the proceeding was against two, both of whom were named in the affidavit, and the summons was directed to one of them "and any other person in possession," and both appeared before the officer, made affidavits, and had a trial by jury, it was sufficient.

4. See generally article SERVICE OF PROCESS.

Manner of Service. — In New York it is provided that the summons may be served in one of three ways: 1. By delivering it to the person to whom it is directed. 2. If the person to whom the summons is directed resides in the city or town in which the property is situated, but is absent, service may be made by delivering a copy thereof at his dwelling-house to a person of suitable age and discretion who resides there; or if no such person can with reasonable diligence be found there, then by delivering a copy at the property sought to be recovered, either to some person of suitable age and discretion residing there, or, if no such person can be found there, to any person of suitable age and discretion employed there. 3. Where service cannot, with reasonable diligence, be made as prescribed above, then it may be made by affixing a copy upon a conspicuous part of the property. *Rathburn v. Weber*, 13 Civ. Pro. Rep. (Buffalo Super. Ct.) 50; *Brown v. New York*, 66 N. Y. 385; *Beach v. Bainbridge*, 7 Hun (N. Y.) 81; *People v. Platt*, 43 Barb. (N. Y.) 116.

In Pennsylvania the summons can be served in two ways: by producing the original summons to the defendant and informing him of the contents

the original lessees of the premises, it should be served on them as well as the under-tenant in possession.¹

Where There Are Two or More Tenants, the service must be made upon each.² In the case of a firm, however, the summons need not be served on each member thereof. A service on one member is sufficient.³

Time of Service.—Service of summons is usually required to be made a specified number of days before the return day thereof.⁴

(c) **Return.**—The statutes of the various states differ somewhat as to when the summons is returnable. As a general rule, however, it would seem that not more than five days should elapse before such return.⁵ Due proof of the service of the summons

thereof, or by leaving a copy of it at his house in the presence of one or more of his neighbors. *Berrill v. Flynn*, 8 Phila. (Pa.) 239. See also *Snyder v. Carfrey*, 54 Pa. St. 90.

In South Carolina it would seem that the service must be personal, and that when served by copy left, and the defendant appears and objects to the jurisdiction upon this ground, the trial justice is without jurisdiction. *State v. Marshall*, 24 S. Car. 507.

Service on Party in Possession.—In *Watts v. Fox*, 64 Pa. St. 336, it was held that the summons should be served on the premises on the person in actual possession.

Service on Agent.—Service on the premises on a person in possession claiming to be the agent of the lessee is sufficient. *Watts v. Fox*, 64 Pa. St. 336.

Irregularity in Service Cured by General Appearance.—In *Grafton v. Brigham*, 70 Hun (N. Y.) 131, it was held that irregularity in the service of summons is cured by the general appearance of the tenant at the return day. Such appearance is a waiver of any defect in the service of process and confers jurisdiction on the justice.

In *Nemetty v. Naylor*, 100 N. Y. 562, the summons was made returnable December 10, which was Sunday, but in the copy served the return day was stated to be December 9, and on that day the parties appeared and consented to proceed, without any objection being taken on account of the mistake. It was held that the mistake was thereby waived, and the assent to proceed conferred jurisdiction.

1. *Matter of Glenn*, 1 How. Pr. (N. Y.) 213; *Croft v. King*, 8 Daly (N. Y.) 265.

2. *People v. Boardman*, 4 Keyes (N.

Y.) 59; *People v. De Camp*, 12 Hun (N. Y.) 378, in which case the tenants were absent from the premises in question, upon which they resided, and the service was made on both by leaving one copy of the summons with a person of mature age and discretion. It was held that service had been properly made upon neither tenant.

3. *Ludwig v. Lazarus*, 10 N. Y. App. Div. 62.

4. *People v. Marvin Safe Co.*, 5 Hun (N. Y.) 218; *Sallee v. Ireland*, 9 Mich. 154, holding that the statutory requirement of service "at least two days before the return day thereof" necessarily excludes from computation the day of the return, and that a summons returnable the twelfth must be served as early as the ninth.

Precept Returnable on Day of Issue.—By the *New York Code Civ. Pro.*, § 2240, it is provided that "if the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least two days before the day on which it is returnable." *People v. Marvin Safe Co.*, 5 Hun (N. Y.) 218.

On Owner and Tenant of Bawdy House.—Where a petition is filed by the owner of property in the vicinity of demised property used as a bawdy house, the summons must be directed to and served upon the landlord or his agent and also upon the tenant of such premises. Either or both may appear on the return day and show cause why the tenant should not be removed. *N. Y. Code Civ. Pro.*, § 2242.

5. **When Returnable.**—In *New York* the summons is made returnable in not less than three nor more than five days, save in cases where the tenant re-

should be made by the petitioner to the officer issuing it, at the time when such summons is returnable, unless the adverse party appears.¹ Such proof should be either by affidavit showing the time, place, and manner of service,² or by an official certificate of service.³

(9) *Answer of Tenant* — (a) *Necessity For.* — At the time prescribed in the summons the tenant must appear and show cause why he should not be dispossessed.⁴ If sufficient cause is not

mains in possession of the demised premises after the expiration of his term without permission of the landlord, when it may be made returnable on the same day. *Russell v. Ostrander*, 30 How. Pr. (N. Y. County Ct.) 93; *Luhrs v. Commoss*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 88; *People v. Andrews*, 52 N. Y. 445.

In *Pennsylvania* it is provided that the summons shall be returnable in four days. *Hower v. Krider*, 15 S. & R. (Pa.) 43. This, however, does not mean that the summons may not be made returnable in less than four days, but simply that it is to be returnable at the discretion of the justices at any time, not to exceed four days. *Hower v. Krider*, 15 S. & R. (Pa.) 43.

In *Stroup v. M'Clure*, 4 Yeates (Pa.) 523, it was held that if there are more than four days between the date and return of the warrant, the defect is cured by an appearance and taking defense.

In *Missouri*, under Rev. Stat. (1889), § 5094, which provides for the service of summons at least five days before the return day thereof, such summons may be made returnable within such time. *Westerhold v. Boese*, 2 Mo. App. Rep. 1000.

1. *Kiernan v. Reming*, 7 Civ. Pro. Rep. (N. Y. Super. Ct.) 311.

Where Appearance Is to Object to Service. — Proof of the service of the summons should be taken, notwithstanding the appearance of the adverse party, where such appearance is only to object to the service. *Kiernan v. Reming*, 7 Civ. Pro. Rep. (N. Y. Super. Ct.) 311.

2. *People v. Boardman*, 4 Keyes (N. Y.) 59; *People v. Matthews*, 43 Barb. (N. Y.) 168; *People v. Platt*, 43 Barb. (N. Y.) 116; *Rathburn v. Weber*, 13 Civ. Pro. Rep. (Buffalo Super. Ct.) 51.

An affidavit that the summons was served "by leaving a true copy of the same with a person who said he belonged there, at his last or usual place

of residence, with a person of mature age, who, at the time of the said service, was on said premises and resided thereon, said tenant being then absent from his last or usual place of business," was held defective, as not showing that the copy was left with a person of mature age at the last or usual place of residence of the tenant. *People v. Matthews*, 43 Barb. (N. Y.) 168.

In *People v. Platt*, 43 Barb. (N. Y.) 116, an affidavit which alleged a service upon an under-tenant, on the demised premises, and that the tenant was absent from his last and usual residence, without stating that such residence was upon the demised premises, was held insufficient.

Affidavit of Service at Date Prior to Summons. — When the service of the summons is sworn to as being upon a date prior to that of the summons itself, the variance is fatal; it is not a mere clerical error which may be corrected, for it leaves the case without any proof as to the time of service, and if accepted would give possible effect to an illegal service. *People v. Boardman*, 4 Keyes (N. Y.) 59.

3. *People v. Boardman*, 4 Keyes (N. Y.) 59.

The certificate of the constable, showing a service of the summons upon the defendant personally by showing the original and delivering a copy thereof to him, is "due proof" of the service thereof. *People v. Lamb*, 10 Hun (N. Y.) 348.

In *Cameron v. McDonald*, 1 Hill (N. Y.) 512, the constable's sworn return was simply that the tenant was absent, and that the copy was left with R., residing on the premises. This return was held insufficient as not showing the tenant's absence from "his last or usual place of residence," or that the copy was left with a "person of mature age."

4. *Colt v. Eves*, 12 Conn. 243; *Shuver v. Klinkenberg*, 67 Iowa 544; *Brown v. New York*, 66 N. Y. 385;

shown at such time, the magistrate must make the final order and issue his warrant.¹

(b) **Manner of Making — By Written and Verified Answer.** — In some jurisdictions it is provided that any person in possession or claiming possession of the premises in question may, at the time appointed in the summons for showing cause, file with the magistrate or the clerk of the court issuing the summons a written answer,² denying the facts upon which the summons was issued, or any of such facts.³ Such answer should be verified.⁴

People v. Ulrich, 2 Abb. Pr. (N. Y. Supreme Ct.) 28.

See the statutes of the various states for the provisions as to the appearance of the tenant.

1. *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 152; *Kiernan v. Reming*, 7 Civ. Pro. Rep. (N. Y. Super. Ct.) 311. If the defendant fails to appear, he is considered as admitting the allegations of the affidavit, and the magistrate is bound to render judgment and issue his warrant against the tenant and other persons in possession or claiming possession. *Brown v. New York*, 66 N. Y. 385.

2. *Bloom v. Huyck*, 71 Hun (N. Y.) 252; *Armstrong v. Cummings*, 20 Hun (N. Y.) 313; *Geisler v. Acosta*, 9 N. Y. 227; *Spraker v. Cook*, 16 N. Y. 567; *Niblo v. Post*, 25 Wend. (N. Y.) 280; *People v. Coles*, 42 Barb. (N. Y.) 96; *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *People v. Teed*, 48 Barb. (N. Y.) 424; *People v. Ulrich*, 2 Abb. Pr. (N. Y. Supreme Ct.) 28; *Matter of Wright*, (Buffalo Super. Ct.) 42 N. Y. St. Rep. 455; *Dickinson v. Price*, 64 Hun (N. Y.) 149.

Affidavit by Tenant's Wife. — In *Matter of Wright*, (Buffalo Super. Ct.) 42 N. Y. St. Rep. 455, it was held that the tenant's wife living on the premises and left in possession by her husband may file such affidavit upon her statement upon oath that she was in possession.

Adjournment by Clerk in Absence of Judge. — In *Deutermann v. Wilson*, 15 Civ. Pro. Rep. (N. Y. C. Pl.) 411, upon the return day of the precept no justice was present, and the clerk, after noting the presence of the landlord and the nonappearance of the tenant, adjourned the case. Thereafter, on such adjourned day, no justice being present, the clerk again, on his own motion, adjourned the case. On the last adjourned day the tenant appeared and filed an answer, which the justice re-

ceived, notwithstanding the landlord's objection, and adjourned the case; and thereafter on the adjourned day, no justice being present, the clerk again adjourned the matter to a subsequent day, on which day a trial was had and a final order made in the tenant's favor. It was held, on appeal from said order, that the clerk had power to adjourn the proceedings, that the justice did not err in receiving the answer when he did, and that he had jurisdiction to make the final order.

3. *People v. Howlett*, 76 N. Y. 574; *Becker v. Church*, 42 Hun (N. Y.) 258; *Yuelin v. Meade*, 1 Civ. Pro. Rep. (N. Y. Marine Ct.) 446; *Armstrong v. Cummings*, 20 Hun (N. Y.) 313; *People v. Coles*, 42 Barb. (N. Y.) 96; *Niblo v. Post*, 25 Wend. (N. Y.) 280; *People v. Teed*, 48 Barb. (N. Y.) 424; *Matter of Wright*, (Buffalo Super. Ct.) 42 N. Y. St. Rep. 455; *Dickinson v. Price*, 64 Hun (N. Y.) 149; *Barnum v. Fitzpatrick*, 27 Abb. N. Cas. (N. Y. Fifth Civ. Dist. Ct.) 334.

The only questions that can be raised by the answer are those which are directly put in issue by a denial of the allegations of the petition; no other issue can be tried by the judge or justice. *Bloom v. Huyck*, 71 Hun (N. Y.) 252.

Allegations in the affidavit of the landlord not denied by the affidavit of the tenant are considered as admitted. *People v. Teed*, 48 Barb. (N. Y.) 424.

Answer Limited to Denials. — In *Becker v. Church*, 42 Hun (N. Y.) 258, the court, after holding that, under section 2244 of the *New York Code*, the tenant may deny generally or specifically, says: "He is, therefore, limited to denials. And there is no provision for affirmative allegations."

4. *Yuelin v. Meade*, 1 Civ. Pro. Rep. (N. Y. Marine Ct.) 446; *Bloom v. Huyck*, 71 Hun (N. Y.) 252.

Counter-affidavit Insufficient. — In *Yuelin v. Meade*, 1 Civ. Pro. Rep. (N.

This Denial Should Be Express and Positive, and not circumstantial and argumentative. No possibility of evasion should exist.¹

Counter-affidavit — Arrest of Proceeding. — In *Georgia*, where the statute provides that the warrant to put the owner in possession shall issue immediately upon the making of the affidavit, the tenant may arrest the proceedings by a counter-affidavit denying the allegations of the affidavit.² When such counter-affidavit is

Y. Marine Ct.) 446, the court said: "I cannot hold that a counter-affidavit, good under the former statute regulating summary proceedings, can be accepted as a valid plea under section 2244 of the Code of Civil Procedure, which requires the plea to be by 'written answer,' verified in like manner as an answer in an action in the Supreme Court denying generally or specifically any material allegation of the petition. The section referred to introduced a new form of plea by answer, instead of that previously allowed by counter-affidavit. It effected more than a mere change of the name by which the plea is called or known. The counter-affidavit was verified like any other affidavit, by merely affixing the jurat, while the new plea is required to be verified like pleadings in the Supreme Court."

1. *Niblo v. Post*, 25 Wend. (N. Y.) 280.

Allegation of General Denial and New Lease. — A general denial, coupled with an allegation that a lease was made with the plaintiff for a specified term, that upon the expiration of such term another lease for a specified term was made, which had not yet expired, and that the rent due thereunder had been paid, is sufficient to raise an issue. *Matter of Wright*, (Buffalo Super. Ct.) 42 N. Y. St. Rep. 455.

2. *Werner v. Footman*, 54 Ga. 128; *Mothershead v. De Give*, 82 Ga. 194; *Huff v. Markham*, 70 Ga. 284; *Clark v. Lee*, 86 Ga. 28; *Mitchell v. White*, 74 Ga. 327; *Cherry v. Ware*, 63 Ga. 289; *Lockett v. Usry*, 28 Ga. 345; *Parker v. Beeman*, 28 Ga. 475.

Allegations. — Such counter-affidavit may state that the lease has not expired and that the tenant is not holding over his term; or that the rent claimed is not due; or that the tenant does not hold the premises from the person who made the affidavit on which the warrant issued, or from any one under whom he claims the premises, or from any one claiming the premises under

him. *Werner v. Footman*, 54 Ga. 128; *Huff v. Markham*, 70 Ga. 284; *Lockett v. Usry*, 28 Ga. 345; *Parker v. Beeman*, 28 Ga. 475.

Immaterial Allegations Stricken Out. — In *Werner v. Footman*, 54 Ga. 128, the counter-affidavit filed to stay proceedings under a warrant to dispossess a tenant holding over set up that a third person had, a month previously, sued out a similar warrant against him for the same premises, and that the plaintiff in the present proceedings had said to the affiant, in a conversation, that he had sold the land to such person, and further set up that his lease had not expired. On motion, all was stricken from such affidavit except the last ground, and it was held that as there was no allegation that the defendant held under such third person, and no denial of his tenancy under the plaintiff, there was no error in the ruling of the court.

Allegation of Affidavit Not Denied by Counter-affidavit. — A demand in the affidavit which is not denied in the counter-affidavit does not become an issue. Thus, where an affidavit to dispossess a tenant holding over averred that possession had been demanded, and the counter-affidavit made no denial thereof, but the only issue raised was whether or not the defendant held under the plaintiff as tenant, after verdict for the plaintiff a new trial will not be granted on the general ground that the verdict is contrary to evidence, for want of proof of demand. *Mitchell v. White*, 74 Ga. 327.

Not Amendable. — The counter-affidavit is not amendable by the insertion of a new and independent defense which was known at the time when such counter-affidavit was made. Thus, in *Mothershead v. De Give*, 82 Ga. 193, the affidavit and warrant to remove a tenant holding over after demand alleged the value of the premises for rent during a period of more than four years previous to the suing out of the warrant, and a refusal to pay the

made, the tenant must at the same time give bond and security to the landlord for the payment, with costs, of such sum as may be recovered on the trial of the case.¹ Such counter-affidavit may be filed at any time before the tenant is dispossessed.²

(10) *Trial*—(a) *By Court or Jury*.—Where the tenant by his answer denies the right of the landlord to possession, the case is tried as the statute directs, either by the magistrate or, upon the demand of either party, by a jury summoned for the purpose.³

same. It was held that the ground of the warrant was the retention of possession after demand, and that the mere denial in the counter-affidavit that the rent claimed was due was no answer to the proceeding; and it was also held that the counter-affidavit could not be amended by adding or substituting a denial of the tenancy, the matter embraced in such denial not being unknown when the original counter-affidavit was interposed, and no excuse being given for the omission then to allege it.

Omission of Tenant's Name.—In *Lockett v. Usry*, 28 Ga. 345, it was held that where there is a blank in the affidavit where the name of the movant should appear, the omission is fatal and is not amendable.

1. *Clark v. Lee*, 86 Ga. 28; *Cherry v. Ware*, 63 Ga. 289; *Huff v. Markham*, 70 Ga. 284; *Hopkins v. Thomas*, 80 Ga. 641; *Pausch v. Guerrard*, 67 Ga. 319.

Bond Must Be Shown to Be Good.—Where an officer executing a warrant to dispossess a tenant refuses to receive a bond tendered to him in support of a counter-affidavit, the presumption is in his favor, and to render him liable for such refusal it must appear that the bond was in substantial compliance with the law, and that the surety was solvent and responsible. *Pausch v. Guerrard*, 67 Ga. 319. See also *Hopkins v. Thomas*, 80 Ga. 641.

Purpose of Exacting Bond.—In *Worthy v. Tate*, 44 Ga. 152, the court, in holding a bond to be indispensable to the tenant's counter-affidavit, said: "We can readily understand the intention of the legislature in prescribing the bond as an essential to the arrest of the proceedings. Parties insolvent may obtain possession of premises, and, under any pretext, hold them by making a counter-affidavit without bond, if they are unable from their poverty to give it."

Must be Tendered Within Reasonable Time.—"A tenant must comply with

the law, and tender his bond, with his counter-affidavit, within reasonable time." *Worthy v. Tate*, 44 Ga. 152.

Remedy Where Unable to Give Bond.—In *Crusselle v. Pugh*, 71 Ga. 744, it was held that where the tenant is unable to give security in order to resist by counter-affidavit a warrant to dispossess him, and is wrongfully removed, he may sue for damages for such removal.

2. *Lockett v. Usry*, 28 Ga. 345.

3. See the statutes of the various states. And see *Miner v. Brown*, 20 Conn. 520; *Fry v. Myers*, 56 N. J. L. 115; *Bloom v. Huyck*, 71 Hun (N. Y.) 252; *People v. Kelsey*, 14 Abb. Pr. (N. Y. Supreme Ct.) 372; *Benjamin v. Benjamin*, 5 N. Y. 383; *Bloomington v. Adler*, 7 Misc. Rep. (N. Y. C. Pl.) 182; *People v. Hovey*, 4 Lans. (N. Y.) 86; *People v. Hamilton*, 39 N. Y. 107; *Farrington v. Morgan*, 20 Wend. (N. Y.) 207; *Bonham v. Mills*, 39 Ohio St. 534.

In *New Jersey* it is held that the right to jury trial in summary proceedings still exists, notwithstanding the Act of 1888. *Fry v. Myers*, 56 N. J. L. 115, wherein the court said: "We have reached the conclusion that the proper construction of the Landlord and Tenant Act, as amended by the Act of 1888, preserves the right of trial by jury before the justice, when not waived."

In *Missouri* it is held that as the landlord and tenant statute for the recovery of possession for the nonpayment of rent provides a full procedure in such action, and that its hearing shall be before a justice, but contains no requirement for a jury, none is permitted. *State v. Allen*, 45 Mo. App. 551.

Demand Made on Appearance Day.—In *Bonham v. Mills*, 39 Ohio St. 534, it was held that the defendant may demand a jury on the appearance day, although it is subsequent to the return day of the summons.

In *Georgia*, where the warrant issues immediately upon the landlord's affi-

Tender of Costs and Expenses. — In some jurisdictions the party demanding a jury must, at the time of making such demand, pay or tender to the judge or justice the costs and expenses of obtaining the jury.¹

Manner of Securing Jury. — The statutes of the different states vary as to the manner in which the jury in summary proceedings is to be secured.² In some jurisdictions, where a jury is demanded the magistrate issues a precept to the proper officer commanding him to summon certain persons, from whom the proper number of jurors is selected.³ In other jurisdictions it is the duty of the magistrate to whom the complaint of the landlord is made to issue a precept to the sheriff of the county, directing him to summon a specified number of persons properly qualified, at the same time at which he issues the summons to the tenant.⁴ In still other states the jury is summoned, it seems, at the same time as the tenant and by the same process.⁵

davit, if proceedings are stayed by the counter-affidavit of the tenant the latter is not to be removed, but the officer to whom such counter-affidavit has been given shall return the proceedings to the next Superior Court of the county in which the land lies, and the case shall be tried there by a special jury as in case of appeal. Georgia Code (1895), § 4816 (4080); *Lamar v. Sheppard*, 84 Ga. 561; *Parker v. Beeman*, 28 Ga. 475. See also *Smith v. Singleton*, 71 Ga. 68; *Thompson v. Chapman*, 57 Ga. 16; *Tufts v. Du Bignon*, 61 Ga. 322.

Warrant Returnable on Face to County Court. — In *Lamar v. Sheppard*, 84 Ga. 561, it was held that though the warrant issued by the county judge be returnable on its face to the County Court, yet if it be actually returned to the Superior Court it is sufficient, and the latter court may entertain jurisdiction to try the issue formed by the counter-affidavit.

1. N. Y. Code Civ. Pro., § 2247; *Bloom v. Huyck*, 71 Hun (N. Y.) 252.

2. See the statutes of the various states.

3. Thus, for instance, in *New York*, upon a jury being demanded, the magistrate is required to issue a precept directed to the proper officer, commanding him to summon twelve persons nominated by such magistrate who are qualified to serve as jurors in courts of record, for the purpose of trying the matter in dispute. *Bloom v. Huyck*, 71 Hun (N. Y.) 252. From such twelve persons six are then drawn in the same way as jurors in justices' courts, and

these six are sworn by the judge or justice to hear and determine the matter. N. Y. Code Civ. Pro., § 2247; *Porter v. People*, 7 How. Pr. (N. Y. Supreme Ct.) 441.

Additional Venire. — In *Roach v. Cosine*, 9 Wend. (N. Y.) 227, holding that if there be a default of jurors on the return of a venire the justice is authorized to issue a second venire, and so *toties quoties* until a jury appears, the court said: "The officer must necessarily have the power of renewing the venire until a jury appears, otherwise there would be a failure of justice. It is a power incident to that of conducting an inquiry by means of a jury."

4. *Adams v. Decker*, 11 N. J. L. 84.

Return of More Jurors than Directed Not Error. — In *Adams v. Decker*, 11 N. J. L. 84, in which it was objected that the sheriff returned a panel of twenty-four jurors instead of twelve as directed, the court said: "This objection is not a valid one; it is usual for the sheriff to return twenty-four, although he is directed to return twelve."

5. *Ayres v. Novinger*, 8 Pa. St. 412; *Pennsylvania R. Co. v. Heister*, 8 Pa. St. 452; *Hower v. Krider*, 15 S. & R. (Pa.) 43; *Blashford v. Duncan*, 2 S. & R. (Pa.) 480; *Stroup v. McClure*, 4 Yeates (Pa.) 523; *Wistar v. Ollis*, 77 Pa. St. 291.

Must Be Selected by Sheriff. — In *Pennsylvania R. Co. v. Heister*, 8 Pa. St. 445, it was held that where a precept is issued to a sheriff commanding him to summon a jury, such duty must be performed by the sheriff himself, and not

Right to Challenge Juror. — As to the right peremptorily to challenge a juror in summary proceedings, the decisions differ, some holding that each party has the right thus to challenge a specified number of jurors,¹ while according to others neither party has such right.²

(b) **Upon What Issues.** — It may be stated as a general rule that the trial in the case of summary proceedings is upon the issues raised by the tenant's denial of the facts upon which the summons or warrant was issued.³ The affidavit of the landlord is not evidence upon the merits on the trial; it stands for a declaration on which the tenant must join issue.⁴

(c) **Matter of Defense — Generally.** — The tenant cannot, upon such trial, defend by showing that the landlord had no title at the time when the lease was given.⁵ Where the landlord has voluntarily parted with his title, and the tenant has attorned to the purchaser, the tenant may interpose the sale and attornment as a defense.⁶ According to the decisions in some jurisdictions, a

by his deputy. See also *McMullen v. Orr*, 8 Phila. (Pa.) 342.

1. In *Minor v. Brown*, 20 Conn. 520, it was held that on the trial of a complaint in summary process to obtain possession of leased premises, each party has the right of challenging peremptorily two jurors.

2. *People v. Hamilton*, 39 N. Y. 107, where such holding was upon the ground that summary proceedings are not civil proceedings within the meaning of the sections of the code providing that upon the trial of issues of fact each party shall be entitled peremptorily to challenge two of the persons drawn as jurors. See also *Roberts v. Cone*, 3 Alb. L. J. 151.

3. "The matters controverted are those facts upon which the summons was issued and denied by the affidavit of the person in possession of the premises." *People v. Kelsey*, 14 Abb. Pr. (N. Y. Supreme Ct.) 372.

4. *Simpson v. Rhinelanders*, 20 Wend. (N. Y.) 103.

5. *Rodgers v. Palmer*, 33 Conn. 155; *White v. Bailey*, 14 Conn. 278; *Newman v. Mackin*, 13 Smed. & M. (Miss.) 383; *Logan v. Woolwine*, 56 Mo. App. 453; *Rowan v. Lytle*, 11 Wend. (N. Y.) 616; *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *McGarvey v. Puckett*, 27 Ohio St. 669.

"The tenant cannot, in any proceeding, defeat the title of his landlord by an independent title. The title alleged by way of defense must be connected with the title of the lessor, or it must

be shown that the title of the lessor has been divested by an act of his own, or by descent from him." *Rogers, J.*, in *Newell v. Gibbs*, 1 W. & S. (Pa.) 500.

Cannot Show Outstanding Title in Stranger. — In *Heritage v. Willfong*, 58 Pa. St. 137, it was held that the tenant cannot, as a defense, be allowed to show an outstanding title in a stranger.

Cannot Deny Landlord's Title Before Surrendering Possession. — In *Newman v. Mackin*, 13 Smed. & M. (Miss.) 383, in which a tenancy of the defendant under a letting from the plaintiff was clearly made out, and the defendant attempted to show a want of the right of possession in the plaintiff, the court said: "It was not competent * * * to the defendant to object to the want of right of possession or of property in the plaintiff. Having admitted the right by accepting the lease, she was estopped from denying it, at least until she had surrendered the possession and placed the plaintiff in the same situation which he occupied before the lease." See also *Rowan v. Lytle*, 11 Wend. (N. Y.) 616.

6. *Logan v. Woolwine*, 56 Mo. App. 453; *Pentz v. Kuester*, 41 Mo. 447.

Expiration by Landlord's Act or by Act of Law. — In *Koontz v. Hammond*, 62 Pa. St. 177, it was held that the tenant may set up any defense of which he could avail himself in an ejectment by his lessor; that his title had expired by his own act or by act of law; or that the lease had been accepted by fraud or misrepresentation, which would show

lessee cannot set up title to the premises acquired by him since the taking of the lease.¹ If, after the letting of the premises, the tenant purchases his landlord's title, the tenancy is extinguished, and the tenant may plead such purchase in bar of an action to recover the premises.²

Not Confined to Negative Proof in Denial. — The tenant, under his general denial, is not confined to mere negative proof in denial of the facts stated by the landlord, but may give evidence of independent facts inconsistent therewith which tend to meet the cause of action.³

Counterclaim. — In *New York*, since the amendment of the code, a tenant may set up a statement of any new matter "constituting a legal or equitable defense or counterclaim."⁴ Prior to this

that there was no tenancy. See also *Newell v. Gibbs*, 1 W. & S. (Pa.) 496; *Heritage v. Wilfong*, 58 Pa. St. 137; *Quinn v. McCarty*, 81 Pa. St. 475.

1. *Rowan v. Lytle*, 11 Wend. (N. Y.) 616.

Contra. — In *Connecticut* it is expressly provided that if the lessee obtain a title after the date of the lease, from the lessor, or any other person, he may show it in defense of his continued possession. *Rodgers v. Palmer*, 33 Conn. 155, where the court said: "By the term 'title' * * * is meant a right to the possession paramount to that of the complainant. The complainant may be a lessee and the defendant a sublessee. Both leases may have expired, and the defendant may have taken in the legal title or taken a new lease from the owner of the fee. It would not be just to permit him to show merely that the complainant's lease had expired, but it would be clear injustice to prevent him from showing that he had acquired the absolute estate after the date of the lease, or a new lease from the owner, or from a grantee of the owner, or from one who had taken the title of the owner by levy of execution."

2. *Logan v. Woolwine*, 56 Mo. App. 453.

In *Silvey v. Summer*, 61 Mo. 253, the court, in holding that a tenant cannot dispute the title of his landlord, said: "What is meant by this is that a tenant cannot set up an outstanding or antagonistic title to that of his landlord. If, however, a tenant has acquired his landlord's title, either directly or through the medium of a tax sale, * * * the rule * * * does not apply."

3. *Hamline v. Engle*, 14 Ind. App. 685.

Execution of Lease under Usurious Agreement. — Under his general denial of the facts alleged the tenant may show that an alleged lease was executed in pursuance of a usurious agreement. *People v. Howlett*, 76 N. Y. 574.

Rule that Tenant Cannot Dispute Landlord's Title. — "If the conventional relation of landlord and tenant does not exist, the proceeding cannot be entertained under this act, and the statute is broad enough to enable a party to prove under this denial that such relation does not exist. * * * It is also urged that the tenant cannot dispute the title of his landlord, but I do not think this principle applies to a case like this. A tenant cannot dispute the title of his landlord because he cannot deny what he has once admitted, but here the instrument containing the admission is void, and is not effectual for any purpose." *Church, C. J.*, in *People v. Howlett*, 76 N. Y. 574.

Extension of Lease or New Contract. — The tenant proceeded against for holding over may, under his general denial, prove that he was not unlawfully holding over by showing that there had been an extension of the lease, or that he was in possession as tenant by virtue of some other contract with the plaintiff. *Hamline v. Engle*, 14 Ind. App. 685. See also *In re Wright*, (Buffalo Super. Ct.) 16 N. Y. Supp. 808.

4. N. Y. Code Civ. Pro., § 2244 (as amended in 1893); *Constant v. Barrett*, 13 Misc. Rep. (N. Y. C. Pl.) 249; *Rogers v. Earle*, 23 Civ. Pro. Rep. (N. Y. Super. Ct.) 220, 5 Misc. Rep. (N. Y.) 164.

amendment it was held that under the statute no such defense or counterclaim could be pleaded, and that the only answer permitted was a general denial or a denial of the specific allegations of the landlord's petition.¹

In *Connecticut* it is held that where, in a proceeding to recover leased premises for nonpayment of rent, a general denial is pleaded, the tenant cannot introduce evidence of a breach of a covenant of the lease on the part of the complainant by which he has sustained damages greater than the amount of the rent claimed.²

(d) *Adjournment*. — When issue is joined it is within the discretion of the court to adjourn the trial of such issue at the request of either party.³ An adjournment can, however, be granted only upon proof to the satisfaction of the court that it is necessary to enable the applicant to procure his necessary witnesses,⁴ or by

Manner of Establishing Defense or Counterclaim. — This statute (Code Civ. Pro., § 2244), as amended, provides that "such defense or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action." *Constant v. Barrett*, 13 Misc. Rep. (N. Y. C. Pl.) 249.

Cannot Set Off Overdue Mortgage. — A tenant who acquires an overdue mortgage upon the demised premises cannot set off the debt against the rent in a summary proceeding. *Constant v. Barrett*, 14 Misc. Rep. (N. Y. C. Pl.) 570.

Damages for Landlord's Conversion of Chattels. — In *Burrell v. Do Sim*, 10 Misc. Rep. (N. Y. C. Pl.) 745, it was held that a claim for damages by reason of a conversion of the tenant's chattels by the landlord cannot be set up as a counterclaim in summary proceedings for nonpayment of rent.

1. *Barnum v. Fitzpatrick*, 27 Abb. N. Cas. (N. Y. Fifth Civ. Dist. Ct.) 334; *Durant Land Imp. Co. v. East River Electric Light Co.*, 15 Daly (N. Y.) 337, 17 Civ. Pro. Rep. (N. Y.) 224.

Under a denial of the averment that rent is due and that the tenant has made default in the payment thereof, the latter may prove payment, or that for any reason no rent is due. *Barnum v. Fitzpatrick*, 27 Abb. N. Cas. (N. Y. Fifth Civ. Dist. Ct.) 334; *Durant Land Imp. Co. v. East River Electric Light Co.*, 15 Daly (N. Y.) 337, 17 Civ. Pro. Rep. (N. Y.) 224.

"It is not even a sufficient answer to the proceeding that the full amount of the stipulated rent is not payable. If

any rent is due, the landlord is entitled to a final order in his favor." *Barnum v. Fitzpatrick*, 27 Abb. N. Cas. (N. Y. Fifth Civ. Dist. Ct.) 334; *Jarvis v. Driggs*, 69 N. Y. 143.

2. *Barnum v. Keeler*, 33 Conn. 209.

3. *Goff v. Vedder*, 12 Civ. Pro. Rep. (Madison County Ct.) 358; *Kiernan v. Reming*, 7 Civ. Pro. Rep. (N. Y. Super. Ct.) 311; *Deutermann v. Wilson*, 15 Civ. Pro. Rep. (N. Y. C. Pl.) 411; *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 152.

Adjournment on Judge's Own Motion in Default of Answer. — The judge before whom a summary proceeding is instituted has no legal power to adjourn the matter to a future day on his own motion in default of an answer by the tenant. *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 152. See also *Deutermann v. Wilson*, 15 Civ. Pro. Rep. (N. Y. C. Pl.) 411.

4. *Goff v. Vedder*, 12 Civ. Pro. Rep. (Madison County Ct.) 358; *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 152; *Boller v. New York*, 40 N. Y. Super. Ct. 523.

Adjournment for Other Causes than to Procure Witnesses. — In *Boller v. New York*, 40 N. Y. Super. Ct. 523, it was held that an adjournment for any other reason than to procure witnesses operates as a discontinuance. See also, to the same effect, *Kiernan v. Reming*, 7 Civ. Pro. Rep. (N. Y. Super. Ct.) 311; *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 152.

In *Goff v. Vedder*, 12 Civ. Pro. Rep. (Madison County Ct.) 358, it is held that the proper construction of the statutory provision is that it does not pro-

consent of all the parties appearing.¹ The adjournment of the trial cannot be for longer than the statutory period except by the consent of the parties.²

(e) **Effect of Discontinuance.** — Where summary proceedings have been instituted by a landlord for holding over after the expiration of his term, and the whole case submitted to the justice for his decision, a discontinuance by the justice on motion of the landlord discontinues the whole proceeding.³

(11) **Final Order — When Made.** — If sufficient cause is not shown upon the return of the summons, or if, upon the trial, the verdict or decision is in favor of the landlord, it is the duty of the court to make a final order directing the delivery of possession to him.⁴ If the verdict or decision is in favor of the tenant, the final order must be made accordingly.⁵

Costs. — The final order should award the costs of the proceedings to the party in whose favor it is made.⁶

hibit an adjournment for any other cause satisfactory to the court. Adjournments for the purpose of procuring witnesses are, according to this case, by the statute made a matter of absolute right, and for other causes discretionary.

1. N. Y. Code Civ. Pro., § 2248; *Kiernan v. Reming*, 7 Civ. Pro. Rep. (N. Y. Super. Ct.) 311; *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 160.

2. *Goff v. Vedder*, 12 Civ. Pro. Rep. (Madison County Ct.) 358.

3. *Gillilan v. Spratt*, 41 How. Pr. (N. Y. C. Pl.) 27.

No Bar to Action for Rent and Damages. — Such a decision of discontinuance is no bar to an action brought subsequently by the landlord against the tenant for rent and damages for the use and occupation of the premises. *Gillilan v. Spratt*, 41 How. Pr. (N. Y. C. Pl.) 27.

4. *White v. Bailey*, 14 Conn. 271; *Brown v. New York*, 66 N. Y. 385; *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 152; *Peer v. O'Leary*, 8 N. Y. Misc. Rep. (Buffalo Super. Ct.) 350; *Stover v. Chasse*, 9 Misc. Rep. (N. Y. C. Pl.) 45; *Bloomington v. Adler*, 7 Misc. Rep. (N. Y. C. Pl.) 182; *Kiernan v. Reming*, 7 Civ. Pro. Rep. (N. Y. Super. Ct.) 311; *Ash v. Purnell*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 234; *Sheldon v. Testera*, 21 Misc. Rep. (N. Y. Supreme Ct.) 477.

Where the lease provides for the payment of rent and of water rents the landlord is entitled to a final order in summary proceedings if any amount

for either is due. *Cochran v. Reich*, 20 Misc. Rep. (N. Y. Supreme Ct.) 623.

Mandamus to Compel Signing. — Where sufficient cause is not shown on the return day of the precept, mandamus will lie to compel the justice to sign the final order. *People v. Murray*, 23 Civ. Pro. Rep. (N. Y. Super. Ct.) 71, 2 Misc. Rep. (N. Y.) 152. See also article MANDAMUS.

5. N. Y. Code Civ. Pro., § 2249.

6. *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 339; *New York L. Ins. Co. v. Waldron*, 9 Daly (N. Y.) 472; *Posson v. Dean*, 8 Civ. Pro. Rep. (Orleans County Ct.) 177; *Rubicum v. Williams*, 1 Ashm. (Pa.) 235.

What Costs Recoverable. — The costs allowed to the prevailing party in a summary proceeding to recover the possession of land are merely the fees of those officers who are required to perform the services, such as the judge, sheriff, constable, etc. Attorneys and counsel fees are not recoverable in such proceeding, against the adverse party. *Patridge v. Ford*, 5 How. Pr. (N. Y. Supreme Ct.) 21.

In *New York L. Ins. Co. v. Waldron*, 9 Daly (N. Y.) 472, it was held that in proceedings in the New York District Courts to recover the possession of leased property for nonpayment of rent, no costs or disbursements can be allowed except the marshal's fees.

How Collected. — In *New York* it is provided that "if the final order is made by a county judge, or a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon as if it was a judg-

Award of Double Rent.—In those states where the warrant is stayed by the counter-affidavit of the tenant, if, upon the trial, the issue raised thereby is decided against the tenant, judgment is rendered against him, if he is holding possession of rented premises beyond the term, for double the rent stipulated,¹ or if he be a tenant at will or by sufferance, then for double the rent the premises are shown by the evidence to be worth.²

(12) **Warrant to Dispossess**—(a) **Issuance.**—Upon the making of the final order in favor of the plaintiff the judge or justice issues a warrant of dispossession to the proper officer.³

ment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a justice of the peace. In every other case an execution may be issued to collect the costs awarded thereby, as if the final order was a judgment rendered in the court of which the judge or justice is the presiding officer." N. Y. Code Civ. Pro., § 2250.

Right to Costs Suspended by Certiorari.—When a certiorari is issued it suspends the landlord's right to recover his expenses. While certiorari is pending, the suspended justice's judgment furnishes to the landlord no evidence of a right to the costs. *Launitz v. Dixon*, 5 Sandf. (N. Y.) 249.

1. *Richardson v. Harvey*, 37 Ga. 224.

Where the issue is found against a tenant holding over he may be charged with double rent for the time he held over, up to the date of the trial, although nothing is said of rent in the plaintiff's affidavit to obtain the warrant. *Pettis v. Brewster*, 94 Ga. 527.

2. *Richardson v. Harvey*, 37 Ga. 224; *Smith v. Singleton*, 71 Ga. 68; *Pettis v. Brewster*, 94 Ga. 527.

3. *Colt v. Eves*, 12 Conn. 243; *People v. Murray*, 2 Misc. Rep. (N. Y. Super. Ct.) 152; *Peer v. O'Leary*, 8 N. Y. Misc. Rep. (Buffalo Super. Ct.) 350; *McKeon v. Whitney*, 3 Den. (N. Y.) 452; *Jarvis v. Driggs*, 69 N. Y. 143; *People v. Willis*, 5 Abb. Pr. (N. Y. Supreme Ct.) 205; *Ash v. Purnell*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 234; *Chretien v. Doney*, 1 N. Y. 419; *Rubicum v. Williams*, 1 Ashm. (Pa.) 235.

In *Pennsylvania* it is held error to issue a writ of possession on the day when judgment is entered, there being an act prohibiting it from being issued within five days after judgment. *Trimbath v. Patterson*, 76 Pa. St. 277.

What Constitutes Issuance.—The war-

rant is held to be issued when the judge, having indorsed the final order on the papers, signs the warrant and delivers it to the clerk, who is its proper custodian until called for. With this act the justice's jurisdiction over the proceeding terminates. After the expiration of the time limit allowed by law to do this, he has no further power over it and he cannot even amend the final order or the warrant. *Ash v. Purnell*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 234.

Issued by Justice Before Whom Precept Returnable.—In *Kiernan v. Reming*, 2 How. Pr. N. S. (N. Y. Super Ct.) 89, it was held that the justice before whom the precept is returnable must issue the warrant to dispossess.

Mandamus to Compel Issuance.—A mandamus lies to compel the magistrate to issue his warrant to recover possession, notwithstanding an appeal has been taken. *People v. Willis*, 5 Abb. Pr. (N. Y. Supreme Ct.) 205. See on this point the article MANDAMUS.

Where Tenant Removes Before Return Day.—“If the person proceeded against obeys the summons and removes from the premises before the return day, he can appear on that day and show the fact of his removal, and then no warrant can be issued.” *Brown v. New York*, 66 N. Y. 385. See also, to the same effect, *Ash v. Purnell*, 16 Daly (N. Y.) 189, 26 Abb. N. Cas. (N. Y.) 92, 19 Civ. Pro. Rep. (N. Y.) 234.

Where Tenant Removes After Final Order.—“So, too, after final order, which we think is in effect a judgment, and the only one which can be rendered in such case, it may be satisfied by a voluntary compliance with its requirements on the part of the tenant, just as effectively as if the warrant had been issued, and in fact it is his duty to go out without waiting to be dispossessed under the warrant.” Book-

(b) **Contents.** — Such warrant should describe the premises¹ and should command such officer to remove the tenant and under-tenants, if any, from the premises, and to put the landlord in full possession thereof.² So, where the issue upon a counter-affidavit is decided against the tenant, the plaintiff is entitled to a writ of possession and to be placed in possession of the premises.³

(c) **Effect of Warrant.** — The warrant for the removal of the tenant operates to cancel and annul the relation of landlord and tenant between the parties and the contract or agreement for the use of

staver, J., in *Ash v. Purnell*, 16 Daly (N. Y.) 189, 26 Abb. N. Cas. (N. Y.) 92, 19 Civ. Pro. Rep. (N. Y.) 234. See also *Gallagher v. Reilly*, 16 Daly (N. Y.) 227.

1. *Ash v. Purnell*, 16 Daly (N. Y.) 189, 26 Abb. N. Cas. (N. Y.) 92, 19 Civ. Pro. Rep. (N. Y.) 234.

2. *Ash v. Purnell*, 16 Daly (N. Y.) 189, 26 Abb. N. Cas. (N. Y.) 92, 19 Civ. Pro. Rep. (N. Y.) 234.

Exception. — Where, as is authorized under *New York Code Civ. Pro.*, § 2237, the neighbor of demised premises used as a bawdy house makes application for the removal of a tenant so using the premises, the warrant of course does not require that the petitioner is to be put in possession. *N. Y. Code Civ. Pro.*, § 2251.

Naming Certain Person as in Possession. — The fact that a warrant answering all the requirements states that a certain person named is in possession will not affect it, since all the essential requisites of a valid warrant remain with this rejected. *Babin v. Ensley*, 14 N. Y. App. Div. 548.

New Tenancy — Countermanding Warrant. — It seems, according to the case of *Croft v. King*, 8 Daly (N. Y.) 265, that where, after a landlord has sued out a dispossess warrant in summary proceedings, to recover the possession of demised premises for nonpayment of rent, he accepts as his tenant one of the persons in possession of the premises, he is not bound to notify the marshal to whom the warrant has been issued of such new tenancy, and countermand the warrant against such person. See also, in this connection, *Scheibel v. Fairbairn*, 1 B. & P. 388; *Brown v. Feeter*, 7 Wend. (N. Y.) 301.

Indorsement of Rent in Arrear. — In *Pennsylvania* it is the duty of the magistrates, where judgment is given against a tenant in an action for default in payment of rent, to ascertain

the amount of rent due and in arrear, and to indorse the same on the writ of possession. *Rubicum v. Williams*, 1 Ashm. (Pa.) 230.

"The omission to ascertain and determine the amount of rent actually due and in arrear, and indorse the same on the writ of possession, was clearly an error. The act requires this to be done in order that the tenant may, if he sees fit, supersede the writ by paying to the constable, for the use of the lessor, the amount of the rent together with the costs of the proceeding." *Williams, J.*, in *Trimboth v. Patterson*, 76 Pa. St. 277.

Protection of Warrant. — A warrant of dispossession, properly and regularly issued, protects all who act under it unless they act wilfully and maliciously. *Higenbotham v. Lowenbein*, 28 How. Pr. (N. Y. Super. Ct.) 221.

What Constitutes Execution. — "It is the duty of the officer to deliver the full and actual possession of the premises recovered. And it is said that the process is not understood to be executed, nor the execution complete, until the officer is gone and the plaintiff left in quiet possession. 2 Tidd's Pr. 1247. If the tenant do not peaceably and quietly yield the possession to the plaintiff and consent thereto, it is the duty of the officer to remove him entirely off the premises, and it cannot be said that he has executed the writ until he has done so." *Farnsworth v. Fowler*, 1 Swan (Tenn.) 1.

To be Executed Regardless of Weather. — In *Higenbotham v. Lowenbein*, 28 How. Pr. (N. Y. Super. Ct.) 221, it is held that the warrant may be executed although the day may be inclement and goods removed may thereby suffer injury. The law does not recognize the state of the weather in executing such a warrant.

3. *Ga. Code* (1895), § 4817 (4081); *Parker v. Beeman*, 28 Ga. 475; *Pettis v. Brewster*, 94 Ga. 527.

the premises, if any exists,¹ from the time of its issue, and **not** from the time of the institution of the proceedings.²

(13) *Stay of Proceedings.* — It is usually provided by the statutes authorizing summary proceedings that the tenant may **stay** the proceedings in all cases save where he is holding after the expiration of his term. The manner in which this may be done varies in each case with the grounds on which the proceedings for dispossession are instituted.³

(14) *Certiorari.* — The right to sue out a writ of certiorari to bring the summary proceeding up for review depends upon general principles. The writ has been frequently allowed in such

1. *Hinsdale v. White*, 6 Hill (N. Y.) 507; *Pursell v. New York L. Ins., etc., Co.*, 42 N. Y. Super. Ct. 383; *Whitney v. Meyers*, 1 Duer (N. Y.) 266; *Ash v. Purnell*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 234.

Recovery of Compensation Between Default and Dispossession. — In some states it seems that, in actions to dispossess for nonpayment of rent, compensation for the use of the premises by the tenant between the default and the time he is dispossessed cannot be recovered by action on the lease; but the landlord's only remedy is by proceeding against the tenant as a wrongdoer. *Hinsdale v. White*, 6 Hill (N. Y.) 507; *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 339; *Rubicum v. Williams*, 1 Ashm. (Pa.) 230.

In *Rubicum v. Williams*, 1 Ashm. (Pa.) 230, it was held that in Pennsylvania "the Act of the third of April, 1830, only authorizes the justices, after they have given judgment against the lessee that the demised premises shall be delivered up to the lessor, to issue process authorizing a redelivery of the possession of the premises to the lessor, and the levy of the costs on the lessee; and that although they may and are bound to ascertain the rent due and in arrear, and to indorse the same on their writ of possession, yet they cannot issue any execution against the tenant to coerce the payment of the sum so ascertained."

In *Indiana* it is held that in an action by a landlord against his tenant to recover the possession of leased premises and damages for the unlawful detention thereof (2 Rev. Stat. 1876, p. 662), the assessment of damages for such detention until the time of such trial is authorized. *White v. Stellwagon*, 54 Ind. 186.

2. *Hinsdale v. White*, 6 Hill (N. Y.)

507; *Pursell v. New York L. Ins., etc., Co.*, 42 N. Y. Super. Ct. 383; *Whitney v. Meyers*, 1 Duer (N. Y.) 266.

Cancels Leases as to Subtenants. — In *Ash v. Purnell*, 19 Civ. Pro. Rep. (N. Y. C. Pl.) 234, the court, in holding that the issuing of the warrant to recover the possession of property for the nonpayment of rent cancels not only the lease between the landlord and his immediate tenant, but also all leases to subtenants, said: "The contention that the issuing of a warrant only cancels the lease between the landlord and his immediate tenant, and does not affect leases between subtenants, is in the teeth of the warrant provided for in section 2251 of the code, for that says it shall command the officer 'to remove all persons' from the premises, which if done would most effectually terminate any lease between subtenants."

In *Missouri* it is held that proceedings under the Landlord and Tenant Act operate to annul the contract for the use of the premises and to cancel the relation of landlord and tenant from the time of the removal of the tenant under the writ. *Evans v. Voght*, 8 Mo. App. 575.

3. See statutes of various states.

Effect of Tender During Proceedings. — A tender of the amount due to date as claimed by the landlord, made during the pendency of the action, if operated for any purpose, will not bar the landlord's right to the final order in summary proceedings, though the tenant may stay the execution of the warrant by the payment of all rent, interest, and costs. Tender of money during the pendency of an action not brought for the recovery of money is no bar thereto, where the right to make a tender is not expressly given by statute. *Stover v. Chasse*, 9 Misc. Rep. (N. Y. C. Pl.) 45.

cases.¹ It should issue only after the case has been finally tried and judgment given thereon before the court below.²

Extent of Review.—The general rules concerning the extent of review on certiorari have been stated in a former article.³ The inquiry is restricted to jurisdiction and regularity and does not go to the merits unless direct provision is made therefor by statute.⁴ If the court is given power to examine, upon the merits, it will affirm, reverse, or quash the proceedings, as justice may require.⁵

The Effect of the issuance of a writ of certiorari as a stay of proceedings has been the subject of statutory regulation in most states. The subject has been considered in a former article.⁶

1. See generally article CERTIORARI, vol. 4, p. 1.

Michigan.—*Smith v. Reed*, 24 Mich. 240; *Farrell v. Taylor*, 12 Mich. 113.

New York.—*Lynde v. Noble*, 20 Johns. (N. Y.) 80; *Launitz v. Dixon*, 5 Sandf. (N. Y.) 249; *People v. Hamilton*, 39 N. Y. 107; *Springsteen v. Powers*, 3 Robt. (N. Y.) 483; *People v. Lockwood*, 3 Hun (N. Y.) 304; *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *Niblo v. Post*, 25 Wend. (N. Y.) 280; *Colden v. Botts*, 12 Wend. (N. Y.) 234; *Roach v. Cosine*, 9 Wend. (N. Y.) 228.

Pennsylvania.—*Brown's Appeal*, 66 Pa. St. 155; *Essler v. Johnson*, 25 Pa. St. 350; *Duddy v. Hill*, 3 Leg. & Ins. Rep. (Pa.) 59; *Grubb v. Fox*, 6 Binn. (Pa.) 460; *Connelly v. Arundell*, 6 Phila. (Pa.) 38; *McGee v. Fessler*, 1 Pa. St. 126.

Interest in Subject-matter Necessary.—A party having no interest in the subject-matter of the proceedings is not entitled to prosecute a writ of certiorari. *Colden v. Botts*, 12 Wend. (N. Y.) 234; *Starkweather v. Seeley*, 45 Barb. (N. Y.) 164.

By Party in Interest Not of Record.—In *Building Assoc. v. Daughen*, 7 W. N. C. (Pa.) 244, it was held that a certiorari may be taken out by a party in interest but not of record.

Bond.—Where the defendant below sues out a certiorari he must execute to the complainant a bond with surety to secure accruing rent, etc. *Smith v. Reed*, 24 Mich. 240.

In *Hutchinson v. Vansciver*, 6 Phila. (Pa.) 39, it was held that the party applying for the writ must give security for all costs that may have accrued or may accrue, and the rent which has already become or may become due, up to the final determination of said certiorari, in the event of the same being determined against him.

2. *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *Lynde v. Noble*, 20 Johns. (N. Y.) 80, where the court said: "The legislature have prescribed a summary proceeding, calculated to secure the rights of parties and insure a speedy decision. * * * If a certiorari will remove the proceedings into this court, before a trial is had before the judge authorized to try the question of possession, there is nothing gained by the statute, for the tenant, by that course, may delay the landlord as long as he could before the passing of the act, and subject him to at least equal expense. Such a construction would virtually be a repeal of the statute."

3. See article CERTIORARI, vol. 4, p. 254 *et seq.*

4. In *New York* the authority of the court is not limited to questions of jurisdiction and regularity. The evidence will be looked into. See *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *People v. Hamilton*, 39 N. Y. 107; *Benjamin v. Benjamin*, 5 N. Y. 383; *People v. Lockwood*, 3 Hun (N. Y.) 304; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *Niblo v. Post*, 25 Wend. (N. Y.) 280.

In *Pennsylvania* the certiorari does not bring up the evidence. *Bedford v. Kelly*, 61 Pa. St. 491; *Buchanan v. Baxter*, 67 Pa. St. 348; *McMillan v. Graham*, 4 Pa. St. 140. See also *Hiesler v. Brown*, 11 Lanc. Bar. (Pa.) 159.

5. *Buck v. Binninger*, 3 Barb. (N. Y.) 391; *Anderson v. Prindle*, 23 Wend. (N. Y.) 616.

6. See article CERTIORARI, vol. 4, p. 209 *et seq.* As to practice in *New York* and *Pennsylvania*, see *Launitz v. Dixon*, 5 Sandf. (N. Y.) 249; *Springsteen v. Powers*, 3 Robt. (N. Y.) 483; *Lynde v. Noble*, 20 Johns. (N. Y.) 80; *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Duddy v. Hill*, 3 Leg. & Ins. Rep. (Pa.)

(15) *Injunction*. — As a general rule, courts of equity will not interfere to stay such proceedings,¹ though according to some cases they may do so where such interference is the only means of preventing fraud or injustice,² or, it seems, where the magistrate had no jurisdiction.³

(16) *Appeal* — *When Lies*. — An appeal will, as a rule, lie from the judgment in summary proceedings to recover possession of demised premises, just as in other civil actions.⁴

59; *Grubb v. Fox*, 6 Binn. (Pa.) 460; *De Coursey v. Guarantee Trust, etc., Co.*, 81 Pa. St. 217; *Jackson v. Gleason*, 6 Phila. (Pa.) 307.

1. *Hyatt v. Burr*, 8 How. Pr. (N. Y. Supreme Ct.) 168.

In *Smith v. Moffat*, 1 Barb. (N. Y.) 65, an injunction was issued to stay progress of summary proceedings, but was afterwards modified so as to allow the landlord to go on with his trial, but staying the issue of any warrant of removal until further direction. In granting a motion to dissolve this injunction entirely, it was held that a court of equity has no power to stay summary proceedings instituted before a justice by a landlord to remove a tenant holding over, and that if a tenant sustains injury or damage by being wrongfully dispossessed of the premises upon the summary proceedings under the statute, he has an adequate remedy by a writ of restitution from the Supreme Court, or by an action at law upon the covenant for quiet enjoyment contained in his lease. See also *Jessurun v. Mackie*, 24 Hun (N. Y.) 624; *Wordsworth v. Lyon*, 5 How. Pr. (N. Y. Supreme Ct.) 463; *Hyatt v. Burr*, 8 How. Pr. (N. Y. Supreme Ct.) 168. And see *Worthy v. Tate*, 44 Ga. 152.

2. *When Injunction Proper — To Relieve from Fraud*. — In *James v. Stuyvesant*, 3 Sandf. (N. Y.) 665, note *a*, it is held that the Court of Chancery may relieve the tenant in case of fraud.

To Prevent Injustice. — In *Worthy v. Tate*, 44 Ga. 152, the court, while holding that a bond is essential to the operation of a counter-affidavit as a stay of proceedings, said: "But while this is true, if there be any ground of equity interposition in the premises, and the party, by proper averments, sets up grounds which would render it unjust and inequitable to remove them by such warrant, we do not see why equity, upon a proper case made, should not enjoin the pro-

ceedings. It would be a harsh construction of the law which would make the poverty of the party a reason for denying them justice. Ordinarily no court would sanction an injunction to restrain these authorized proceedings by statute. But if the tenant could show a defense, not within the statute, or outside of it, or grounds within it, which by the bill showed that injustice would be done, we think it is within the sound discretion of the chancellor to interfere with the process of law by injunction and grant a hearing to the parties." See also *McIntyre v. Hernandez*, 39 How. Pr. (N. Y. Super. Ct.) 123.

3. *Koster v. Van Schaick*, 11 Daly (N. Y.) 205.

4. *New York*. — *Everall v. Lossen*, 7 Civ. Pro. Rep. (N. Y. C. Pl.) 112; *Warner v. Henderson*, 25 Hun (N. Y.) 303; *Brown v. Cassady*, 34 Hun (N. Y.) 55; *Harrison v. Swart*, 34 Hun (N. Y.) 259; *Deuel v. Rust*, 24 Barb. (N. Y.) 438; *Hammond v. Carpenter*, 29 How. Pr. (N. Y. Supreme Ct.) 43; *Briggs v. Swales*, 29 How. Pr. (N. Y. Supreme Ct.) 201; *Shaw v. McCarty*, 63 How. Pr. (N. Y. C. Pl.) 286; *McIntyre v. Hernandez*, 39 How. Pr. (N. Y. Super. Ct.) 121; *Jessurun v. Mackie*, 24 Hun (N. Y.) 624; *Lewis v. Hoffman*, 5 Civ. Pro. Rep. (Allegany County Ct.) 141; *Broadwell v. Holcombe*, 4 Civ. Pro. Rep. (N. Y. Super. Ct.) 163; *Moench v. Yung*, 18 Civ. Pro. Rep. (N. Y. C. Pl.) 259; *Jacobs v. Zeltner*, 24 Civ. Pro. Rep. (N. Y. C. Pl.) 45, 9 Misc. Rep. (N. Y.) 455.

Pennsylvania. — *Hazen v. Culbertson*, 10 Watts (Pa.) 393; *Koontz v. Hammond*, 62 Pa. St. 177; *Gibbons v. McGuigan*, 6 Phila. (Pa.) 108; *McClelland v. Patterson*, (Pa. 1886) 5 Cent. Rep. 734; *Koenig v. Bauer*, 57 Pa. St. 168; *Dunmire v. Price*, 12 W. N. C. (Pa.) 179; *Hardy v. Watts*, 22 Pa. St. 33.

Vermont. — *Baldwin v. Skeels*, 51 Vt. 121.

See generally article APPEALS, vol. 2, p. 1.

Security. — When the tenant appeals, in order to stay the issuing of a warrant he is generally required to give security for the payment of all rents accruing or to accrue upon the premises, or, if there is no lease thereof, the value of the use and occupation of the premises, subject to the institution of the proceedings.¹

(17) *Writ of Restitution.* — If the tenant has been wrongfully dispossessed of the premises upon summary proceedings, he may be restored to possession by a writ of restitution, which the appellate court is authorized to award on its reversal of the final order.²

Final Order by Default Appealable. — In *Jacobs v. Zeltner*, 24 Civ. Pro. Rep. (N. Y. C. Pl.) 45, 9 Misc. Rep. (N. Y.) 455, it was held that a final order when obtained by default is none the less appealable. See also *Moench v. Yung*, 16 Daly (N. Y.) 143.

Appeal to County Court. — In *People v. Willis*, 5 Abb. Pr. (N. Y. Supreme Ct.) 205, it is held that an appeal will lie to the County Court only where the proceedings were before a justice of the peace and not where had before other courts or officers.

Appeal from Order of County Court Dismissing Appeal. — In *Hammond v. Carpenter*, 29 How. Pr. (N. Y. Supreme Ct.) 43, it was held that an order of a County Court dismissing an appeal taken from a judgment of a justice of the peace in summary proceedings to recover the possession of lands is appealable.

Costs on Reversal. — Where a judgment recovered by a plaintiff in summary proceedings to recover the possession of land is reversed upon appeal, the defendant is entitled to costs as of course. *Harrison v. Swart*, 34 Hun (N. Y.) 259.

Costs on Affirmance. — In *Everall v. Lossen*, 7 Civ. Pro. Rep. (N. Y. C. Pl.) 112, it was held that where the final order, in summary proceedings to recover possession of real property, is affirmed on appeal, costs are in the discretion of the court, and where they are awarded to the respondent, the clerk should tax such costs only as would be taxable if the special proceeding had been an action, and the final order a judgment.

1. *Hammond v. Carpenter*, 29 How. Pr. (N. Y. Supreme Ct.) 43; *Deuel v. Rust*, 24 Barb. (N. Y.) 438; *People v. Bigelow*, 11 How. Pr. (N. Y. Supreme Ct.) 83; *Briggs v. Swales*, 29 How. Pr. (N. Y. Supreme Ct.) 201; *Hazen v. Culbertson*, 10 Watts (Pa.) 393; *Hardy*

v. Watts, 22 Pa. St. 33; *Baldwin v. Skeels*, 51 Vt. 121. See also *Amter v. Woods Invest. Co.*, (Colo. App. 1898) 51 Pac. Rep. 1010.

Amendment of Appeal by Giving Security. — In *Briggs v. Swales*, 29 How. Pr. (N. Y. Supreme Ct.) 201, it was held that the County Court may allow the appellant to amend his appeal by giving the security required, where he omits, on bringing his appeal, to give such security.

2. *Smith v. Moffat*, 1 Barb. (N. Y.) 65; *Chretien v. Doney*, 1 N. Y. 420; *Moench v. Yung*, 18 Civ. Pro. Rep. (N. Y. C. Pl.) 259; *McGee v. Fessler*, 1 Pa. St. 126. See generally article RESTITUTION.

In *Du Bouchet v. Wharton*, 12 Conn. 533, it was held that in *Connecticut*, on the reversal of a judgment for the plaintiff in summary proceedings on the ground that the term of the lease had not expired, the court will award a writ of restitution.

In *Bristed v. Harrell*, 21 Misc. Rep. (N. Y. Supreme Ct.) 93, the final order was reversed for lack of jurisdiction in the justice to make it. It was held that it was necessary to award restitution. To the same effect see also *People v. Platt*, 43 Barb. (N. Y.) 116; *People v. Keteltas*, 12 Hun (N. Y.) 67.

Covenant that Failure to Pay Rent Shall Terminate Lease. — In *Wolcott v. Schenk*, 16 How. Pr. (N. Y. Supreme Ct.) 449, it was held that restitution of the premises may be awarded the tenant, although the lease contains a covenant that upon failure to pay the rent at the time appointed, the estate of the lessee and all his interest in the demised premises should from thenceforth cease and be absolutely void. Such a covenant does not determine the estate of the lessee and make it absolutely void. It becomes, by the omission to pay the rent, voidable at the option of the lessor, for whose ex-

(18) *Action for Damages for Dispossession.* — Where the final order in summary proceedings is reversed upon appeal, a tenant who has been dispossessed has his remedy by action for the recovery of the damages which he may have sustained by such dispossession.¹

(19) *New Trial.* — Where, upon appeal, the final order in summary proceedings is reversed, a new trial may be granted.²

II. TENANT'S ACTIONS — 1. *Replevin.* — For the proceedings in action of replevin by the tenant against his landlord, see article REPLEVIN.

2. *Trespass.* — As to when the action of trespass is the proper remedy for the tenant against his landlord, and for the proceedings thereunder, see article TRESPASS.

3. *Actions for Wrongful or Irregular Distress.* — As to the remedies available to the tenant against his landlord for wrongful or irregular distress, see article DISTRESS, vol. 7, p. 27.

4. *Covenant for Quiet Enjoyment.* — Every lease contains an implied covenant of quiet enjoyment where there is no express covenant of like effect.³ In an action by a tenant against his landlord for breach of such covenant, as in the case of a breach of covenant of warranty or of quiet enjoyment in a conveyance of real property, no particular form of words is required in which

clusive benefit it applies, and to void it a proper demand and refusal to pay must be shown.

After Expiration of Term. — Where the landlord obtains possession of the demised premises by summary proceedings which are reversed by the Supreme Court upon certiorari, that court should not award restitution to the tenant if the term has expired before the judgment of reversal is rendered. *Chretien v. Doney*, 1 N. Y. 419. See also *McGee v. Fessler*, 1 Pa. St. 126.

1. *Broadwell v. Holcombe*, 4 Civ. Pro. Rep. (N. Y. Super. Ct.) 159.

2. *Moench v. Yung*, 18 Civ. Pro. Rep. (N. Y. C. Pl.) 259, wherein the court said: "Appeals in such proceedings are taken with the 'like effect' as appeals from judgments. 'With like effect' means with like result; and this includes any disposition in the one case which the appellate court could make in the other."

New Trial Instead of Granting Restitution. — The statutory provision for restitution upon reversal of a final order in summary proceedings refers only to the power of the court, which is merely collateral to the disposition of the appeal, and does not prevent the denial of restitution or the granting of

a new trial. *Moench v. Yung*, 18 Civ. Pro. Rep. (N. Y. C. Pl.) 259.

3. *Burr v. Stenton*, 43 N. Y. 462; *Mack v. Patchin*, 42 N. Y. 167; *New York v. Mabie*, 13 N. Y. 160; *Tone v. Brace*, 8 Paige (N. Y.) 597; *Vernam v. Smith*, 15 N. Y. 328; *Graves v. Berdan*, 26 N. Y. 498; *Eldred v. Leahy*, 31 Wis. 551.

"It can hardly be doubted, I think, at this day, that by the general assent of the courts in this state a covenant for quiet enjoyment is implied in every mutual contract for the leasing and demising of land, by whatever form of words the agreement is made." E. D. Smith, J., in *Mack v. Patchin*, 42 N. Y. 167.

In New York it is held that the statute forbidding the implication of covenants in conveyances does not apply to leases for years. *Burr v. Stenton*, 43 N. Y. 462; *Graves v. Berdan*, 26 N. Y. 498; *New York v. Mabie*, 13 N. Y. 151; *Vernam v. Smith*, 15 N. Y. 332.

In Wisconsin such implied covenant still exists in case of a demise of land for a term not exceeding three years. *Eldred v. Leahy*, 31 Wis. 546.

Proof Sufficient to Sustain. — It is sufficient for the tenant to prove that there was an interference with or disturbance of his beneficial enjoyment of the

to allege eviction.¹ Where eviction is alleged as a breach of the covenant for quiet enjoyment, the declaration must not leave it doubtful whether the evictor might not have come in under title from the plaintiff himself.²

5. Forcible Entry and Detainer. — As to the requisites to the maintenance of this action by the tenant, and for the procedure, see article *FORCIBLE ENTRY AND DETAINER*, vol. 9, p. 19.

6. Interpleader. — Where a claim for rent is made by two parties, the tenant may, if unable to ascertain the right, file a bill of interpleader.³

III. LANDLORD'S LIENS FOR RENT AND ADVANCES — 1. In General. — In many states the statutes give a landlord a lien upon the crops or other property of his tenant to secure his rent or advances made to his tenant to enable the latter to raise a crop.⁴

How Enforced. — These liens can be enforced only by legal process.⁵ Various remedies for the enforcement of the lien are established by statute in the different states, and are separately construed in the succeeding sections of this article.

Strict Construction. — The statutory remedy provided will not be extended by construction.⁶

demised premises. *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260.

1. See article *COVENANT*, vol. 5, p. 373.

2. *Brookes v. Humphreys*, 5 Bing. N. Cas. 55, 35 E. C. L. 28.

3. *Badeau v. Tylee*, 1 Sandf. Ch. (N. Y.) 270, where the rent was claimed by a husband, insisting on a title by will, and by the heirs, insisting by descent.

As to interpleader in general, see article *INTERPLEADER*, vol. 11, p. 444.

4. As to the existence and nature of landlord's liens, see title *Landlord and Tenant*, Am. and Eng. Encyc. of Law.

5. *Buck v. Lee*, 36 Ark. 525; *Knox v. Hunt*, 18 Mo. 243; *Sanders v. Ohlhausen*, 51 Mo. 163.

"The statutory lien of the landlord, without other authority, does not entitle him to seize and appropriate the crop without legal process. But if he comes into possession of it without trespass, and especially with the tenant's consent, for the purpose of securing rent, or if it be deposited with others for the like purpose, the rent must be fully tendered before it can be retaken by the tenant or his mortgagee." *Buck v. Lee*, 36 Ark. 525.

The word "effected" in the *Iowa* statute, providing that the lien shall be effected in the manner pointed out, means the same as if it had said it

should be thus enforced, or carried out, or thus effect should be given to it. *Grant v. Whitwell*, 9 Iowa 155; *Merrit v. Fisher*, 19 Iowa 354.

Replevin Will Not Lie. — A landlord's lien is not such an interest in the tenant's property or crops as will enable the landlord to maintain replevin therefor. *Bell v. Matheny*, 36 Ark. 572; *Knox v. Hellums*, 38 Ark. 413. See also *Snell v. Ricketts*, 28 Neb. 616.

6. *Alabama.* — *Fitzsimmons v. Howard*, 69 Ala. 590; *Foster v. Westmoreland*, 52 Ala. 223; *Nicrosi v. Roswald*, 113 Ala. 592; *Taliaferro v. Lane*, 23 Ala. 369; *Gunn v. Howell*, 27 Ala. 663. *District of Columbia.* — *Bryan v. Sanderson*, 3 MacArthur (D. C.) 431.

Florida. — *Smoot v. Strauss*, 21 Fla. 611.

Iowa. — *Merrit v. Fisher*, 19 Iowa 354; *Clark v. Haynes*, 57 Iowa 96.

South Carolina. — *Segler v. Coward*, 24 S. Car. 122.

The remedy by landlord's attachment is purely statutory, and will be strictly construed. *Merrit v. Fisher*, 19 Iowa 354.

The court fully recognizes the doctrine that where a summary process is given by statute, those who wish to avail themselves of it must be confined strictly to its provisions, and shall take nothing by intendment. *Betton v. Willis*, 1 Fla. 262. See also *Smoot v. Strauss*, 21 Fla. 611; *Logwood v. Plant-*

Lien for Rent and Advances Enforced Together. — The landlord's lien for rent and his lien for advances to make a crop are usually enforced in the same manner, and may be enforced in the same proceeding.¹

Question for Court and Jury. — It is a question for the jury whether supplies furnished were advanced to make a crop;² but whether or not a lien was given for the particular articles advanced is a question for the court.³

In North Carolina the statute gives the landlord a lien coupled with possession which is in the nature of a statutory mortgage.⁴ This lien may be enforced by action of claim and delivery⁵ or any other appropriate proceeding.⁶

2. Enforcement by Attachment — *a. IN GENERAL.* — In a number of states the statutes creating a landlord's lien provide for the enforcement of such lien by an action of attachment.⁷

er's, etc., Bank, Minor (Ala.) 23; Foster v. Westmoreland, 52 Ala. 223; Dumes v. McLosky, 5 Ala. 239; Young v. Martin, 2 Yeates (Pa.) 312.

Instructions. — An instruction which denounces as harsh a landlord's attachment, a remedy given by the legislature, should not be given. Randolph v. McCain, 34 Ark. 606.

1. *Alabama.* — Scaife v. Stovall, 67 Ala. 237; Wilson v. Stewart, 69 Ala. 302; Fitzsimmons v. Howard, 69 Ala. 590; Martin v. Blanchett, 77 Ala. 288; Ballard v. Stephens, 92 Ala. 616; Giddens v. Bolling, 93 Ala. 92.

Tennessee. — Lewis v. Mahon, 9 Baxt. (Tenn.) 375; Dougherty v. Kelum, 3 Lea (Tenn.) 643; Davis v. Wilson, 86 Tenn. 519.

Partition of Crop and Enforcement of Lien. — In Alabama the statute provides a summary remedy for the partition of a crop of corn, cotton, or other produce raised and made by persons in such manner as to make them joint owners or tenants in common therein, and if there be a claim for advances, such claim may be enforced in the same proceeding. The petition under such statute need not be technically formal, but enough must be stated to show a case within the jurisdiction of the court under the statute, and if there be a claim for advances, the amount should be stated with a general description of the articles advanced, so as to bring them within one or more of the classes enumerated for which a lien exists. "Enough must be averred to show that there had been a contract under which the crops were grown, which contract constituted the parties tenants in common; and the

facts out of which the relation springs must be briefly averred. This is done by stating the substance of the contract, and that the crop was raised and made under it." Mooney v. Hough, 84 Ala. 80.

2. Ledbetter v. Quick, 90 N. Car. 276.

3. Mooney v. Hough, 84 Ala. 80; Jones v. Pullen, 66 Ala. 306.

4. Livingston v. Farish, 89 N. Car. 141; State v. Pender, 83 N. Car. 653; Slaughter v. Winfrey, 85 N. Car. 159; Belcher v. Grimsley, 88 N. Car. 88.

The lien includes the costs of the legal proceedings to enforce it. Slaughter v. Winfrey, 85 N. Car. 159.

5. Livingston v. Farish, 89 N. Car. 142; Durham v. Speake, 82 N. Car. 87; Varner v. Spencer, 72 N. Car. 382; Boone v. Darden, 109 N. Car. 74.

6. Livingston v. Farish, 89 N. Car. 140.

The crops may be seized pending litigation to enforce the lien when neither party gives a forthcoming bond. Durham v. Speake, 82 N. Car. 87; Slaughter v. Winfrey, 85 N. Car. 160.

7. *Alabama.* — Hawkins v. Gill, 6 Ala. 620; Dulany v. Dickerson, 12 Ala. 601; Simmons v. Fielder, 46 Ala. 304; Tucker v. Adams, 52 Ala. 254; Dumes v. McLosky, 5 Ala. 239; Foster v. Westmoreland, 52 Ala. 223; De Bardeleben v. Crosby, 53 Ala. 363; Folmar v. Copeland, 57 Ala. 588; Abraham v. Hall, 59 Ala. 386; Busbin v. Ware, 69 Ala. 279; Westmoreland v. Foster, 60 Ala. 448; McDonald v. Morrison, 50 Ala. 30; Smith v. Crockett, Minor (Ala.) 277; Lomax v. Le Grand, 60 Ala. 537; Flexner v. Dickerson, 65 Ala. 129; Scaife v. Stovall, 67 Ala. 237; Wilson

Exclusive Remedy. — Under some statutes such attachment is the exclusive remedy at law for the active enforcement of the lien,¹

v. Stewart, 69 Ala. 302; *Fitzsimmons v. Howard*, 69 Ala. 590; *Agee v. Mayer*, 71 Ala. 88; *Lehman v. Howze*, 73 Ala. 302; *Martin v. Blanchett*, 77 Ala. 288; *Robinson v. Holt*, 85 Ala. 596; *Albright v. Mills*, 86 Ala. 324; *Abraham v. Nicrosi*, 87 Ala. 173; *Richards v. Bestor*, 90 Ala. 352; *Ballard v. Stephens*, 92 Ala. 616; *Reese v. Rugely*, 82 Ala. 267; *Dozier v. Robinson*, 82 Ala. 408; *Union Warehouse, etc., Co. v. McIntyre*, 84 Ala. 78; *Giddens v. Bolling*, 93 Ala. 92; *Aderhold v. Blumenthal*, 95 Ala. 66; *McKleroy v. Cantey*, 95 Ala. 295; *Carmen v. State Nat. Bank*, 101 Ala. 189; *Smith v. Huddleston*, 103 Ala. 223; *Couch v. Davidson*, 109 Ala. 313; *Bain v. Wells*, 107 Ala. 562; *Andrews Mfg. Co. v. Porter*, 112 Ala. 381; *Nicrosi v. Roswald*, 113 Ala. 592.

Arkansas. — *Roberts v. Jacks*, 31 Ark. 597; *Rogers v. Cooper*, 33 Ark. 406; *Tignor v. Bradley*, 32 Ark. 781; *Jackman v. Anderson*, 33 Ark. 414; *Mitchell v. Badgett*, 33 Ark. 387; *Randolph v. McCain*, 34 Ark. 696; *Kurtz v. Dunn*, 36 Ark. 648; *Buck v. Lee*, 36 Ark. 525; *Nolen v. Royston*, 36 Ark. 561; *Bell v. Matheny*, 36 Ark. 572; *Reavis v. Barnes*, 36 Ark. 575; *Patton v. Garrett*, 37 Ark. 605; *Varner v. Rice*, 39 Ark. 344.

District of Columbia. — *Joyce v. Wilkenning*, 1 MacArthur (D. C.) 567; *Gibson v. Gautier*, 1 Mackey (D. C.) 35; *Wallach v. Chesley*, 2 Mackey (D. C.) 209; *The Richmond v. Cake*, 1 App. Cas. (D. C.) 447.

Iowa. — *Grant v. Whitwell*, 9 Iowa 152; *Merritt v. Fisher*, 19 Iowa 354; *Garner v. Cutting*, 32 Iowa 547; *Rotzler v. Rotzler*, 46 Iowa 189; *Clark v. Haynes*, 57 Iowa 96; *Houghton v. Bauer*, 70 Iowa 314.

Kansas. — *Neifert v. Ames*, 26 Kan. 515; *Tarpy v. Persing*, 27 Kan. 745; *Knowles v. Sell*, 41 Kan. 171.

Mississippi. — *Jamison v. Acker*, (Miss. 1893) 14 So. Rep. 691.

Tennessee. — *Sharp v. Fields*, 1 Heisk. (Tenn.) 571; *Phillips v. Maxwell*, 1 Baxt. (Tenn.) 25; *Dougherty v. Kellum*, 3 Lea (Tenn.) 643; *Richardson v. Blakemore*, 11 Lea (Tenn.) 292; *Biggs v. Piper*, 86 Tenn. 591; *Patterson v. Hawkins*, 3 Lea (Tenn.) 484.

Jurisdiction of Justice. — Where a tenant gave his note for two hundred dol-

lars for the rent of a farm, and agreed therein that a justice of the peace might have jurisdiction thereof, the justice also had jurisdiction, in a suit on the note, to enforce a landlord's lien against the crops raised by a subtenant on the land. *Houghton v. Bauer*, 70 Iowa 314.

Garnishment of Assignee. — "We are clearly of the opinion that when an assignee of a tenant converts into money 'goods, furniture, and effects upon which the landlord had a lien at the time of the assignment,' and the landlord seeks to enforce his lien by attachment against his tenant—a right given by the statute in cases where the tenant makes a general assignment—such money in the hands of the assignee may be reached by process of garnishment." *McKleroy v. Cantey*, 95 Ala. 295.

1. *Folmar v. Copeland*, 57 Ala. 588; *Garner v. Cutting*, 32 Iowa 547; *Sullivan v. Ellison*, 20 S. Car. 484; *Kennedy v. Reames*, 15 S. Car. 550. But see *Westmoreland v. Foster*, 60 Ala. 448.

"The plaintiff, as landlord, clearly had an agricultural lien on one-third of the crop made on the premises leased (16 Stat. at L. 411; *Carter v. Du Pre*, 18 S. Car. 182), but such a lien can only be enforced according to the machinery provided by the statute itself, viz., through a warrant issued by a clerk of the court against the crop itself in specie, and not against the proceeds of the crop." *Sullivan v. Ellison*, 20 S. Car. 484, citing *Kennedy v. Reames*, 15 S. Car. 550.

"Save the attachment which, in certain conditions, may be sued out under section 3472, Code of 1876, there is no remedy in the law courts for the enforcement of this lien. It is but a right to have carved out of the products of the soil a sum of money sufficient to pay the rent charges. Distress for rent, as that right existed in England, is not of force in this state; and the landlord has no right to take personal possession of the crop without the consent of the tenant. Failing to obtain such consent, he can only invoke the aid of the courts to afford him redress, as aid is furnished to all other lienholders where neither the contract or the law vests a title or confers a right to the possession." *Folmar v. Cope-*

while under other statutes the remedy by attachment is not exclusive of other remedies.¹

In Missouri it was held, under a former statute, that the remedy by attachment therein provided for was not given to enforce the lien, but was given to secure the rent from property on the place on which there was no lien,² the proper remedy for the enforce-

ment, 57 Ala. 588 [*citing* Westmoreland v. Foster, 60 Ala. 448; Donald v. Hewitt, 33 Ala. 547; Screws v. Roach, 22 Ala. 675].

Preventive Relief in Equity.—“It is true that the landlord's remedy for the collection of his rent and the enforcement of his lien is statutory, and must be pursued when the object is to enforce the lien and collect the rent due. Revision of 1860, § 2303; Merritt v. Fisher, 19 Iowa 354. But, as held in the case cited, this statutory remedy is given for no other purpose than the recovery of rent due. Now the remedy sought, in the case before us, is relief against the alleged frauds of defendants whereby plaintiff's security for a debt not then due was about to be injured and destroyed. It is not the remedy provided in the statute that is invoked, but a remedy which a court of equity always delights to give, viz., one which prevents the commission of a fraud upon one party by the other, and it will always do so when, as in this case, the law does not afford a full and adequate remedy.” Garner v. Cutting, 32 Iowa 547.

1. Sanders v. Ohlhausen, 51 Mo. 163; Hulett v. Stockwell, 27 Mo. App. 328, wherein Phillips, P. J., said: “It seems to be conceded by both parties that the trial court was influenced in its conclusion by holding that the action would not lie, in this form, to enforce the landlord's lien, the facts being such as to authorize the remedy by attachment, which is exclusive. In this view we cannot concur. Section 3083, Revised Statutes, declares that ‘every landlord shall have a lien upon the crops grown on the demised premises in any year, for the rent that shall accrue for such year, and such lien shall continue for eight months after such rent shall become due and payable, and no longer.’ Section 3091 authorizes the landlord, in certain contingencies, when he deems his rent endangered by removal or threatened removal from the premises of the crops thereon, to resort to the action of at-

tachment. But this latter remedy is only permissive, and not exclusive. The lien given by the statute in favor of the landlord may be enforced by an action, in the proper jurisdiction, as any other lien given by law or in equity. No other view has ever been entertained by the Supreme Court touching this question. It was early held, in Knox v. Hunt, 18 Mo. 243, that the landlord might take judicial steps, by legal process, to enforce his lien. In Sanders v. Ohlhausen, 51 Mo. 165, it is held that the process of attachment authorized by the statute is not exclusive. And the claim by interplea was upheld in that case. In Price v. Roetzell, 56 Mo. 500, the right to proceed by petition to the Circuit Court to enforce the lien is expressly recognized, and the learned judge who delivered the opinion said: ‘The suit was to enforce such lien, and in aid of it an attachment was obtained, though absolutely unnecessary, since the court could have enjoined any sale of the crops by the administrator, and had the right to order their sale as perishable property by the sheriff, and their proceeds held subject to the result of the suit.’ So it was held by Henry, J., in Hubbard v. Moss, 65 Mo. 652: ‘We do not think that the attachment was a remedy provided for enforcing the lien, for the lien may be in full force and the landlord have no right to an attachment at all.’”

Replevin and Attachment Are Cumulative and Alternative Remedies where the rent is payable in kind. Tarry v. Pershing, 27 Kan. 745.

In Tennessee an attachment or a judgment at law and execution levied upon the property in whosoever hands it might be found are alternative remedies. Phillips v. Maxwell, 1 Baxt. (Tenn.) 30; Richardson v. Blake-more, 11 Lea (Tenn.) 292; Biggs v. Piper, 86 Tenn. 591; Patterson v. Hawkins, 3 Lea (Tenn.) 484.

2. Price v. Roetzell, 56 Mo. 500; Hubbard v. Moss, 65 Mo. 647; Chamberlain v. Heard, 22 Mo. App. 416;

ment of the lien being an action to foreclose.¹ But under a later statute it has been held that an attachment is the proper remedy to enforce a landlord's lien upon crops.²

Proceeding in Rem. — The remedy by attachment is a proceeding *in rem*.³

Construction of Statutes. — Statutes regulating a landlord's attachment for rent and advances should be liberally construed,⁴ and this rule is sometimes expressly declared by the statute itself.⁵

b. ORDINARY ATTACHMENT AND DISTRESS DISTINGUISHED — **Ordinary Attachment.** — While a landlord's attachment to enforce his lien resembles in its main features an ordinary attachment, there is a distinction between the two.⁶ Accordingly, where the landlord sues out an attachment under the general attachment

Hulett v. Stockwell, 27 Mo. App. 328; Crawford v. Coil, 69 Mo. 588.

1. See *infra*, III. 5. **Enforcement by Action to Foreclose.**

2. Rev. Stat. (1879), §§ 3083, 3091, 3093; Garrouette v. White, 92 Mo. 237; Haseltine v. Ausherman, 87 Mo. 410; Dawson v. Quillen, 43 Mo. App. 120; Cleveland v. Crum, 33 Mo. App. 616; Chamberlain v. Heard, 22 Mo. App. 416.

3. Rogers v. Cooper, 33 Ark. 406; Jackman v. Anderson, 33 Ark. 414.

4. Code Ala., § 3315; Ellis v. Martin, 60 Ala. 394; Blair v. Miller, 42 Ala. 308; Ware v. Todd, 1 Ala. 199; Richards v. Bestor, 90 Ala. 352; Mooney v. Hough, 84 Ala. 80.

Landlords attaching for rent are not held to the same strictness of proof of the grounds as in case of parties suing out attachments to secure the payment of ordinary debts. It is the policy of the law to prefer landlords, and they are given an exclusive lien on the property of the tenant on the premises for their rent. McLean v. McLean, 10 Bush (Ky.) 167.

5. "In the early history of this state, the courts adopted the policy of construing the attachment laws with great strictness, as departures from the common-law modes of procedure. But this course was changed in deference to the legislative branch of the government, with whom the proceeding by attachment was a favorite remedy, and by whom the law had been changed as often as the remedy was limited by the strict construction of the courts. Runyan v. Morgan, 7 Humph. (Tenn.) 210. Afterwards it was expressly provided by the code, § 3477, 'the attachment law shall be liberally construed, and

the plaintiff, before or during trial, shall be permitted to amend any defect of form in the affidavit, bond, attachment, or other proceedings.'" Dougherty v. Kellum, 3 Lea (Tenn.) 645.

6. **Ordinary Attachment Distinguished.**

—"The form, purposes, and effect of an ordinary general attachment and of an exceptional attachment are entirely distinct. The former creates, the latter enforces, a lien; the former commands the seizure of the estate, generally, the latter of the particular property on which the lien exists." Baxley v. Segrest, 85 Ala. 183.

In Merritt v. Fisher, 19 Iowa 354, Dillon, J., said: "The statute (Rev. Stat. Iowa, c. 99) gives to the landlord 'a lien for his rent' upon designated personal property of the tenant. This lien is to be 'effected,' that is enforced, Grant v. Whitwell, 9 Iowa 152, 'by an action for the rent due, in which the landlord is entitled to a writ of attachment upon filing an affidavit that the action is commenced to recover rent accrued within one year previous thereto, upon premises described in the affidavit.' Rev. Stat., § 2313. Ordinarily, the goods of a debtor, in this state, can be attached only when certain causes for an attachment exist, and a bond is filed for the use of the debtor to secure to him all damages he may sustain by reason of the wrongful suing out of the attachment. Rev. Stat., c. 124. But the statute, in analogy to the common-law right of distress (which common-law right the statute abrogates, or takes the place of), has given to the landlord, for the recovery of rent, a special remedy. It entitles him to an attachment without assigning the ordinary causes of fraud.

law, although for rent, the attachment must be supported and justified under the general law or not at all.¹

Distress Distinguished.— So also an attachment by a landlord to enforce his statutory lien must be distinguished from the common-law right of distress for rent, which was a method of acquiring a lien which did not previously exist.²

nonresidency, and the like, and without filing a bond for the use of the supposed debtor or tenant."

1. Attachment under General Law.— In *Clark v. Haynes*, 57 Iowa 96, the court said: "Having sought and obtained such attachment, the object of which is to create a new lien and not to render effective one already existing, we think that he can be allowed to take only what such attachment gives him. In *Merritt v. Fisher*, 19 Iowa 354, the court, speaking of a landlord's lien, said: 'The lien and the remedy thus given to the landlord are purely statutory. It is a species of class legislation in favor of landlords, granting them rights not given to creditors generally. It follows that in availing himself of this special remedy the landlord must take it just as the statute gives it to him.'"

In *Baxley v. Segrest*, 85 Ala. 183, it was held that a general attachment sued out by a landlord against the estate of his tenant, when none of the causes upon which such attachment can issue, under the *Alabama Code* (1886), §§ 2929, 2930, exist, cannot be justified on the ground that a cause existed for the issuance of an attachment to enforce the landlord's lien under section 3061. The court stated its reason for this holding as follows: "It is manifest that there may be legal damage resulting from the issue of an attachment commanding the seizure of the property generally, and creating a lien thereon, which could not result from the seizure of particular property on which a lien has been previously created. * * * Had the defendant proved the existence of any one of the grounds which warrant a resort to the process for the enforcement of a landlord's lien, it would not have been a defense to the action."

2. See generally *Lomax v. Le Grand*, 60 Ala. 537; *Bryan v. Sanderson*, 3 MacArthur (D. C.) 431; *Herron v. Gill*, 112 Ill. 247; *Marye v. Dyche*, 42 Miss. 347; *Stamps v. Gilman*, 43 Miss. 456; *Fitzgerald v. Fowlkes*, 60 Miss. 270; *Henry v. Davis*, 60 Miss. 212.

"The Main Points of Difference between the statutory and common-law systems are that the former substitutes the process of courts for the personal distraint of the landlord allowed by the latter, and confines the distress to the property of the tenant; whereas under the latter, the right to distraint extended to the goods of a stranger found on the demised premises. These changes were necessary to conform the law to the genius of our institutions, which is inimical alike to the taking of property without due process of law, and to the subjection of goods of one man to the satisfaction of the debt of another, on the mere fortuitous circumstance of their being on the premises of the debtor. Aside from the cardinal points of difference, and such changes in detail as were necessary to limit and effectuate the new remedy, it is apprehended that the principles of the common law as to rent and the remedies for its collection apply also to the statutory right and remedy we are considering. At common law there would be no distress, unless the relation of landlord and tenant existed. Under our statute the existence of this relation is essential to the right of attachment. At common law the right to distraint pertained only to property which was or had been within a certain period on the premises. There is no express or necessarily implied limitation of this kind in our statute, but, following the common law, we have adjudged that the right to attach extended only to goods which enjoyed the protection of the premises for which rent is claimed. *Ex p. Barnes*, 84 Ala. 540. Distress could only be made, at common law, during the term of the lessee; and doubtless, under the statute, an attachment could not be maintained after the termination of the demise, except, it may be, in the enforcement of a lien which had attached before." *Abraham v. Nicrosi*, 87 Ala. 173.

"At common law the landlord could distraint any goods found upon the premises at the time of the taking, but he had no lien until he had made his

c. WHEN ATTACHMENT LIES — *Statute Controls.* — When an attachment will lie to enforce a landlord's lien, is entirely a matter of statutory regulation in the various states.¹

right active by actual seizure. A statutory lien implies security upon the thing before the warrant to seize it is levied. It ties itself to the property from the time it attaches to it, and the levy and sale of the property are only means of enforcing it. In other words, if the lien is given by statute proceedings are not necessary to fix the status of the property. But in the absence of this statutory lien, it is necessary to take proceedings to acquire a lien upon the property of the tenant for the benefit of the landlord. This the landlord is enabled to do in a summary way to satisfy the rent which is due him, and in this he has an advantage as creditor over creditors at large of the tenant." *Gibson v. Gautier*, 1 Mackey (D. C.) 35.

1. *Alabama.* — In *Fitzsimmons v. Howard*, 69 Ala. 590, it was held that the affidavit must state the existence of one of the following four grounds for attachment, namely: "1. That the claim asserted is due, and the tenant, on demand made after maturity, refuses or fails to pay it. And whether the claim for rent or advances is due [has matured] or not. 2. When any party interested in the claim, his agent, or attorney [makes oath that he] has good cause to believe that the tenant is about to remove from the premises or otherwise dispose of the crop without paying the amount that will be thus due. 3. That the tenant has removed from the premises or otherwise disposed of some part of the crop, without paying such amount [the amount shown to be due, or to become due], without the consent of the plaintiff. 4. When the tenant has disposed of, or the plaintiff has good cause to believe he is about to dispose of, the articles, or some of the articles advanced, etc." See also *Westmoreland v. Foster*, 60 Ala. 448; *Flexner v. Dickerson*, 65 Ala. 129.

Arkansas. — "A landlord who has a lien on the crop for rent may bring suit before a justice of the peace, or in the Circuit Court, as the case may be, and have a writ of attachment for the recovery of the same, whether the rent be due or not, in the following cases (*Gantt's Dig.*, § 4101): First. When the tenant is about to remove the crop from the premises without paying the rent.

Second. When he has removed it, or any portion thereof, without the consent of the landlord. Before such writ of attachment can issue, the landlord, his agent, or attorney, must make and file an affidavit of one of the above facts, that the amount claimed, which must be therein stated, is or will be due for rent, etc., stating the time when the same became or will be due, and that he has a lien on such crop for such rent, etc. *Gantt's Dig.*, § 4102." *Rogers v. Cooper*, 33 Ark. 406.

District of Columbia. — In *Wallach v. Chesley*, 2 Mackey (D. C.) 209, the court, after referring to the abolition of the landlord's right of distress, said: "As a substitute for this right so abolished, it is provided that the landlord shall have a tacit lien on such of the tenant's chattels on the premises as are subject to execution for debt, to commence with the tenancy and continue for a limited period. It then goes on to provide how this lien shall be enforced. It does not give the landlord a lien without any means of enforcement. It provides for several conditions of things; first, when the rent is due; and next, when the rent is not yet matured. When the rent is due, the lien may be enforced by an attachment issued upon an affidavit that the rent is due and unpaid. There is no trouble about that. But it will occur to anybody that the tenant may, just before the maturity of his rent, and in order to avoid compulsory payment of it, remove his chattels or change the property in them. To meet that contingency it is further provided that, even before the rent is due, if the landlord will make affidavit that the tenant is about to remove or sell all or some part of his chattels, the attachment may issue. And those are the only two cases provided for in the statute in which an attachment is the remedy intended." See also *Bryan v. Sanderson*, 3 MacArthur (D. C.) 431, wherein the statute is set out.

Missouri. — *Rev. Stat. Mo.*, (1879), § 3091, gives two independent grounds for an attachment for rent, either of which is sufficient to sustain the writ; and, accordingly, if a tenant either removes his property from the demised premises within thirty days prior to the

General Rule. — But as a general rule, an attachment can issue only when the rent is due, or the tenant has removed or is about to remove the property from the premises without the consent of the landlord.¹

After Rent Is Due. — Referring to the various statutes in force at the time the decisions were rendered, it has been held that an attachment will lie when the rent is due, irrespective of any disposition of the property on the part of the tenant.²

Before Rent Is Due. — In *Iowa* it has been held that an attachment to enforce a landlord's lien will not lie before the rent is due.³ But in perhaps a majority of the states the statutes authorize an attachment before the rent is due, under specified circumstances, in order to preserve the lien from destruction by the removal of the property.⁴

commencement of the suit for attachment, or if he has disposed or attempted to dispose of his property, so as to endanger, hinder, or delay the landlord from the collection of his rent, the proceeding for attachment is well grounded. *Garrouette v. White*, 92 Mo. 237. See also *Chamberlain v. Heard*, 22 Mo. App. 416.

1. *Flexner v. Dickerson*, 65 Ala. 129; *Westmoreland v. Foster*, 60 Ala. 448. See also the preceding note, and the codes and statutes of the various states.

2. *Andrews Mfg. Co. v. Porter*, 112 Ala. 381; *Phillips v. Maxwell*, 1 Baxt. (Tenn.) 29; *Dougherty v. Kellum*, 3 Lea (Tenn.) 644; *Patterson v. Hawkins*, 3 Lea (Tenn.) 484.

In *Missouri* a lien upon the crop grown upon the leased premises, for eight months after the rent is due, is given by Rev. Stat., § 3083. The manner of enforcing the lien is provided by section 3091. When the rent is due and unpaid, that, without more, authorizes the landlord to enforce the lien by attachment in the manner provided by the last-named section. *Chamberlain v. Heard*, 22 Mo. App. 416.

3. *Gardner v. Cutting*, 32 Iowa 547; *Clark v. Haynes*, 57 Iowa 96; *Rotzler v. Rotzler*, 46 Iowa 189.

Preventive Remedy in Equity. — If the landlord needs to aid his lien by preventing a disposition of the property, he must do so by an action in equity for an injunction. *Garner v. Cutting*, 32 Iowa 552, quoted with approval in *Clark v. Haynes*, 57 Iowa 98.

4. *Alabama.* — "This section provides that 'when the rent or any instalment thereof is due, and the tenant fails or

refuses, on demand, to pay such rent or instalment,' the landlord shall have the right, for the enforcement of his rent lien, conferred by the preceding section (3069), 'to sue out an attachment before any officer authorized to issue attachments, and returnable to any court having jurisdiction of the amount claimed.' It also provides that the attachment may be sued out, whether the debt is due or not, (1) 'when the tenant has fraudulently disposed of his goods;' (2) 'when the defendant has made an assignment for the benefit of his creditors;' and (3) 'when the defendant has made a complete transfer of all or substantially all of his goods, without the consent of the landlord, or without having paid the rent in full for the term.' It thus appears that without the existence of either of these conditions the landlord may sue out the process 'when the rent or any part of it is due,' and the tenant has failed on demand to pay; and, when one or the other of said conditions does exist, while he may sue it out to collect rent that is due, he cannot, without the existence of any of them, sue to collect rent that is not due. In other words, he cannot resort to this process to enforce his lien and collect his rent upon the simple refusal of the tenant on demand to pay, except for rent already due." *Nicrosi v. Roswald*, 113 Ala. 592.

Nonpayment of One Instalment. — The Alabama Code, §§ 3069, 3070, provides that when the rent or any instalment is due, and the tenant fails to pay it, the landlord may sue out an attachment. The statute further provides that an attachment may be sued out,

Removal of Goods. — An attachment lies where the tenant is about to remove his goods,¹ and the removal of a part is ground for attachment, although sufficient remains to pay the debt.² In *Missouri*, however, an attachment to enforce the lien lies on the ground of removal only when such removal endangers or hinders the collection of the rent.³

whether rent is due or not, under certain specified conditions. Construing this statute, it was held in *Nicrosi v. Roswald*, 113 Ala. 592, that where an attachment is sued out on the sole ground that only one instalment of the rent is due and unpaid, the lien for the undue instalments cannot be enforced. Attachment for rent not due lies only under the specified conditions of the statute, of which the nonpayment of one instalment is not one. In answer to the objection raised to this construction of the statute, that a suit for one instalment of rent past due was a bar to suits on the other instalments as they severally matured, the court said: "The doctrine against splitting a cause of action has no application to rent which, by the contract of renting, is made payable in different instalments at different dates." *Citing Campbell v. Hatchett*, 55 Ala. 548; *South, etc., Alabama R. Co. v. Henlein*, 56 Ala. 368.

Arkansas. — "A landlord, to enforce his lien on the crop, may have a specific attachment against the crop before his rent is due, under the circumstances mentioned in section 4101, Gantt's Digest, and as provided in section 4102. In this case the attachment, which was quashed, whatever was the design or intention of plaintiff, was not specific or against the crop, but general and against all his property, and whether quashed or not, the plaintiff could not recover if the rent was not due when the suit was commenced." *Tignor v. Bradley*, 32 Ark. 781. See also *Rogers v. Cooper*, 33 Ark. 406; *Patton v. Garrett*, 37 Ark. 605.

Missouri. — Whether rent is due or not, attachment lies to enforce a lien where the tenant "intends to remove, or is removing, or has within thirty days removed, his property from the leased premises, or shall in any manner dispose of such crop or attempt to dispose of the same so as to endanger, hinder, or delay the landlord from the collection of his rent." *Chamberlain v. Heard*, 22 Mo. App. 416.

Tennessee. — Attachment lies before the rent is due when the tenant is about

to sell or remove the crop. *Phillips v. Maxwell*, 1 Baxt. (Tenn.) 29.

1. *Patterson v. Hawkins*, 3 Lea (Tenn.) 484.

Where the lease is for a period of several years, and the rent is payable monthly, and the tenant is about to remove his goods and chattels from the leased premises, the landlord may issue his attachment under said act, and serve it on said chattels for rent in arrear and for rent which will be due and payable for the month during a part of which the tenant occupied the premises. *Joyce v. Wilkenning*, 1 MacArthur (D. C.) 567.

2. *Randolph v. McCain*, 34 Ark. 696.

A removal by the tenant of any considerable portion of the crop from the field where it grows to another place rented from the same landlord, without his consent, and there consuming it, will justify him in attaching the crop. A removal of part of the crop from the premises without his consent, even for honest purposes, will support an attachment. *Patton v. Garrett*, 37 Ark. 605. See also *Knowles v. Sell*, 41 Kan. 171, wherein it was held that the removal of any appreciable part of the crop from the leased premises, without the consent of the landlord, will support an attachment, and that the motive of the tenant in removing it is wholly immaterial. *Citing Masterson v. Bentley*, 60 Ala. 520.

3. *Haseltine v. Ausherman*, 87 Mo. 410; *Meier v. Thomas*, 5 Mo. App. 584; *Chamberlain v. Heard*, 22 Mo. App. 416; *Dawson v. Quillen*, 43 Mo. App. 118.

"It is not the sense of the statute that the tenant shall not remove any portion of the crop, but only that he shall not remove or dispose of it so as to endanger or hinder the landlord's collection of the rent. This is a question for the jury." *Haseltine v. Ausherman*, 87 Mo. 413.

In determining whether the removal or sale of the crop endangered or delayed the collection of the rent, the question is, does the removal or disposal of the crop hinder or endanger

Injunction as Alternative Remedy. — Injunction and attachment are alternative remedies where the tenant intends to remove his property from the demised premises.¹

d. FOR WHAT CLAIMS ATTACHMENT LIES. — A landlord's attachment lies only for rent, and cannot be maintained to recover damages;² but the mere inclusion in the claim of some small items not covered by the lien will not vitiate the proceedings as to other items properly included,³ although it has been held that

the collection of the rent out of the crop? Accordingly it is immaterial how much or how little other property the tenant may have, and it is error to instruct or permit the jury to consider the amount of the defendant's other property in determining whether the removal of the crop endangered or delayed the collection of the rent. *Dawson v. Quillen*, 43 Mo. App. 118; *Haseltine v. Ausherman*, 87 Mo. 413.

The plaintiff, in his affidavit, set out two causes for an attachment: (1) That the defendant, within thirty days next before the commencement of this action, did remove his property from the rented premises. (2) That the defendant did attempt to dispose of the crop so as to endanger, hinder, and delay the plaintiff in the collection of his rent. The defendant, by his plea, joined issues on the causes assigned and both issues were found by the jury for the plaintiff. Each cause was, by the statute, made an independent and substantive ground for attachment, and either was sufficient to sustain the writ. The uncontradicted evidence was that the defendant had removed all of his property from the premises, as charged in the affidavit, and the verdict must have been for the plaintiff upon the issue joined on that ground of the attachment, even though the other might not have been sustained by the evidence. *Garrouette v. White*, 92 Mo. 237.

1. *Sheble v. Curdt*, 56 Mo. 437.

2. *Clark v. Haynes*, 57 Iowa 96.

The landlord has a lien for rent and for nothing else. *Riley v. Renick Milling Co.*, 44 Mo. App. 519.

A Landlord's Attachment Will Not Lie for damages for a failure to till the land, or by reason of a breach of the covenants in the lease, not connected with the demise of land. It can be maintained only for rent due. *Merritt v. Fisher*, 19 Iowa 354, citing *Rev. Stat. (1860)*, c. 99.

Damages for breach of contract can-

not be enforced by attachment under sections of the *Tennessee Code* giving attachment for rent. *Patterson v. Hawkins*, 3 Lea (Tenn.) 483.

3. *Giddens v. Bolling*, 93 Ala. 92; *Kurtz v. Dunn*, 36 Ark. 648; *Varner v. Rice*, 39 Ark. 344.

"The plaintiff's right to an attachment to secure and enforce his lien for rent was not affected or impaired by his including in his suit a demand for which he had no lien on the crops. The property attached could have been condemned only for the satisfaction of the rent." *Kurtz v. Dunn*, 36 Ark. 648.

A note given for rent of land and hire of stock and farming tools is a lien only for the rent, and an attachment of the crop will be sustained only for the amount of the rent. *Varner v. Rice*, 39 Ark. 344.

Distinction Between Attachment by Landlord and by Third Person for Advances. — In *Giddens v. Bolling*, 93 Ala. 92, *McClellan, J.*, said: "This action was commenced by attachment for rent and advances sued out by the landlord, *Bolling*. One item of comparatively insignificant amount in the account of the landlord was neither for rent nor advances. On this a motion was predicated to dissolve the attachment *in toto*. It was properly overruled. Authorities are cited to sustain the assignment of error directed against the court's action in this regard which bear upon the entirely different question presented where it was sought to enforce the lien on crops, etc., conferred by section 3286 of the Code of 1876, under a written note or obligation which covered items not within the terms of the statute. In such cases it was uniformly held that the effort to fix a lien on the crops for items not provided for vitiated the obligation, so far as the rights and remedies given by the statute were concerned, as a whole, so that no lien arose or could be enforced, even for other items included therein which came within the terms of the act.

where the claim for a lien debt is inseparably commingled with a claim for indebtedness not entitled to the lien, the entire demand is reduced to the lower level, and the lien is lost.¹

Attorney's Fees stipulated for in the lease in case of a violation of its provisions may be recovered in attachment as a part of the rent.²

c. PROCEEDINGS TO PROCURE ATTACHMENT — (1) *Affidavit* — (a) *In General*. — An affidavit complying with certain statutory provisions is universally required as a condition precedent to the issuance of an attachment.³ The affidavit must state the exist-

And from this view it resulted that an attachment under section 3288 of that code was subject to a motion to dissolve *in toto*, unless every item of the debt, for the collection of which the extraordinary remedy was invoked, was incurred for 'horses, mules, oxen, or necessary provisions, farming tools and implements, or money to purchase the same.' *Pearson v. Evans*, 61 Ala. 416; *Comer v. Daniel*, 69 Ala. 434; *Bell v. Hurst*, 75 Ala. 44. The considerations underlying these adjudications can have no application in a case like the present, where the attachment is sued out by the landlord for a gross sum alleged to be due from his tenant for rent and advances. In such case the fact that one inconsiderable item going to make up the amount claimed is not of the character for which the statute gives a lien enforceable by attachment does not vitiate the claim for which the lien does exist, nor deprive the landlord of his remedy by attachment for the collection of such claims. What the remedies of a defendant in attachment with respect to that part of the claim which is not a debt for which the writ may issue are, it is unnecessary for us to decide. It may be a motion to strike out such items and discharge the levy *pro tanto* would be appropriate. Possibly, also, an action on the case, as for excessive levy, would lie. But however that may be, we are very clear to the conclusion that his remedy is not by motion to dissolve the attachment *in toto*, and the ruling of the trial court against that motion in this case was free from error; and this would be true even though the entire claim for advances had appeared to be made up of items which were not of the class for which a lien is given, so long as other part of the gross sum was for rent due the plaintiff in attachment."

1. *Riley v. Renick Milling Co.*, 44

12 Encyc. Pl. & Pr.—58

Mo. App. 519, holding that the statutory lien of a landlord for rent cannot be enforced in an action for the recovery of one entire demand, both for the rent on leased premises and for the board of the tenant by the landlord.

Argument in Support of Rule. — "It is a general principle of the law that where the law gives a lien, or a special privilege, or a special remedy, to a debt of a given kind, and that debt is mingled with another debt to which the law attaches no such lien, privilege, or remedy, and the two have been mingled in such a manner that they cannot be separated by reference to any agreement between the parties, or by means of the evidence in the case, the whole is reduced to the lower level, and the lien, privilege, or special remedy is gone. An analogous principle is constantly applied under the statute relating to mechanics' liens; so that where the lien claimant mingles in the account filed in support of his lien items which are nonlienable with items which are lienable, in lumping charges, in such a manner that they cannot be separated by an inspection of the account, his lien is entirely gone. The statute (Rev. Stat. 1889, § 6376) gives the landlord a lien on the crop grown for rent, and for nothing else. The attachment given by another section of the statute, the section under which the attachment in this case was sued out (Rev. Stat. 1889, § 6384), gives an attachment under certain conditions for rent and for nothing else." *Riley v. Renick Milling Co.*, 44 Mo. App. 519.

2. *Richards v. Bestor*, 90 Ala. 352, citing *Johnson v. Durner*, 88 Ala. 580.

3. *Alabama*. — *Tucker v. Adams*, 52 Ala. 254; *De Bardeleben v. Crosby*, 53 Ala. 363; *Flexner v. Dickerson*, 65 Ala. 129; *Hawkins v. Gill*, 6 Ala. 620; *Staggers v. Washington*, 56 Ala. 225; *Brown v. Coats*, 56 Ala. 439; *Shield v. Dol-*

claimed is assigned as the ground of attachment, the affidavit must negative the consent of the landlord to such removal¹ and aver that the removal was "from the premises," a mere allegation that the defendant in attachment has removed the crops without paying the rent being insufficient.² In *Missouri* the affidavit must state that the landlord believes that he will lose his rent unless the attachment issues, but such averment is not an issuable one.³ In *Tennessee* the affidavit on which an attachment is sought for supplies furnished by the landlord must state that an account of those supplies was kept as the articles were fur-

ized to exact greater certainty or more special averments than the statute prescribes. Conclusions or inferences need not be negated. An affidavit setting forth the ground of attachment substantially in the words of the statute is sufficient." *Reese v. Rugely*, 82 Ala. 267, citing *Gunter v. Du Bose*, 77 Ala. 326.

1. *De Bardeleben v. Crosby*, 53 Ala. 363; *Busbin v. Ware*, 69 Ala. 279; *Robinson v. Holt*, 85 Ala. 596; *Bell v. Allen*, 76 Ala. 450; *Fitzsimmons v. Howard*, 69 Ala. 590.

Instances of Insufficient Affidavits.—An affidavit by a landlord, for the purpose of obtaining an attachment for rent and advances, which states, as a ground for the attachment, that he "has good cause to believe said tenants are about to remove from the premises, or otherwise dispose of, the crop, without paying the amount which will be due for rent and advances," is fatally defective in failing to aver that the contemplated removal of the crops from the premises of the landlord was without his consent; and a motion to quash the attachment issued thereon, made at the first term at which it could have been made, was properly allowed. *Busbin v. Ware*, 69 Ala. 279, wherein the court said: "The statute, in our opinion, requires the consent of the landlord or of his assignee to be negated, whether the averment is that the removal of the crop is about to be made by the tenant, or whether it has already taken place." Citing Ala. Code (1876), § 3472; *De Bardeleben v. Crosby*, 53 Ala. 363.

In *Rogers v. Cooper*, 33 Ark. 406, the court said: "Nor did the original affidavit state either of the grounds for attachment prescribed by the statute. It did not state that defendant was 'about to remove the crop from the premises without paying the rent,' or that he had removed the crop, or a por-

tion thereof, from the premises, without the consent of the plaintiff. When the defendant moved to dissolve the attachment before the justice for want of a sufficient affidavit, the plaintiff was permitted to amend the affidavit by inserting a clause as above stated, which did not help it much. The affidavit, as amended, reads thus: 'That said debt (\$235.50, the full amount of the note) is justly due and remains wholly unpaid, and defendant had removed a part of the property from the premises without paying said rent,' etc. If the justice wrote this amendment, he could not have had the statute before him. It was an attempt, perhaps, to cover the second ground for attachment prescribed by the statute. The amendment states that 'the defendant had removed a part of the property from the premises without paying said note,' when it should have stated that the defendant had removed a portion of the crop from the premises without the consent of the plaintiff."

2. *Knowles v. Steed*, 79 Ala. 427.

Insufficient Averment of Removal.—"The evidence introduced for this purpose, as recited in the bill of exceptions, is that the defendant in attachment 'had moved a part of the crop grown on the rented premises, without paying the landlord said advances, and without the consent of his said landlord.' The ground prescribed by the statute is that 'the tenant has removed from the premises, or otherwise disposed of, any part of the crop, without paying such rent and advances, or either, and without the consent of the landlord.' Code (1886), § 3061. An affidavit setting forth the grounds in the words of the bill of exceptions would fail to conform to the statutory requirement, and would be defective." *Baxley v. Segrest*, 85 Ala. 183.

3. *Chamberlain v. Heard*, 22 Mo. App. 416.

amount became or will become due,¹ and that such amount is due or will become due for rent or advances.² A demand after maturity of the claim for rent or advances must be averred in the affidavit.³ Where removal of the property on which the lien is

will not be quashed because the affidavit states the amount of the debt claimed as being a certain sum, "more or less." *Dougherty v. Kellum*, 3 Lea (Tenn.) 643.

1. *Rogers v. Cooper*, 33 Ark. 406.

In Iowa the affidavit must state that the rent accrued within one year previous to the attachment. *Clark v. Haynes*, 57 Iowa 96.

In Alabama the affidavit must disclose the year for which the rent was due or accruing, *Westmoreland v. Foster*, 60 Ala. 448; because it is only for rent of the current year that a lien enforceable by attachment exists. *De Bardeleben v. Crosby*, 53 Ala. 363.

Continued Tenancy—Advances.—In *Reese v. Rugely*, 82 Ala. 267, *Clopton, J.*, said: "The defects in the affidavit, as averred in the plea in abatement, are that it fails to show that the advances were made during the existence or continuance of the tenancy, and that the demand was made after the maturity of the debt. The statute declares that whenever a tenant fails to discharge his indebtedness for advances, and continues his tenancy under the same landlord, the balance due shall be held as an advance towards making the crop of the succeeding year, for which a lien shall attach upon the crop. Code (1876), § 3469. To constitute the balance due a new advance, it is not requisite that tenancy of the same land shall continue. The essential fact is the continuance and identity of the relation, and not the identity of the land. *Thompson v. Powell*, 77 Ala. 391. Though the better practice, it is not necessary, in case of a continued tenancy, that the affidavit should state specifically that the advances were made during the preceding year, if such be the fact, and that the tenant failed to discharge his indebtedness for such advances. The effect of the statute is to make the balance unpaid an advance for the following year, and it may be stated in the affidavit generally as due for advances towards making the crop of such year. *Gunter v. Du Bose*, 77 Ala. 326. The jurisdictional facts may be shown by express averments or by necessary implication. While the affi-

davit might have been drawn with more definitiveness, giving it the benefit of a liberal construction, as the statute requires, it sufficiently shows that the relation of landlord and tenant existed, and that the advances were made for the statutory purposes during the continuance of the relation." *Citing Gunter v. Du Bose*, 77 Ala. 326.

2. *Fitzsimmons v. Howard*, 69 Ala. 590; *Hawkins v. Gill*, 6 Ala. 620; *Garner v. Cutting*, 32 Iowa 547.

Affidavit for Advances.—In *Ballard v. Stephens*, 92 Ala. 616, an affidavit embracing a claim for advances as well as rent was held manifestly bad in respect to the claim for advances, in that it did not set forth the nature or kind of articles advanced, whether live stock, necessary provisions, etc., or even that the advances were made to enable the defendant to make a crop, or for the sustenance and well-being of the tenant or his family. *Citing Flexner v. Dickerson*, 65 Ala. 129; *Beard v. Woodard*, 78 Ala. 317.

3. *Fitzsimmons v. Howard*, 69 Ala. 590; *Robinson v. Holt*, 85 Ala. 596; *Reese v. Rugely*, 82 Ala. 267; *Dozier v. Robinson*, 82 Ala. 408; *Bell v. Allen*, 76 Ala. 450; *Cockburn v. Watkins*, 76 Ala. 486; *Gunter v. DuBose*, 77 Ala. 326.

Sufficiency of Averment of Demand.—"The affidavit sets forth, as the ground of attachment, that the amount of the advance 'is due and unpaid, and that, after demand made by affiant, the said Jim Rugely refuses or fails to pay it.' In *Fitzsimmons v. Howard*, 69 Ala. 590, the affidavit was held defective because it failed to aver a demand after the maturity of the debt. The maturity of the claim was averred in the affidavit in the present tense, while the past tense is used in stating the refusal or failure to pay after demand. The averment of the demand was in the form of recital, from which it could not be implied that it was made after the debt became due. The affidavit might be true, and the demand made when it was not the duty of the tenant to pay. But the affidavit in question uses the words of the statute, with an immaterial transposition. We are not author-

defects in the bond have been held no ground for quashing the attachment, as the bond may be amended.¹ Where the attachment is issued wrongfully, the defendant may sue upon the bond and recover his damages.²

f. FORM OF WRIT OF ATTACHMENT. — The ordinary phraseology of the writ has usually been in the form of a mandate to attach so much of the crop grown on the rented premises as may be sufficient to satisfy the debt and costs.³

g. ISSUANCE AND LEVY OF WRIT. — A landlord's right of attachment extends only to goods which have been upon the rented premises,⁴ because it is only upon such property that a lien exists.⁵ Accordingly, an attachment for rent should issue against the crops grown on the rented premises, and not against the tenant's estate generally.⁶ The attachment may be levied upon the whole crop to secure rent payable in part of the crop.⁷

Crops of Subtenant. — Where a landlord's lien extends to all the crops grown on rented premises, it extends to crops grown by a subtenant, but a writ of attachment to enforce such lien must issue against the tenant in chief, and not against the subtenant, irrespective of who raised the crops,⁸ and under such a writ the

it as a common-law obligation." *Rogers v. Cooper*, 33 Ark. 406.

In *Iowa* no bond is necessary. *Meritt v. Fisher*, 19 Iowa 354; *Garner v. Cutting*, 32 Iowa 547.

1. *Hawkins v. Gill*, 6 Ala. 620.

2. "If there is not a debt due or owing from the defendant to the plaintiff in the attachment, the attachment wrongfully issues, and the condition of the bond is broken, entitling the defendant to nominal, if there is no actual, damage. *Lockhart v. Woods*, 38 Ala. 631, and cases there cited." *Tucker v. Adams*, 52 Ala. 254.

3. *Agee v. Mayer*, 71 Ala. 88, citing *Hawkins v. Gill*, 6 Ala. 620.

4. *Agee v. Mayer*, 71 Ala. 88; *Abraham v. Nicrosi*, 87 Ala. 173. See also *Baxley v. Segrest*, 85 Ala. 183.

5. In *Missouri*, under an earlier statute, it was held that the landlord's right of attachment was not given as a remedy to enforce his lien, but was intended to subject property of the tenant upon which no lien existed, the lien being enforced by an action to foreclose. It was held, however, that the attachment could be levied on property on which a lien existed, as well as upon other property, when the statutory grounds for an attachment existed, and thus the lien was indirectly enforced by attachment. *Hubbard v. Moss*, 65 Mo. 647; *Sanders v. Ohlhausen*, 51 Mo. 163; *Price v. Roetz*,

56 Mo. 500; *Crawford v. Coil*, 69 Mo. 588; *Chamberlain v. Heard*, 22 Mo. App. 416.

6. *Hawkins v. Gill*, 6 Ala. 620; *De Bardeleben v. Crosby*, 53 Ala. 363; *Agee v. Mayer*, 71 Ala. 88. Compare *Jackman v. Anderson*, 33 Ark. 414.

Alabama Statute Construed. — "The whole purpose of the statute is to create a lien in favor of landlords on crops grown on rented lands, and to provide an efficient remedy for the enforcement. It was not intended to give the landlord, in any other respect, or in respect to any other property, priority over other creditors of the tenant or to authorize him to resort to the process of attachment in any other case, when they were not entitled to a like remedy. *Hawkins v. Gill*, 6 Ala. 620. The attachment should properly specify that it is leviable only on the crop grown on the premises. We do not say, if it issues generally, not expressing that it was leviable only of the crop, that it would be so irregular or defective as to be abatable or subject to a motion to quash. But if it should be levied on other property, the levy would on motion be set aside, and the property discharged." *De Bardeleben v. Crosby*, 53 Ala. 363.

7. *Tarpy v. Persing*, 27 Kan. 745.

8. *Simmons v. Fielder*, 46 Ala. 304; *Givens v. Easley*, 17 Ala. 385; *Hadden v. Powell*, 17 Ala. 314, 21 Ala. 745;

crops of the subtenant may be seized.¹

Levy on Property in Hands of Third Person. — An attachment may be levied on the crop in the hands of a third person who took with notice of the lien,² and it has been held that the property may be seized on attachment even though already in the custody of an officer of the court.³

Levy After Removal. — In the *District of Columbia* it has been held that an attachment cannot be levied on goods removed from the premises before the rent is due. The remedy under the statute in this case is by a judgment and execution levied upon the goods in whosoever hands they may be found.⁴

Exemptions. — An attachment to enforce a landlord's lien upon crops may be levied thereon notwithstanding the tenant's claim of exemptions therein. The lien is superior to the claim of

Agee v. Mayer, 71 Ala. 88; *Houghton v. Bauer*, 70 Iowa 314; *Williams v. Braden*, 63 Mo. App. 514.

Reason for Rule. — "There is no privity of contract between the landlord and any of the occupants of his rented land except the tenant in chief, and in a certain sense, as to the landlord, all the crops, which are charged by law with the payment of rent, may be regarded as the crops of the tenant in chief until this lien is discharged, waived, or otherwise lost. 'The attachment law must be liberally construed to advance the manifest intent of the law.' Code, § 3315; *Ellis v. Martin*, 60 Ala. 394; *Blair v. Miller*, 42 Ala. 308; *Ware v. Todd*, 1 Ala. 199. Sections 3476, 3477, of the code are intended merely to require the crops of the tenant in chief to be exhausted before proceeding to go against the crops of the undertenant. They cannot be construed as intended to embarrass attachment proceedings by encouraging objections for want of form in the writ which are not of an essential nature." *Agee v. Mayer*, 71 Ala. 88.

Where the contract for rent of the undertenant has been assigned to the landlord, perhaps the attachment for rent may issue against such undertenant. See *Simmons v. Fielder*, 46 Ala. 304 [citing *Givens v. Easley*, 17 Ala. 385; *Hadden v. Powell*, 17 Ala. 314, 21 Ala. 745].

Distinction Between Attachment for Rent and for Advances. — In *Alabama* a landlord's lien for rent and advances extends to the crops of a subtenant (code, § 3066), but a statutory lien for advances to make a crop does not (code, § 3286), and when an attachment

is sued out to enforce a statutory lien for advances, the clerk is not authorized to direct a levy on the crops of tenants or subtenants, nor does the writ justify the sheriff in making such levy. *Albright v. Mills*, 86 Ala. 324.

1. See cases cited in the preceding note.

2. *Hussey v. Peebles*, 53 Ala. 432; *Folmar v. Copeland*, 57 Ala. 588; *Hudson v. Vaughan*, 57 Ala. 609; *Lomax v. Le Grand*, 60 Ala. 537; *Governor v. Davis*, 20 Ala. 366; *Scaife v. Stovall*, 67 Ala. 237. See also *Finney v. Harding*, 136 Ill. 573.

"Whoever acquires possession of the crop, with notice of the landlord's lien, takes it subject to the lien. *Fowler v. Rapley*, 15 Wall. (U. S.) 328. So long as it remains in the possession of such person unconverted or unaltered, it is subject to attachment at the suit of the landlord." *Hussey v. Peebles*, 53 Ala. 432.

3. *Gibson v. Gautier*, 1 Mackey (D. C.) 35, wherein the court said: "It is insisted by the plaintiffs that the landlord had no right to seize, under this attachment, goods already in the custody of the law, and that the attempted levy under the third attachment was therefore void. But, in our opinion, when this attachment was issued the landlord had a statutory lien upon the goods then on the premises, and the circumstance that they were then in the custody of the marshal could not destroy his lien." But see *contra*, *Meyer v. Oliver*, 61 Tex. 586 (distress proceedings).

4. *Wallach v. Chesley*, 2 Mackey (D. C.) 209.

exemptions.¹

h. FORTHCOMING BOND. — Generally the defendant in attachment for rent may regain possession of his goods by giving a forthcoming bond.² After a defendant has obtained possession of his property upon giving a forthcoming bond, it is doubtful whether he may thereafter question the grounds of the attachment and have damages for its wrongful issuance.³

i. QUASHING, VACATING, OR DISCHARGING ATTACHMENT. — Substantial, but not formal, defects in the affidavit are ground for quashing the attachment.⁴ Defects and irregularities in the writ of attachment or in the bond may be raised by motion to quash or by plea in abatement.⁵

A Plea in Abatement puts in issue the truth of the facts averred in the affidavit.⁶ On the trial of a plea in abatement, while the

1. *Cathcart v. Turner*, 18 Fla. 837; *Durham v. Speeke*, 82 N. Car. 87; *Slaughter v. Winfrey*, 85 N. Car. 159.

2. *Randolph v. McCain*, 34 Ark. 696.

In *Woolley v. Maynes-Wells Co.*, 15 Utah 341, it was held that although the Act of March 8, 1894, relating to lessor's liens, makes no provision for the discharge of a writ or release of the property seized, the court nevertheless had power under Comp. Laws 1888, §§ 3324, 3325, to discharge the writ of attachment upon the execution of a bond and to release the property, as the Act of 1894 did not of itself afford a complete remedy.

In *Mississippi* it has been held that the officer must hold the products seized and cannot surrender them to the defendant upon his giving a forthcoming bond. *Mitchell v. Drake*, 57 Miss. 605. In this case the property had in fact been surrendered upon the giving of a forthcoming bond. As to the rights of the parties in such case, the court said: "The bond, not being authorized by statute, cannot be made the basis of a summary judgment in this proceeding, but must be sued on by the officer or by the plaintiff in a common-law action. The judgment should have been for a condemnation and sale of the cotton, treating it as still in the hands of the officer, and leaving the plaintiff at liberty to proceed by motion against the officer for a failure of duty or by suit at law upon the bond. This judgment may be entered here."

3. See *Randolph v. McCain*, 34 Ark. 696. See also article FORTHCOMING AND DELIVERY BONDS, vol. 9, p. 647.

4. *Knowles v. Steed*, 79 Ala. 427;

Dougherty v. Kellum, 3 Lea (Tenn.) 643.

5. Motion to Quash or Plea in Abatement—Discretion of Court. — "Defects and irregularities in a writ of attachment, or apparent on the face of the affidavit or bond, may be taken advantage of by motion to quash, if the motion is interposed within the time prescribed for pleading in abatement. *Planters', etc., Bank v. Andrews*, 8 Port. (Ala.) 404; *Hall v. Brazleton*, 40 Ala. 406, *Steamboat Farmer v. McCraw*, 31 Ala. 659; Rule 13, Rev. Code 821. The motion is addressed to the sound discretion of the court, and may be entertained or refused, and the party put to his plea, as the court may elect. An exercise of the discretion is not revisable. *Ellison v. Mounts*, 12 Ala. 472." *De Bardeleben v. Crosby*, 53 Ala. 363. To the same effect see *Busbin v. Ware*, 69 Ala. 280.

Objections to the Bond have been held to furnish no ground for quashing the attachment, as a defective bond may be amended. *Hawkins v. Gill*, 6 Ala. 620.

A Plea in Abatement Will Not Lie where the claim is for both rent and advances, and only the claim for advances is defective. What is alleged in the affidavit as to the advances may be treated as mere surplusage, which, being eliminated, leaves a good affidavit for rent, and the case must be proceeded with as upon a claim for rent only. *Ballard v. Stephens*, 92 Ala. 616.

6. Issues Raised by Plea in Abatement. — In *Cleveland v. Crum*, 33 Mo. App. 616, it was held that in an attachment for the rent under the Landlord and

defendant may show the amount of rent due, as bearing upon the question whether his disposal of the property will endanger collection of the rent, a decision on such plea as to the amount of rent due will not be *res judicata* at the trial on the merits.¹ It has been held that a plea in abatement to an attachment and to the affidavit on which it is founded must crave oyer of them and set them out.²

A Subtenant may, in *Alabama*, move to vacate the attachment at the return term upon the ground that the crops of the tenant in chief attached were sufficient to satisfy the rent.³

An Attachment is Not Discharged by a refusal to accept a tender of the rent,⁴ nor by an improper execution of the writ by the officer.⁵

Restoration of Property. — Upon quashing or discharging the attachment, the property must be restored to the defendant.⁶

Assessment of Damages. — But there should be no assessment of damages upon the discharge of the attachment before the trial or

Tenant Act, the procedure should conform to the provision of the general attachment law, that if the defendant pleads in abatement, such plea puts in issue the facts alleged in the affidavit for the attachment, that the plaintiff should be held to prove the existence of the facts alleged by him as the ground for the attachment; that the trial court properly instructed the jury that the burden of proof is on the plaintiff, and unless the issue be proven in his favor by a preponderance of evidence, it should find for the defendant; and where the allegation in the plaintiff's affidavit is that rent is past due and unpaid, it is not error to refuse an instruction casting the burden of proving the payment on the defendant.

Construction of Plea. — Where the plea in abatement in attachment for rent before a justice denies that the defendant is moving his property, it will be intended that it denies that he is so moving it as to furnish ground for attachment, and the plea is not bad because it fails expressly to traverse the allegation that the landlord is in danger of losing his rent. *Meier v. Thomas*, 5 Mo. App. 584.

1. *Dawson v. Quillen*, 43 Mo. App. 119.

2. *Richards v. Bestor*, 90 Ala. 352, citing *Tommey v. Gamble*, 66 Ala. 469.

3. *Lehman v. Howze*, 73 Ala. 302, decided under the Code of 1876, § 3476, which required the crop of the tenant in chief to be exhausted by the land-

lord before an attachment sued out by him to enforce his lien for rent or advances could be levied on the crop of an undertenant, unless the tenant in chief had not made a crop, or it was insufficient to satisfy the rent, and provided that a levy made in violation of its provisions should be vacated on motion at the first term of court thereafter.

4. *Bloom v. McGehee*, 38 Ark. 329, holding further that to make a plea of such tender good, the money must be paid into court.

5. "The right to the attachment was not affected by the manner in which the order of attachment was executed by the officer. If the execution of it was not required by the statute, it might have been quashed; or if the return was defective it might have been amended according to the facts; but in either case [there] was no cause for discharging the attachment." *Kurtz v. Dunn*, 36 Ark. 648.

6. *Jackman v. Anderson*, 33 Ark. 414, wherein the court said: "It necessarily follows that the property must be restored to the defendant upon such discharge of the attachment."

* * * The process *in rem* under which the property is seized into the custody of the sheriff being in effect abated or quashed by the judgment of the court discharging the attachment, the sheriff has no longer any legal authority to hold the property." Citing *Delano v. Kennedy*, 5 Ark. 459; *Gantt's Dig.*, § 459; Acts of 1875, p. 7.

final disposition of the case.¹

j. PARTIES — (1) Plaintiffs. — The landlord may, of course, maintain as plaintiff an attachment to enforce his lien,² and the attachment may be maintained in his name although the rent note was made payable to his agent.³ Where an individual acts as a firm, the lien may be enforced in his individual name.⁴

An Assignee of the rent cannot maintain the attachment suit.⁵

(2) Defendants. — The attachment may be maintained, not only against the immediate lessee, but also against the tenant of such lessee, provided the rent accrued during such lessee's term.⁶ An attachment has been held to lie even against an innocent purchaser.⁷

(3) Interpleading Claimants. — A claimant to the property seized under a landlord's attachment may maintain his claim thereto by an interplea.⁸

1. Kurtz v. Dunn, 36 Ark. 648.

2. When a note for rent is, by consent of all parties, executed by the tenant to a creditor of the landlord, to be held as collateral security for a debt, and it is afterwards redelivered by the creditor to the landlord, this revives the landlord's lien which before was dormant, and unites in him the debt and the right to enforce satisfaction out of the crop; and in the action the payee in the note may well be made a party for the protection of the tenant. Varner v. Rice, 39 Ark. 344.

3. Nolen v. Royston, 36 Ark. 561.

4. Giddens v. Bolling, 93 Ala. 92.

5. Roberts v. Jacks, 31 Ark. 597; Varner v. Rice, 39 Ark. 344; Block v. Smith, 61 Ark. 266; Nolen v. Royston, 36 Ark. 561.

"It is contended by appellants that the landlord's lien for rent on the crop of the tenant is personal to himself, and is not assignable, so as to vest the right of action as to the lien in the assignee. This is certainly true, and is the doctrine of Varner v. Rice, 39 Ark. 344; Nolen v. Royston, 36 Ark. 561; and Roberts v. Jacks, 31 Ark. 597. That is to say, it goes without question or controversy, in this state, that the assignee of a rent note has his action at law for the recovery on the note, but has no right at law or in equity to have the landlord's lien enforced in his favor; for, as has been said, the lien is personal to the landlord himself, and * * * 'is not assignable, so as to give a right of action in the assignee.' " Block v. Smith, 61 Ark. 266.

In Mississippi the lien of the landlord is assignable, but the assignee cannot

resort to the statutory remedy of attachment for rent. Newman v. Greenville Bank, 66 Miss. 323; Gross v. Bartley, 66 Miss. 116.

6. Garrouette v. White, 92 Mo. 237.

7. Phillips v. Maxwell, 1 Baxt. (Tenn.) 25, the court saying: "The remedy by attachment is independent and complete within itself. To 'enforce a lien by attachment,' *ex vi termini*, means that the landlord may proceed to fix and make specific his inchoate lien by levying his attachment on the crop raised on his premises, whether in possession of the tenant or a third party and others, impounding it subject to the judgment and execution which he may recover at the termination of the suit. By section 3540 this lien is continued until the termination of the suit, by judgment and execution, which may then be levied on the crop in whosoever hands it may be. The lien thus made fixed and specific relates back to the date of the contract, and overreaches any title acquired by the purchaser of the crop from the tenant, although without notice of the lien. But by section 3542, if the landlord elects to proceed against the purchaser for the value of the property, and not for the property itself, he cannot recover if the purchaser had no notice of the lien."

8. "The point is suggested that there can be no interplea in the usual form in ordinary attachments, under the Landlord and Tenant Act, it being contended that such act makes no provision for an interplea, such as is found in the statute of attachment. It is true there is no direct provision, but by sec-

k. PLEADINGS. — The pleadings in an attachment for rent are, in most respects, covered by ordinary considerations.¹ Under the *Mississippi* Agricultural Lien Law, a statement of the claim is necessary, but it may be waived, and may be filed *nunc pro tunc* by amendment.² In an attachment before a justice of the peace, formal pleadings are not required,³ and the affidavit may also answer the purpose of a statement or complaint.⁴ Ordinarily, the proceedings to procure an attachment form no part of the pleadings,⁵ and no issue can be taken upon them.⁶

l. JUDGMENT. — It has been held that the judgment in an attachment suit for rent should be a general judgment against the defendant, when he is personally served or appears;⁷ and such a

tion 6385, Revised Statutes 1889, of the Landlord and Tenant Act, it is provided that all proceedings on attachments issued under this chapter shall be the same as provided by law in case of suits by attachment." This, we think, is sufficient authority for an interplea in cases arising in attachment for rent." *Williams v. Braden*, 63 Mo. App. 513.

1. See article ATTACHMENT, vol. 3, p. 1. See also the various articles throughout this work dealing with specific pleadings.

Sufficiency of Complaint. — In an action of attachment for rent where it does not appear that the attachment was to enforce a crop lien, the complaint is not demurrable because it fails to describe with sufficient certainty the land and crop, or either of them, so as to give to the plaintiff a lien for rent, or because it does not show a contract to pay the plaintiff rent or that the plaintiff had a lien for the rent. *Burgess v. American Mortg. Co.*, (Ala. 1897) 22 So. Rep. 282.

Rent and Supplies. — A landlord, in a suit to enforce his lien on the tenant's crops, may join demands for rent and supplies which are a lien on the same crop, but he must give the amount of each demand constituting the aggregate sum sued for. *Dougherty v. Kellum*, 3 Lea (Tenn.) 643.

2. *Allen v. Standifer*, 57 Miss. 612. In this case it was held that a defendant in a writ of seizure, under the Agricultural Lien Law, who takes issue on the affidavit which sets out the plaintiff's claim waives the filing of a statement thereof on the return day, as required by statute, and the court should, upon an affidavit of merits by the plaintiff, allow the latter to amend by filing such statement. It was fur-

ther held that after the suit had been pending for two terms, upon the issue of the affidavit for the writ it is erroneous to give judgment for the defendant for failure of the plaintiff to file the required statement, when both sides are ready for trial and the plaintiff tenders his statement and offers to continue the case at his costs.

3. *Knowles v. Steed*, 79 Ala. 427.

4. *Tignor v. Bradley*, 32 Ark. 781; *Hanner v. Bailey*, 30 Ark. 681.

"The affidavit for the attachment, containing a statement of the cause of action, answered the purpose of both." *Kurtz v. Dunn*, 36 Ark. 648, citing *Tignor v. Bradley*, 32 Ark. 781.

5. *Roberts v. Jacks*, 31 Ark. 597.

6. *Tucker v. Adams*, 52 Ala. 254. But see *Patton v. Garrett*, 37 Ark. 605.

"The proceedings to authorize an attachment are no part of the pleadings in the case; no issue can be taken upon them; they were made to enable the plaintiff to sue out summary process." *Roberts v. Jacks*, 31 Ark. 597.

7. **Form of Judgment.** — In *Hubbard v. Moss*, 65 Mo. 647, an attachment for rent was levied upon the crop grown by the tenant, and the writ of summons was personally served upon the defendant. Thereafter a general judgment was regularly rendered in favor of the plaintiff and against the defendant. At the following term the court altered this judgment and rendered a judgment *nunc pro tunc*, specially, against the property attached, as well as generally, against the defendant. On appeal the court said: "We cannot conceive why, even if the court had the right to make it, the *nunc pro tunc* entry was made. The two judgments were substantially the same. One, the first, was for one hundred dollars and that plaintiff have execu-

judgment may be rendered for the amount due, even though the ground of attachment fail.¹ In *Mississippi*, however, no personal judgment can be rendered in a proceeding by writ of seizure under the Agricultural Lien Law, but the judgment should be purely *in rem*, condemning the property seized.²

A Personal Judgment for Costs may, however, be rendered against a defendant for any balance of costs not paid by the property seized, after paying the plaintiff what is due him.³

Where a Claimant to the Property Interposes in the attachment suit, the suit against the defendant remains in abeyance until the determination of the claim, and a judgment rendered before that time is erroneous.⁴

tion against the property of defendant; the second was for the same amount, and that plaintiff have execution against the property attached in the suit, as well as against the other property of defendant. Under the execution awarded by the original judgment, the sheriff could have taken as well the attached property as other property of defendant, and under the second he could do more. The lien of the attachment was not lost by the judgment as first entered. Section 36 of the Attachment Act, Wag. Stat., p. 188, provides: "When defendant has been served with the writ, or appears to the action, the judgment and execution shall hold, not only the property attached, but the other property of the defendant."

In *Tarpy v. Persing*, 27 Kan. 745, judgment was rendered in the following form: "It is therefore considered, ordered, and adjudged by the court that the said plaintiff, Abraham Persing, do have and recover of and from the said defendant, Patrick Tarpy, the aforesaid sum of fifty-two dollars and ninety-six cents, so as aforesaid found due, and costs of this suit, and that the judgment herein be, and the same is, a lien upon all the crop raised upon said leased premises. It is further ordered by the court that said attached property be sold, and the proceeds arising from the sale thereof be applied to the satisfaction of said judgment herein, and costs of this suit."

1. *Tucker v. Adams*, 52 Ala. 254; *Patton v. Garrett*, 37 Ark. 605; *Dougherty v. Kellum*, 3 Lea (Tenn.) 643.

Costs Where Attachment Fails. — Where the ground of attachment fails, but a good general judgment is rendered on the service of a summons, the costs of the recovery and the costs of

the attachment should be severally borne by the unsuccessful party. *Dougherty v. Kellum*, 3 Lea (Tenn.) 643.

2. *Mitchell v. Drake*, 57 Miss. 605; *Hartsell v. Myers*, 57 Miss. 135; *Burrow v. Sanders*, 57 Miss. 211.

Personal Judgment Erroneous. — "It was error, also, to give a personal judgment against the defendant in excess of the value of the property seized. The Act of 1876 (Acts 1876, p. 109) regulating liens on crops and providing for their enforcement, under the provisions of which this proceeding was instituted, contemplates only a subjection of property seized to the liens of the several parties interested, and nowhere makes provision for the rendition of personal judgments. However desirable it might be to settle all the rights of the parties in one litigation, the lawgiver has provided only for a proceeding *in rem*, and when the court has fully distributed the property seized and adjudged the costs, its jurisdiction under the statute is exhausted." *Hartsell v. Myers*, 57 Miss. 135.

3. *Burrow v. Sanders*, 57 Miss. 211.
4. *Abraham v. Nicrosi*, 87 Ala. 173, citing Ala. Code, §§ 3012, 3013; *Moore v. Dickerson*, 44 Ala. 485; *Lamplsey v. Beavers*, 25 Ala. 534.

In an attachment suit, the defendant appearing only for the purpose of moving to dissolve the attachment and dismiss the levy, the attached property having been claimed by a third person as purchaser, although the court may correctly adjudge that the property is, on the facts proved, subject to the attachment, it should only render judgment overruling the defendant's motions, and delay final judgment until the determination of the adverse claim

The Judgment Cannot be Collaterally Attacked by a stranger to the suit upon the ground that the plaintiff in the attachment was not at the time the owner of the rent notes sued upon.¹

Certiorari Lies, under the *Mississippi* statute, to remove to the Circuit Court a case under the Agricultural Lien Law decided by a justice of the peace.²

3. Enforcement by Distress or Summary Process.— Under the statutes of several states a landlord's lien is enforced by distress proceedings.³ The procedure in a distress for rent has been

to the property; and the defendant himself may assign as error the rendition of final judgment against him. *Abraham v. Nicrosi*, 87 Ala. 173.

Claim Limited to Part of Property.— In an attachment suit, if a statutory claim is interposed to the property levied on, no judgment can be rendered until the claim suit is ended (code, § 3000); but the interposition of a claim to a part only of the property levied on does not require a suspension of the trial. *Richards v. Bestor*, 90 Ala. 352.

1. Collateral Attack by Stranger.— "It is contended that as *Aderhold*, the landlord, had transferred the rent notes of *Toole* to *Lewis*, as collateral security to a debt he was owing to *Lewis*, and as the rent notes were so held by *Lewis* when the attachment for the rent was sued out by the landlord against the tenant, the Circuit Court had no jurisdiction of the case, and that the judgment rendered is a mere nullity. This position is untenable under the facts disclosed in the record. The proceedings of the attachment suit in the Circuit Court on their face were in all respects regular. The court had jurisdiction of the persons and subject-matter. Its judgment is conclusive, as between the landlord and tenant, of the amount due for rent, and that it was due the landlord. The defendant in that suit, if the facts justified it, might have shown that the plaintiff did not own the debt, and was not the proper person to sue; but a stranger to that suit cannot show, in a collateral proceeding, that the plaintiff was not the owner of the claim and not entitled to maintain the action. If neither the holder of the collateral nor the debtor objects to the party suing, a stranger to the action cannot interfere to defeat the suit, or, after judgment, impeach its validity as between the parties to the suit. The case of *Ware v. Russell*, 57 Ala. 43, is not in conflict with this prin-

ciple." *Aderhold v. Blumenthal*, 95 Ala. 66.

2. Burrow v. Sanders, 57 Miss. 211, holding that the Circuit Court should, in such case, examine the questions of law appearing on the face of the record and proceedings, and affirm or reverse the justice's judgment.

3. Florida.— *Smoot v. Strauss*, 21 Fla. 611; *Fox v. Jones*, 26 Fla. 276.

Georgia.— *Scruggs v. Gibson*, 40 Ga. 511; *Smith v. Green*, 34 Ga. 178; *Driver v. Maxwell*, 56 Ga. 11; *Hill v. Reeves*, 57 Ga. 31; *Rosenstein v. Forrester*, 57 Ga. 94; *Worrill v. Barnes*, 57 Ga. 404; *Lathrop v. Clewis*, 63 Ga. 282; *McCray v. Samuel*, 65 Ga. 739; *Ware v. Blalock*, 72 Ga. 804; *McDougal v. Sanders*, 75 Ga. 140; *Colclough v. Mathis*, 79 Ga. 394; *Bryant v. Mercier*, 82 Ga. 409; *Jones v. Eubanks*, 86 Ga. 616.

Illinois.— *Miles v. James*, 36 Ill. 399; *Thompson v. Mead*, 67 Ill. 395; *Prettyman v. Unland*, 77 Ill. 206; *Mead v. Thompson*, 78 Ill. 62; *Hunter v. Whitfield*, 89 Ill. 229; *Wetsel v. Mayers*, 91 Ill. 497; *Frink v. Pratt*, 130 Ill. 327; *Finney v. Harding*, 136 Ill. 573; *Joliet First Nat. Bank v. Adam*, 138 Ill. 483; *Kern v. Noble*, 57 Ill. App. 27.

Kentucky.— *Williams v. Wood*, 2 Metc. (Ky.) 41; *Loth v. Carty*, 85 Ky. 591; *McLean v. McLean*, 10 Bush (Ky.) 167; *Petry v. Randolph*, 85 Ky. 351.

Mississippi.— *Towns v. Boarman*, 23 Miss. 186; *Marye v. Dyche*, 42 Miss. 347; *Stamps v. Gilman*, 43 Miss. 456; *Maxey v. White*, 53 Miss. 80; *Mitchell v. Drake*, 57 Miss. 605; *Hartsell v. Myers*, 57 Miss. 135; *Burrow v. Sanders*, 57 Miss. 211; *Smith v. Jones*, 65 Miss. 278.

Texas.— *Jones v. Walker*, 44 Tex. 200; *Rosenberg v. Shaper*, 51 Tex. 134; *Wise v. Old*, 57 Tex. 514; *Bourcier v. Edmondson*, 58 Tex. 675; *Templeman v. Gresham*, 61 Tex. 52; *Meyer v. Oll-*

judgment may be rendered on the ground of attachment for judgment can be rendered under the Agricultural Lien Act purely *in rem*, cor

A Personal Judgment against the defendant for the amount seized, after p

Where a Clerk determines the time is

tion as the *DISTRESS*, vol. 7, p. 20. and *Frink v. Pratt*, 130 Ill. 327; *Rippon v. Mead*, 67 Ill. 395; *Wetzel v. Mayers*, 91 Ill. 497; *Kern v. Noble*, 57 Ill. App. 27.

The levy of a distress warrant is not essential to the right of possession in a landlord of the property upon which the statute gives him a lien for rent, and such warrant is not the exclusive remedy for the assertion and protection of the lien. *Hunter v. Whitfield*, 89 Ill. 229.

The issue and levy of a distress warrant is not the only means for the assertion, protection, and enforcement of the landlord's lien for rent, and where the tenant dies before the rent becomes due, the rights of the landlord may be protected by presenting the claim in apt time to the Probate Court for allowance. The court has ample power to protect the rights of all parties interested. *Kern v. Noble*, 57 Ill. App. 27.

Mississippi.—In *Newman v. Greenville Bank*, 66 Miss. 323, it was held that the landlord's right as against the products raised on the leased land is broader than the remedy conferred by the statute regulating attachments for rent, and that he is therefore not confined to the statutory remedy in enforcing his rights as to such products. The court said: "In *Henry v. Davis*, 60 Miss. 212, and in *Fitzgerald v. Fowlkes*, 60 Miss. 270, we held that the right of the landlord as against the agricultural products was broader than the remedy afforded him by an attachment for rent under the provisions of chapter 50 of the code, of which section 1301 is a part; that it was not intended by the legislature to restrict pursuit of

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such the products, as to which no lien, might be seized; *v. Smith*, 64 Miss. 816, it was held that an action might be brought by the landlord to recover the value of the agricultural products from one who had bought and converted them, with notice of the landlord's lien. The result of the decisions is that the landlord is not confined to the statutory remedy to enforce his lien upon the products raised on the demised premises, and our conclusion is that the lien created by law exists without writing or record and must prevail even against a *bona fide* purchaser for value."

Texas.—In Texas it is held that distress is not the exclusive remedy, and that the lien may be enforced by action to foreclose without seizure and without previous distress proceedings. *Bourcier v. Edmondson*, 58 Tex. 679; *Templeman v. Gresham*, 61 Tex. 52; *Rosenberg v. Shaper*, 51 Tex. 135; *Randall v. Rosenthal*, (Tex. Civ. App. 1894) 27 S. W. Rep. 906.

"Appellants contend that, in order to foreclose a landlord's lien, it is not a necessary prerequisite that distress proceedings be instituted, and therefore the court erred in refusing to give them judgment foreclosing their lien. We agree with appellants that the institution of distress proceedings is not a necessary prerequisite to a foreclosure of the landlord's lien. The lien is preserved by the bringing of the suit to foreclose, if brought in time." *Randall v. Rosenthal*, (Tex. Civ. App. 1894) 27 S. W. Rep. 907 [citing *Bourcier v. Edmondson*, 58 Tex. 675; *Templeman v. Gresham*, 61 Tex. 50; *Wilkes v. Adler*, 68 Tex. 689].

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will not be liable to the landlord for its value in a personal action, but the landlord may still levy his distress warrant on the grain, if it can be found and identified. *Finney v. Harding*, 136 Ill. 573.

1. **Procedure After Equitable Plea.**—Where, to an affidavit to foreclose a landlord's lien for supplies under sections 1978, 1991, of the *Georgia Code*, the defendant, in addition to his counter-affidavit, filed an equitable plea, in which he set up other matters of account between the plaintiff and himself, not arising from the relation of landlord and tenant, and prayed for a general accounting, for the cancellation of certain deeds and the delivery of collateral securities, and for an injunction and the appointment of a receiver and an auditor, and the plaintiffs filed an equitable answer to this plea, and all matters of account involved were referred to an auditor, the case was changed from an ordinary statutory proceeding to enforce a landlord's lien into an equitable proceeding, and the mode of trial as to the whole was not legal, but equitable. Consequently, where exceptions of law and fact were filed to the findings of the auditor it was not right of either party to have the exceptions of fact tried by a jury, but it was the duty of the judge, under the Act of October 16, 1885, to examine the report of the auditor, and, if it did not appear to him that error had been committed, to approve the report, and dismiss the exceptions, and have a verdict taken in accordance with the findings of the auditor. *Mackenzie v. Flannery*, 90 Ga. 590.

Where the defendant in a statutory proceeding to enforce a landlord's lien for supplies filed, in addition to his

demand is a condition precedent the landlord's special lien, but merely the affidavit to procure and in the case of a special lien.² Both the general and one distress warrant, or option of the landlord.³

⁴ S. Car. 119. The warrant is void for irregularity or its issuance. *Monday v. Bell*, 28 S. Car. 126, wherein the court, on improvidence and neglect in procuring the warrant is void. Also *Ivy v. Caston*, 28 S. Car. 126.

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2. *Towns v. Boarman*, 23 Miss. 186; *Canterberry v. Jordan*, 27 Miss. 82; *Smith v. Jones*, 65 Miss. 276.

A Removal, to Justify a Distress for rent, must be such as would endanger or defeat collection of the rent out of the property. *Stamps v. Gilman*, 43 Miss. 456.

3. **Replevin to Test Legality of Distress.**—*Towns v. Boarman*, 23 Miss. 186; *Canterberry v. Jordan*, 27 Miss. 82; *Maxey v. White*, 53 Miss. 80; *Smith v. Jones*, 65 Miss. 276.

An attachment for rent, under section 1302 of the code (1880), is not the commencement of a suit, but is intended to be executed without the intervention of a court, unless its operation is arrested by the tenant or a third person claiming the property distrained, either of whom may replevy the same; when, in either case, the writ and bond must be returned, either to the Circuit Court or to the magistrate who issued the writ, according to the amount of the claim and value of the property. When the property is thus replevied, a suit is for the first time commenced, the tenant or third person being plaintiff and the landlord defendant. *Smith v. Jones*, 65 Miss. 276.

Proceedings in Replevin.—The remedy of the tenant desiring to replevy the goods distrained for rent is to give bond, as prescribed by section 1630 of the code, amended in 1872, Acts 34,

treated in a former article.¹

Exclusiveness of Remedy. — In *Illinois*, *Mississippi*, and *Texas* a distress is not the exclusive remedy to enforce the lien.²

Against Bona Fide Purchasers. — It has been held that distress proceedings are maintainable against a purchaser of the property with or without notice of the lien, provided the property can be followed.³

ver, 61 Tex. 586; *Texas*, etc., *R. Co. v. Bayliss*, 62 Tex. 571; *Biesenbach v. Key*, 63 Tex. 79; *Ghio v. Shutt*, 78 Tex. 377; *Priutt v. Kelley*, (Tex. App. 1890) 15 S. W. Rep. 119; *Randall v. Rosenthal*, (Tex. Civ. App. 1894) 27 S. W. Rep. 906.

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such property to the circumstances under which the general goods and chattels, as to which the landlord has no lien, might be seized; and in *Cohn v. Smith*, 64 Miss. 816, it was held that an action might be brought by the landlord to recover the value of the agricultural products from one who had bought and converted them, with notice of the landlord's lien. The result of the decisions is that the landlord is not confined to the statutory remedy to enforce his lien upon the products raised on the demised premises, and our conclusion is that the lien created by law exists without writing or record and must prevail even against a *bona fide* purchaser for value."

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"Appellants contend that, in order to foreclose a landlord's lien, it is not a necessary prerequisite that distress proceedings be instituted, and therefore the court erred in refusing to give them judgment foreclosing their lien. We agree with appellants that the institution of distress proceedings is not a necessary prerequisite to a foreclosure of the landlord's lien. The lien is preserved by the bringing of the suit to foreclose, if brought in time." *Randall v. Rosenthal*, (Tex. Civ. App. 1894) 27 S. W. Rep. 907 [citing *Bourcier v. Edmondson*, 58 Tex. 675; *Templeman v. Gresham*, 61 Tex. 50; *Wilkes v. Adler*, 68 Tex. 689].

3. *Watt v. Scofield*, 76 Ill. 261; *Frink v. Pratt*, 130 Ill. 327; *Finney v. Harding*, 136 Ill. 573.

A *Bona Fide Purchaser* of grain from a tenant, without notice of the landlord's lien thereon for unpaid rent, or of facts sufficient to put him on inquiry,

Changing Statutory into an Equitable Proceeding. — The ordinary statutory proceeding to enforce a landlord's lien may be converted by the pleadings of the parties into an equitable proceeding with all its incidents.¹

In Mississippi the landlord's remedy is by an attachment in the nature of a distress, under which the tenant's goods are seized and sold just as if a judgment had been rendered therefor.² If the tenant wishes to contest the legality of the distress, he must do so by bringing an action of replevin against the distraining landlord, and it is only by such replevin that an attachment or distress for rent can be brought into court. The distress is not mesne but is final process, unless its operation is arrested by a suit in replevin as provided by statute.³

will not be liable to the landlord for its value in a personal action, but the landlord may still levy his distress warrant on the grain, if it can be found and identified. *Finney v. Harding*, 136 Ill. 573.

1. Procedure After Equitable Plea. — Where, to an affidavit to foreclose a landlord's lien for supplies under sections 1978, 1991, of the *Georgia Code*, the defendant, in addition to his counter-affidavit, filed an equitable plea, in which he set up other matters of account between the plaintiff and himself, not arising from the relation of landlord and tenant, and prayed for a general accounting, for the cancellation of certain deeds and the delivery of collateral securities, and for an injunction and the appointment of a receiver and an auditor, and the plaintiffs filed an equitable answer to this plea, and all matters of account involved were referred to an auditor, the case was changed from an ordinary statutory proceeding to enforce a landlord's lien into an equitable proceeding, and the mode of trial as to the whole was not legal, but equitable. Consequently, where exceptions of law and fact were filed to the findings of the auditor it was not right of either party to have the exceptions of fact tried by a jury, but it was the duty of the judge, under the Act of October 16, 1885, to examine the report of the auditor, and, if it did not appear to him that error had been committed, to approve the report, and dismiss the exceptions, and have a verdict taken in accordance with the findings of the auditor. *Mackenzie v. Flannery*, 90 Ga. 590.

Where the defendant in a statutory proceeding to enforce a landlord's lien for supplies filed, in addition to his

counter-affidavit, an equitable plea, praying for a general accounting, and offering to do equity and pay the landlord whatever might be found to be due him, the auditor may find a balance in favor of the landlord without any prayer in his pleadings for a decree in his behalf. *Mackenzie v. Flannery*, 90 Ga. 590.

2. *Towns v. Boarman*, 23 Miss. 186; *Canterberry v. Jordan*, 27 Miss. 96; *Smith v. Jones*, 65 Miss. 276.

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Proceedings in Replevin. — "The remedy of the tenant desiring to replevy the goods distrained for rent is to give bond, as prescribed by section 1630 of the code, amended in 1872, Acts 34,

In South Carolina the landlord's lien is enforced by a warrant of seizure and a summary sale.¹

In Georgia the landlord has a general lien on the property of his tenant for the rent, and also a special lien upon the crops grown

and obtain the writ of replevin commanding a restoration of the goods to the plaintiff in the writ. At the return term, or before, the tenant, having replevied the goods, as aforesaid, should declare against the plaintiff in the attachment for the goods distrained and replevied; and the landlord should answer this declaration by an avowry in which his right to seize the goods distrained is asserted; and this, in turn, should be answered by the plaintiff in the writ of replevin; and so on, until the mutual altercations of the parties to this suit result in an issue. The plaintiff in such writ of replevin becomes an actor, and must follow up his suit. By his writ he arrests the officer distraining goods from obeying the mandate of the attachment and the statute requiring the officer to give notice and sell the goods to make the money due the plaintiff in attachment; and he must assert his right in court to the goods distrained under the attachment, and restored to him by virtue of his writ of replevin, and thus tender an issue to the landlord, who must meet the issue and show by what right he attached the goods. It is only in this way that the attachment for rent can be brought before the court; for it is not mesne process returnable to a court, but in the nature of final process, commanding the officer to seize and sell goods of the tenant to pay the plaintiff's demand for rent, unless bond for the payment of rent shall be given. Code, § 1621; Towns v. Boorman, 23 Miss. 186. The statute, section 1632 of code, speaks of the tenant who replevies as plaintiff in such writ, and declares that if he shall make default, or fail to prosecute his writ, judgment shall be entered against him and the sureties on his bond, as upon an issue found against him." Maxey v. White, 53 Miss. 80, holding further that the writ of replevin in such cases is not the writ provided for in the general action of replevin, and "not guilty" is not a proper plea to it. The writ is the special one provided by section 1630 of the code, and to be proceeded with as hereinbefore indicated.

"If the claim of the landlord is dis-

puted by the tenant, or if the property seized is claimed by a third person, it may be replevied by either; and in either case the writ and bond are required to be returned, either to the Circuit Court or to the magistrate who issued the writ, if the amount of the rent claimed and the value of the property levied on is within his jurisdiction. When the property levied on is thus replevied, the proceeding becomes for the first time a suit. A suit is then and there commenced by the party replevying, in which he is plaintiff and the landlord is defendant, followed by notice being given to the defendant and by a declaration being filed by the plaintiff, if the controversy is carried to the Circuit Court, to which the defendant pleads by denying the taking of the property or by an avowry; and the pleadings so begun are continued until the parties are at issue. If the writ of attachment and replevy bond are returned to the justice who issued the writ, the suit is conducted in the same manner as in the Circuit Court, except that written pleadings are dispensed with or are not required. We observe that the general issue pleaded by appellant to the declaration was improper. Unless he denied the taking of the goods, he should have answered by an avowry, alleging his right to seize the goods, and setting forth the attachment and justifying his action thereunder. Code, § 1358; Dudley v. Harvey, 59 Miss. 34; Lavigne v. Russ, 36 Miss. 326; Maxey v. White, 53 Miss. 80. But as no objection was made to the plea in the court below, its insufficiency cannot be availed of here." Smith v. Jones, 65 Miss. 276.

1. Segler v. Coward, 24 S. Car. 119; Jones v. Clarkson, 16 S. Car. 628; Sullivan v. Ellison, 20 S. Car. 484; Monday v. Elmore, 27 S. Car. 126; Baum v. Bell, 28 S. Car. 201; Sease v. Dobson, 33 S. Car. 234; Leonard v. Brockman, 46 S. Car. 128.

A Warrant of Seizure must be issued by the clerk and executed by the sheriff, Jones v. Clarkson, 16 S. Car. 628; it must issue against the crop in specie, and not against the proceeds of the crop, Sullivan v. Ellison, 20 S. Car.

upon the rented premises. A demand is a condition precedent to the enforcement by distress of the landlord's special lien, but not of his general lien,¹ and consequently the affidavit to procure a distress warrant must aver a demand in the case of a special lien, but not in the case of a general lien.² Both the general and the special lien may be enforced in one distress warrant, or they may be enforced separately at the option of the landlord.³

484; and it may issue although there was no fraudulent intent in the removal, *Leonard v. Brockman*, 46 S. Car. 128.

The Affidavit for a warrant of seizure must state the amount due. *Segler v. Coward*, 24 S. Car. 122, holding that an affidavit stating that the defendant was indebted to the plaintiff "for twelve hundred bushels of cotton seed," without any statement whatever as to value, was insufficient.

An affidavit simply stating that the defendant refused to pay what the plaintiff alleged to be due is insufficient. It must also state that the defendant was about to sell or dispose of his crop, or that he had done or was about to do something else which would defeat the lien. *Segler v. Coward*, 24 S. Car. 122; *Monday v. Elmore*, 27 S. Car. 126.

An averment that the defendant has sold a portion of his crop and has refused to pay the rent due, with intent to defeat the lien, is equivalent to saying that the intent of the defendant was to defraud a creditor. *Monday v. Elmore*, 27 S. Car. 126.

The affidavit must show the existence of a cause of action. *Monday v. Elmore*, 27 S. Car. 126.

The affidavit must state the facts upon which the plaintiff's belief of his allegations is founded. *Baum v. Bell*, 28 S. Car. 201.

Motion to Vacate.—An illegal warrant of seizure may be vacated on motion. *Segler v. Coward*, 24 S. Car. 119; *Baum v. Bell*, 28 S. Car. 201.

A motion to vacate, and setting the case down for trial, upon a notice that the amount claimed is not justly due as provided by statute, are alternative remedies. *Sease v. Dobson*, 33 S. Car. 234.

A motion to vacate may be heard and determined at chambers. *Segler v. Coward*, 24 S. Car. 119.

On motion to vacate, the court cannot consider affidavits not made before the clerk to procure a warrant. *Segler*

v. Coward, 24 S. Car. 119. The warrant may be vacated for irregularity or improvidence in its issuance. *Monday v. Elmore*, 27 S. Car. 126, wherein the distinction between improvidence and irregularity in issuing the warrant is pointed out. See also *Ivy v. Caston*, 21 S. Car. 588; *Baum v. Bell*, 28 S. Car. 201.

On motion to vacate, the court cannot go into the merits of the pending case. *Baum v. Bell*, 28 S. Car. 201.

On Notice that the Amount Claimed Is Not Due, and issue made, the validity of the lien may be attacked notwithstanding no motion to vacate had been made. *Sease v. Dobson*, 33 S. Car. 234.

1. *McCray v. Samuel*, 65 Ga. 739.

2. *Lathrop v. Clewis*, 63 Ga. 282. But see *Colclough v. Mathis*, 79 Ga. 394, holding that in order to enforce the special lien of a landlord, the rent must be due, but a demand for the payment thereof is not required.

It seems that the general lien spoken of in some of the cases is not strictly a lien, but rather a right to acquire a lien by the levy of a distress for the rent upon any property of the tenant.

3. *McCray v. Samuel*, 65 Ga. 739; *McDougal v. Sanders*, 75 Ga. 140, holding that it does not follow from section 1977 of the code that one having, as a landlord, a right to rent, which may be either a special or a general lien, is obliged to adopt the remedy for the enforcement of the former in preference to that given to enforce the latter, or that, where he has two demands for rent, one a special and the other a general lien, he may not include and enforce both in one distress warrant. He is not compelled, but has the option, to do so.

The Affidavit upon a special lien must aver that the crop had matured, or that some other date had been agreed upon by the parties as the date of the lien. *McDougal v. Sanders*, 75 Ga. 140.

Special Lien Enforced by Distress.—The special liens of landlords on the

A landlord's lien for supplies or advances is enforced in *Georgia* by a summary execution and sale,¹ the execution for advances being a final process, unless its operation is arrested by the filing of a counter-affidavit, in which case it becomes mesne process.²

4. Enforcement by Judgment and Execution. — In *Tennessee* a landlord's lien may be enforced either by attachment, as already seen, or by judgment at law against the tenant, and execution thereon levied on the crop in whosoever hands it may be.³ A similar statute exists in the *District of Columbia*.⁴

crops made on land rented from them are to be enforced by distress warrants, and not in the manner provided in section 1991 of the code for the enforcement of liens on personalty. And such a distress warrant may be issued by a justice of the peace upon the affidavit of the attorney of the landlord. *Colclough v. Mathis*, 79 Ga. 394.

1. *Ware v. Blalock*, 72 Ga. 804; *Swann v. Morris*, 83 Ga. 143; *Colclough v. Mathis*, 79 Ga. 394; *Favors v. Johnson*, 79 Ga. 553.

Lien for Supplies Enforced by Summary Execution. — The proper remedy to enforce a landlord's lien, under section 1978 of the code, for supplies furnished, is that prescribed in section 1991, and not a distress warrant; and under the latter section the affidavit to foreclose the lien may be made before the ordinary of the county. *Mackenzie v. Flannery*, 90 Ga. 590. See also *Colclough v. Mathis*, 79 Ga. 394.

Affidavit on Lien for Supplies. — It is not necessary, in an affidavit to foreclose a landlord's lien for supplies furnished, to set out the property on which the lien is claimed. Execution is to be issued against the property subject to the lien; and the law specifies that the property so subject is the crops raised during the year when the supplies were furnished. *Ware v. Blalock*, 72 Ga. 804.

An affidavit to foreclose a landlord's lien for supplies furnished to the tenant, specifying the amount due and complying with the other requisites for such foreclosure, without an itemized account of the supplies being attached, is sufficient. If issues were taken on the amount claimed to be due, the court might, on motion, require the plaintiff to attach an itemized account. *Jones v. Eubanks*, 86 Ga. 616.

In *Ware v. Blalock*, 72 Ga. 804, the affidavit to foreclose a landlord's lien for supplies set out fully the relation of landlord and tenant, and stated that

the landlord furnished supplies to make a crop for the year. It also stated the amount claimed, the demand on the owner, and a refusal to pay after the debt became due. This was held sufficient.

2. Counter-affidavit. — "If the counter-affidavit had been filed before levy of the execution issued upon the landlord's foreclosure of his lien for advances and supplies, and before the sale of the tenant's property, this execution would then be mesne process, under the decision of this court in *Rountree v. Rutherford*, 65 Ga. 444, and *Cosgrave v. Mitchell*, 74 Ga. 824, decided at February term, 1885. If the property be sold before the interposition of the counter-affidavit, then the process is final. *Elam v. Hamilton*, 69 Ga. 736; *Smith v. Green*, 34 Ga. 180. The creditor, under section 1991 of the code, could not interpose a counter-affidavit if the debtor could not, and the debtor could not after sale of his property after foreclosure and under execution issued thereon, but the creditor must look to the money. *Franklin v. Norton*, 47 Ga. 643; *Gladden v. Cobb*, 73 Ga. 238. The plaintiff in error should have contested with the landlord as to the money upon rule against the officer who held it, and he could, in that proceeding, have shown anything that entitled him to the money as fully as he could in any issue raised on his counter-affidavit." *Smith v. McPherson*, 78 Ga. 84.

Mortgage creditors of the tenant may file a counter-affidavit in proceedings to enforce a lien for the advances. *Swann v. Morris*, 83 Ga. 143.

3. *Tenn. Code*, §§ 3539-3542; *Phillips v. Maxwell*, 1 Baxt. (Tenn.) 29; *Richardson v. Blakemore*, 11 Lea (Tenn.) 292; *Biggs v. Piper*, 86 Tenn. 591; *Patterson v. Hawkins*, 3 Lea (Tenn.) 484.

4. *Wallach v. Chesley*, 2 Mackey (D. C.) 209.

5. Enforcement by Action to Foreclose. — In *Texas* the landlord's lien established by statute is not lost by the failure of the landlord to sue out a distress warrant for rent, nor is it acquired by a resort to that remedy, but the lien may be preserved by suit to foreclose, which will prevent its loss by the expiration of the time limited in the statute for its continuance.¹ So, also, under the *Missouri* statute it has been held that the landlord's lien may be

The statute, after abolishing the right of distress and establishing a tacit lien, proceeds as follows: "Sec. 679. This lien may be enforced: First, by attachment to be issued upon affidavit that the rent is due and unpaid; or, if not due, that the defendant is about to remove or sell all or some part of those chattels; or second, by judgment against the tenant and execution to be levied on said chattels, or any of them, in whosoever hands they may be found; or third, by action against any purchaser of any of said chattels, with notice of the lien, in which action the plaintiff may have judgment for the value of the chattels purchased by the defendant, but not exceeding the rent arrear and damages." This statute was construed in *Bryan v. Sanderson*, 3 MacArthur (D. C.) 431.

In *Wallach v. Chesley*, 2 Mackey (D. C.) 209, it was held that under this statute an attachment could not be levied on goods removed by the tenant before the rent became due, but that in such case the remedy of the landlord was by judgment and execution to be levied upon such chattels or any of them, in whosoever hands they might be found. The reason for this distinction as given by the court is as follows: "As we have already stated, the common-law right of distraining was confined to the chattels upon the premises. It was an exceptional right, and a very oppressive one in many cases; and the remedy by attachment, given by this statute as a substitute for that, is itself an extraordinary and exceptional right, varying from the course of the common law, and there is reason enough for holding that that remedy, which is a judicial seizure, as the other was a private seizure, of the debtor's property, before any judgment, should be confined to the condition of things in which the relation of landlord to the tenant, and of both to the property subject to the right, was unchanged. But if the property has

been once removed from the premises and may have gotten into other hands, there ought to be a judicial determination of the cause of action before this extreme remedy can be resorted to, of a seizure before any hearing upon the merits of the claim."

1. *Bourcier v. Edmondson*, 58 Tex. 675; *Templeman v. Gresham*, 61 Tex. 52; *Rosenberg v. Shaper*, 51 Tex. 135; *Randall v. Rosenthal*, (Tex. Civ. App. 1894) 27 S. W. Rep. 906; *Wilkes v. Adler*, 68 Tex. 689.

The statute does not compel the landlord to take the tenant's property by distress warrant in order to secure his debt by enforcing his lien; it permits him to do so when, for his own security, he desires to seize the property to which the lien attaches, and hold it until he can procure a judgment and order for its sale. *Bourcier v. Edmondson*, 58 Tex. 675.

Parties. — The general rule is that all persons who claim an interest in property on which a lien is sought to be foreclosed should be made parties. The District Court will adjust the rights of the respective parties though the interest claimed by some of the parties may not be such as of itself to confer jurisdiction. *Templeman v. Gresham*, 61 Tex. 50, following *Hall v. Hall*, 11 Tex. 547, and *Peticolas v. Carpenter*, 53 Tex. 27.

Petition or Complaint — Sufficiency. — The landlord not having such access to the premises as would enable him to inventory the articles which he may desire to subject to the payment of his debt, its description must of necessity be general and vague. When no seizure of the property under summary process is sought, and it is left with the owner until the lien is foreclosed, its general description, with the exact locality of the house containing it, the person in possession, and the party to whom it belongs, is sufficient. The description given was, under the circumstances, sufficient. *Bourcier v. Edmondson*, 58 Tex. 675.

enforced by an action to foreclose, and that an attachment is not necessary, as the court in a foreclosure suit may enjoin a removal and order a sale.¹

6. Enforcement in Equity.—As has been seen, the statutory remedy for the enforcement of the lien has often been held not to be exclusive. Accordingly, where the legal remedy is inadequate, as where the accounts are complicated, or where other grounds of equity jurisdiction exist, it has been held that the landlord's lien may be enforced by a bill in equity.² So it has

1. *Price v. Roetzell*, 56 Mo. 500; *Hubbard v. Moss*, 65 Mo. 647; *Hulett v. Stockwell*, 27 Mo. App. 328, wherein the court said that section 3091 of the Revised Statutes "authorizes the landlord, in certain contingencies, when he deems his rent endangered by removal or threatened removal from the premises of the crops thereon, to resort to the action of attachment. But this latter remedy is only permissive and not exclusive. The lien given by the statute in favor of the landlord may be enforced by an action, in the proper jurisdiction, as any other lien given by law or in equity. No other view has ever been entertained by the Supreme Court touching this question. * * * It occurs to me that it should be the unquestioned office of the court, in maintaining the action for the enforcement of the lien, to exercise its ancient and customary chancery jurisdiction of restraining the defendant, during the litigation respecting the enforcement of the lien, from destroying, removing, or impairing the subject upon which the lien was to operate. Otherwise its judgment enforcing the lien would be unavailing and an empty ceremony."

Under the Old Statute an action to foreclose was the regular remedy for a direct enforcement of the landlord's lien, and it was held that he could not enforce it by attachment; that the attachment was a remedy "to secure the rent from property on the place on which there is no lien." *Price v. Roetzell*, 56 Mo. 500; *Chamberlain v. Heard*, 22 Mo. App. 416; *Hubbard v. Moss*, 65 Mo. 647.

2. Bill in Equity Lies.—In the following cases it was held that a bill in equity was properly brought to enforce the lien:

Alabama.—*Carman v. Alabama Nat. Bank*, 101 Ala. 189.

Arkansas.—*Roberts v. Jacks*, 31 Ark. 597; *Reavis v. Barnes*, 36 Ark.

575; *Knox v. Hellums*, 38 Ark. 413; *Dickenson v. Harris*, 48 Ark. 355; *Anderson v. Bowles*, 44 Ark. 110.

Illinois.—*Webster v. Nichols*, 104 Ill. 160; *Kuttner v. Haines*, 35 Ill. App. 307.

Iowa.—*Clark v. Haynes*, 57 Iowa 96.

Texas.—*Ghio v. Shutt*, 78 Tex. 376.

Bill in Equity Will Not Lie.—In the following cases it was held that a bill in equity would not lie to enforce the lien:

Alabama.—*Hudson v. Vaughan*, 57 Ala. 609.

District of Columbia.—*The Richmond v. Cake*, 1 App. Cas. (D. C.) 447; *Joyce v. Wilkenning*, 1 MacArthur (D. C.) 567.

Florida.—*Haynes v. McGeehee*, 17 Fla. 159.

Iowa.—*Rotzler v. Rotzler*, 46 Iowa 189.

When Bill in Equity Lies.—A court of equity has no jurisdiction of a suit by a lessor of premises the object of which is simply to obtain a decree against a legal assignee for the rent due from him, for the reason that there is a complete remedy at law. But when it is sought to enforce payment of rent of premises as against the assignee of the unexpired term by the sale of specific property, upon the ground that a lien for that purpose is reserved upon the property—in other words, to enforce that lien, whether it is a legal or equitable one—a court of equity will have jurisdiction. *Webster v. Nichols*, 104 Ill. 160.

Story, in his work on Equity Jurisprudence, vol. 1, § 506, says: "Liens also give rise to matters of account; and although this is not the sole, or, indeed, the necessary, ground of interference of courts of equity, yet, directly or incidentally, it becomes a most important ingredient in the remedial justice administered by them in cases of this sort." After specifying instances

been held that a bill in equity by an assignee will lie, as an attachment will not lie in such a case.¹ And for the same reason it has been held that when the death of a tenant renders it impossible to pursue the statutory remedy by attachment, a court of equity will enforce the lien of the landlord.²

In Tennessee it has been held that a court of equity has jurisdiction of an attachment to enforce a landlord's lien for rent.³

in which liens attach, the author proceeds: "Now, it is obvious that most of these cases must give rise to matters of account, and as no suit is maintainable at law for the property, by the owner, until the lien is discharged, and as the nature and amount of the lien often are involved in great uncertainty, a resort to a court of equity, to ascertain and adjust the account, seems in many cases absolutely indispensable for the purposes of justice." Quoted with approval in *Webster v. Nichols*, 104 Ill. 160.

The right of the landlord is strictly a legal or statutory one, enforceable in a summary way. It can therefore find no support or favor in equity. *Petry v. Randolph*, 85 Ky. 351; *Stone v. Bohm*, 79 Ky. 141.

1. *Bill by Assignee*. — "We hold that the landlord's lien for rent passed to the appellants in this cause by the elder Foster's indorsement of the rent note to them. There was, however, when this suit was commenced, no statute which authorized the transferee of a contract for rent to sue by attachment. *Foster v. Westmoreland*, 52 Ala. 223. But, there being a lien on the property which had passed by the transfer to Westmoreland and Trousdale, the case falls directly within the original jurisdiction of the Chancery Court. See *Price v. Pickett*, 21 Ala. 741; 2 Story's Eq. Jur., §§ 1231, 1227. And this jurisdiction is not taken away, although the common-law court may now administer coextensive relief." *Westmoreland v. Foster*, 60 Ala. 448, citing *Waldron v. Simmons*, 28 Ala. 629.

2. *Bill Lies After Death of Tenant*. — "The lien of a landlord on crops grown on the rented premises, for the payment of rent, is an incident to the tenancy. The lien is neither a *jus in re* nor a *jus ad rem* — it is not property in the crops, but a right to charge them with the payment of the rent. *Hugsey v. Peebles*, 53 Ala. 432. The statute provides a remedy by attachment

for the enforcement of the lien in particular instances. There are many cases in which judicial interference for the enforcement of the lien is necessary, or it will be unavailing — not provided for by the statute. In these cases, and in cases in which the statutory remedy is inadequate, a court of equity, in the exercise of its general jurisdiction to enforce liens, or charges, or trusts, for the payment of debts, may grant appropriate relief, and may, as it would pursue any property subject to a lien, charge, or trust, follow the crops into the hands of all others than a *bona fide* purchaser without notice. The death of the tenant rendered it impossible for the landlord to pursue the statutory remedy by attachment, and the court of equity has jurisdiction to intervene and enforce the lien." *Abraham v. Hall*, 59 Ala. 386, citing *Foster v. Westmoreland*, 52 Ala. 223.

Necessary Parties. — The personal representative of a deceased tenant is a necessary party to a bill to enforce a landlord's lien for rent against crops which are in the hands of a third person. *Abraham v. Hall*, 59 Ala. 386.

3. *Sharp v. Fields*, 1 Heisk. (Tenn.) 572, wherein the court said: "This attachment may be issued at law; and we see no reason why it may not likewise issue from a court of chancery, especially when it is alleged in the bill that the defendants are intending fraudulently to dispose of the crop, to defeat complainant's right to his rent."

Allegations of Bill. — It is not necessary to allege that any specific sum is due, but it is sufficient to show that the defendants, as tenants, owe rents, which they are endeavoring fraudulently to place beyond the reach of the landlord, for the purpose of defeating his claims. *Sharp v. Fields*, 1 Heisk. (Tenn.) 573.

A bill charging that the title of A, a former owner of land in fee simple, has "been vested in complainant by operation of law" sufficiently alleges

7. Enforcement in Collateral Proceedings. — It has been many times held that a landlord's statutory lien exists independently of the statutory remedy.¹ Accordingly, where the property is brought into the custody of the court for distribution, upon application of some one other than the landlord, it comes burdened with the landlord's lien, and in the distribution thereof the court must have regard to the priority of such lien, and the landlord need not resort to his statutory remedy.²

Execution Against Property. — Thus, where property of the tenant or its proceeds are in the hands of an officer of the court by virtue of an execution in favor of a third person, the landlord may enforce his lien by a rule on the officer to determine the priority of his and the execution creditor's claims;³ and under some statutes it is made the sheriff's duty to pay the landlord his rent out of the proceeds of a levy upon the tenant's property at the instance of a third person.⁴

that he has title. *Sharp v. Fields*, 1 Heisk. (Tenn.) 571.

A charge in the bill that the defendants were occupying lands at the death of the tenant for life, and that the complainant permitted them to remain after the death, and is entitled as owner to one-third of the crops as rent, is a sufficient charge of indebtedness to support an attachment in equity for rent. *Sharp v. Fields*, 1 Heisk. (Tenn.) 571.

1. *Alabama*. — *Westmoreland v. Foster*, 60 Ala. 448; *Ellis v. Martin*, 60 Ala. 394; *Agee v. Mayer*, 71 Ala. 88; *Carmen v. State Nat. Bank*, 101 Ala. 189.

District of Columbia. — *Bryan v. Sanderson*, 3 MacArthur (D. C.) 431.

Illinois. — *Thompson v. Mead*, 67 Ill. 395; *Prettyman v. Unland*, 77 Ill. 206; *Mead v. Thompson*, 78 Ill. 62; *Hunter v. Whitfield*, 89 Ill. 229; *Wetzel v. Mayers*, 91 Ill. 497; *Frink v. Pratt*, 130 Ill. 327; *Finney v. Harding*, 136 Ill. 573; *Kern v. Noble*, 37 Ill. App. 27.

Iowa. — *Grant v. Whitwell*, 9 Iowa 152; *Garner v. Cutting*, 32 Iowa 547.

Kansas. — *Neifert v. Ames*, 26 Kan. 515.

Kentucky. — *Williams v. Wood*, 2 Metc. (Ky.) 41.

Mississippi. — *Newman v. Greenville Bank*, 66 Miss. 323.

Missouri. — *Knox v. Hunt*, 18 Mo. 243; *Sanders v. Ohlhausen*, 51 Mo. 163.

Virginia. — *In re Wynne*, Chase's Dec. (U. S.) 228.

Texas. — *Rosenberg v. Shaper*, 51 Tex. 134; *Bourcier v. Edmondson*, 58

Tex. 678; *Templeman v. Gresham*, 61 Tex. 50.

2. *Bryan v. Sanderson*, 3 MacArthur (D. C.) 431; *Doane v. Garretson*, 24 Iowa 351; *Loth v. Carty*, 85 Ky. 591; *Bourcier v. Edmondson*, 58 Tex. 679.

3. *Scott v. Pound*, 61 Ga. 579; *Colclough v. Mathis*, 79 Ga. 394.

4. *Alabama*. — *Smith v. Huddleston*, 103 Ala. 223.

District of Columbia. — *Harris v. Dammann*, 3 Mackey (D. C.) 90; *Gibson v. Gautier*, 1 Mackey (D. C.) 35.

Kentucky. — *Williams v. Wood*, 2 Metc. (Ky.) 41; *Burket v. Boude*, 3 Dana (Ky.) 209.

Mississippi. — *Stamps v. Gilman*, 43 Miss. 456.

Missouri. — *Knox v. Hunt*, 18 Mo. 243; *Sanders v. Ohlhausen*, 51 Mo. 163.

New Jersey. — *Central Bank v. Peterson*, 24 N. J. L. 668; *Fischel v. Keer*, 45 N. J. L. 507.

It Is Proper Practice for a landlord, who is entitled to have his arrears of rent paid before the removal or sale of goods levied on, to apply to the court for a rule that the proceeds of the sale under execution be applied to the payment of his rent. *Fischel v. Keer*, 45 N. J. L. 507.

To compel the marshal to pay over one year's rent, the landlord may move the court out of which the execution issues for an order to pay the amount due him from the sale, and this motion may be made at any time before the money is paid over, the marshal being bound on the receipt of a landlord's notice to retain the money. *Gibson v. Gautier*, 1 Mackey (D. C.) 35.

Where Goods are Attached by a third person, the landlord of the debtor can present his lien by petition or by intervention, and need not resort to a statutory remedy.¹

Receiver. — Where the proceeds of the crop are in the hands of a receiver, the landlord may enforce his lien thereon by an interpleader.²

Where the Tenant Makes an Assignment for the benefit of creditors, the assignee also represents the landlord, and must discharge his lien out of the assigned property, and may be compelled to do so by application in the assignment proceedings.³

Where an officer levies on and removes the tenant's chattels without paying the rent due (for not exceeding one year), the landlord has choice of two remedies: first, by motion for an order of court requiring the proceeds to be paid to him, by which he waives the tort and affirms the sale; or second, by an action for the tort, in which the measure of damages is the amount of rent due if the goods were worth it; if not, their actual value, without regard to what they brought at the sheriff's sale. *Burket v. Boude*, 3 Dana (Ky.) 209.

1. *Kentucky*. — *Slack v. Koon*, (Ky. 1897) 39 S. W. Rep. 26.

Missouri. — *Sanders v. Ohlhausen*, 51 Mo. 163.

Texas. — *Needham Piano, etc., Co. v. Hollingsworth*, (Tex. Civ. App. 1897) 40 S. W. Rep. 751.

Priority of Landlord's Lien. — A claim for rent due by the insolvent firm operates as a lien superior to the attachment liens, and is entitled to be first satisfied out of the moneys arising from a sale of the attached property. *Sullivan v. Cleveland*, 62 Tex. 678.

2. *Lemay v. Johnson*, 35 Ark. 225, holding that where the proceeds of a tenant's crop are in the hands of a receiver appointed by the court, in a suit by a mortgagee to foreclose his mortgage upon it the landlord of the tenant

may interplead and enforce his lien for rent upon the proceeds, whether the rent was paid in money or in a portion of the crop or in other property or services.

3. *Loth v. Carty*, 85 Ky. 591; *Rosenberg v. Shaper*, 51 Tex. 134; *In re Wynne*, Chase's Dec. (U. S.) 228.

Where the Tenant Has Assigned his property for the payment of his creditors, and the trustee has brought a suit to settle the estate, the landlord need not sue out a distress warrant or attachment for his rent in order to enforce his lien; and where the trustee brings his suit within three months after the landlord's claim for rent becomes due, it is immaterial whether or not the landlord asserts his lien within the three months, the property being in the custody of the court. *Loth v. Carty*, 85 Ky. 591.

The landlord's lien exists against an assignee of the goods, etc., on the leased premises for the benefit of creditors, independently of a levy of distress warrant prior to the assignment. *Rosenberg v. Shaper*, 51 Tex. 134.

Bankruptcy. — The remedies by distress warrant or attachment were, in case of bankruptcy, superseded by the effect and operation of the Bankrupt Act. *In re Wynne*, Chase's Dec. (U. S.) 228.

LAND PATENTS.

By S. B. FISHER.

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I. COLLATERAL ATTACK — 1. Patents Merely Voidable. — A patent for land which is merely voidable cannot be collaterally attacked.¹

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| 1. <i>Alabama</i> . — <i>Masters v. Eastis</i> , 3 Port. (Ala.) 368. | <i>Minnesota</i> . — <i>Lamprey v. Mead</i> , 54 Minn. 290. |
| <i>Arkansas</i> . — <i>State v. Morgan</i> , 52 Ark. 150. | <i>Mississippi</i> . — <i>Gastrell v. Phillips</i> , 64 Miss. 473; <i>Dixon v. Doe</i> , 23 Miss. 84. |
| <i>California</i> . — <i>Moore v. Wilkinson</i> , 13 Cal. 478; <i>People v. Stratton</i> , 25 Cal. 242; <i>Terry v. Megerle</i> , 24 Cal. 609; <i>Doll v. Meador</i> , 16 Cal. 324; <i>Rondell v. Fay</i> , 32 Cal. 354; <i>Hagar v. Lucas</i> , 29 Cal. 309; <i>Bonds v. Hickman</i> , 29 Cal. 460; <i>Yount v. Howell</i> , 14 Cal. 465. | <i>New Mexico</i> . — <i>Chavez v. Chavez de Sanchez</i> , 7 N. Mex. 58. |
| <i>Colorado</i> . — <i>Aspen v. Aspen Town, etc., Co.</i> , 10 Colo. 191; <i>Wells v. Francis</i> , 7 Colo. 396. | <i>Tennessee</i> . — <i>Overton v. Campbell</i> , 5 Hayw. (Tenn.) 165. |
| <i>Georgia</i> . — <i>Winter v. Jones</i> , 10 Ga. 190. | <i>Virginia</i> . — <i>Blankenpickler v. Anderson</i> , 16 Gratt. (Va.) 62. |
| <i>Illinois</i> . — <i>Reichart v. Felps</i> , 33 Ill. 439. | <i>United States</i> . — <i>New Dunderberg Min. Co. v. Old</i> , 79 Fed. Rep. 598; <i>Sherman v. Buick</i> , 93 U. S. 209; <i>Stoddard v. Chambers</i> , 2 How. (U. S.) 377; <i>Easton v. Salisbury</i> , 21 How. (U. S.) 426; <i>Simmons v. Wagner</i> , 101 U. S. 260. |
| <i>Kentucky</i> . — <i>Hartley v. Hartley</i> , 3 Metc. (Ky.) 58; <i>Taylor v. Fletcher</i> , 7 B. Mon. (Ky.) 83; <i>Cain v. Flynn</i> , 4 Dana (Ky.) 501; <i>Kirksey v. Turner</i> , 95 Ky. 226. | In <i>Cain v. Flynn</i> , 4 Dana (Ky.) 499, it is held that a patent has the dignity of record evidence of title, and its contents cannot be questioned collaterally by anything <i>dehors</i> the patent, in the absence of any statutory provision authorizing it. See also, to the same effect, <i>Hartley v. Hartley</i> , 3 Metc. (Ky.) 58. |
| <i>Michigan</i> . — <i>Webber v. Pere Marquette Boom Co.</i> , 62 Mich. 626. | |

A patent not void on its face for fraud or irregularity in procuring the same can be impeached only in a direct equitable proceeding for that purpose.¹ This rule applies even in the case of conflicting patents.²

2. Void Patents.—If, however, a patent shows upon its face that it is void, it may be assailed and vacated at law in any controversy in which it is involved.³

1. *Wells v. Francis*, 7 Colo. 396; *Yount v. Howell*, 14 Cal. 465; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23; *Saunders v. New York Cent., etc., R. Co.*, 144 N. Y. 75; *Jackson v. Hart*, 12 Johns. (N. Y.) 77; *Norvell v. Camm*, 6 Munf. (Va.) 233; *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 447; *Moore v. Robbins*, 96 U. S. 530; *Carter v. Thompson*, 65 Fed. Rep. 329.

"In the case of an actual and perfect patent, there is no remedy but to set it aside in a court of equity, or in some other proceeding having that for its direct end and object. It cannot be done in the ordinary progress of a trial at law, on evidence which the party had no means to know would be relied on, and therefore could not be prepared to meet. In other words, you cannot go behind a patent in a trial at law; the patent alone must prevail." *Roane, J.*, in *Norvell v. Camm*, 6 Munf. (Va.) 233.

In *Patterson v. Winn*, 11 Wheat. (U. S.) 380, the court said: "We may * * * assume as the settled doctrine of this court that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment. But in general, other objections and defects complained of must be put in issue, in a regular course of pleadings, on a direct proceeding to avoid the patent."

In *People v. Stratton*, 25 Cal. 242, the court, in referring to the rule laid down in *Patterson v. Winn*, 11 Wheat. (U. S.) 380, said: "But notwithstanding the patent may have been issued without authority, or the state may have had no title to grant, the patent would, in the first instance, be presumed, in an action of ejectment, to be valid, and to pass to the patentee a title to the lands described, and the burden of proof would be upon the party who might undertake its impeachment to establish the facts necessary for its overthrow; because it is not to be pre-

sumed *in limine* that the state has granted by patent lands which it did not own or have the right to grant. The party who may be permitted thus to impeach a patent issued by the state must himself possess a status authorizing him to do so. He must show that he has title to the premises, or such an interest therein in subordination to the title, wherever it may reside, as will authorize him to call the true title to his aid." See also *Terry v. Megerle*, 24 Cal. 609.

Presumption as to Patent.—A patent is the highest evidence of title, and furnishes the presumption that all the prerequisites required by law have been complied with previous to its emanation. The validity of a patent cannot be questioned in either a court of law or of equity, except on the ground of fraud or mistake. *Carter v. Spencer*, 4 How. (Miss.) 42. See also *Parkison v. Bracken*, 1 Pin. (Wis.) 174; *Overton v. Campbell*, 5 Hayw. (Tenn.) 165; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23; *Jackson v. Hart*, 12 Johns. (N. Y.) 77.

2. In a court of law the patent is conclusive. Even in the case of conflicting patents, the first patent is conclusive, and relief can be had only in a court of chancery. *Parkison v. Bracken*, 1 Pin. (Wis.) 174; *Jackson v. Lawton*, 10 Johns. (N. Y.) 23; *Jackson v. Hart*, 12 Johns. (N. Y.) 77; *Polk v. Wendal*, 9 Cranch (U. S.) 98; *Brush v. Ware*, 15 Pet. (U. S.) 105; *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *Groves v. Slaughter*, 15 Pet. (U. S.) 490.

3. *Rondell v. Fay*, 32 Cal. 354; *Doll v. Meador*, 16 Cal. 324; *Winter v. Jones*, 10 Ga. 190; *Dixon v. Doe*, 23 Miss. 84; *Gastrell v. Phillips*, 64 Miss. 473; *Rose v. Richmond Min. Co.*, 17 Nev. 25; *New York Cent., etc., R. Co. v. Aldridge*, 135 N. Y. 83; *Overton v. Campbell*, 5 Hayw. (Tenn.) 165; *Alexander v. Greenup*, 1 Munf. (Va.) 134.

In 2 *Minor's Institutes*, p. 897, the doctrine is thus stated: "When the false suggestion, mistake, or illegality

II. ACTION TO CANCEL—1. In General.—Where fraud in the obtaining of a land patent is charged, courts of equity have authority to examine into its validity, and if it appears that there was fraud or mistake in the issuance thereof, to make a decree setting aside such patent.¹ In the exercise of this power every

appears on the face of the grant, it is absolutely void, and may be declared so to be in whatever court it is adduced as an evidence of title. So it seems that it may be impeached in a court of law for any matter which makes it absolutely void; as where the state has no title to the thing granted, where the officer had no authority to issue the grant, or where the grantee was dead at the time of issuing it. But for causes anterior to its being issued, which render it voidable merely and which are not apparent on its face, it appears to be impeachable only by scire facias or bill in equity." *Hambleton v. Wells*, 4 Call (Va.) 213; *White v. Jones*, 4 Call (Va.) 253; *Alexander v. Greenup*, 1 Munf. (Va.) 134; *Wetherinton v. McDonald*, 1 Hen. & M. (Va.) 306; *Stringer v. Young*, 3 Pet. (U. S.) 341; *Patterson v. Winn*, 11 Wheat. (U. S.) 380.

Patent Void for Want of Authority.—If a patent shows that it was issued in the absence of legislation directing a sale of the property described, it is void upon its face. *Rondell v. Fay*, 32 Cal. 354. See also *Winter v. Jones*, 10 Ga. 190; *Rose v. Richmond Min. Co.*, 17 Nev. 25; *Garner v. Willett*, 18 Ill. 456.

Pre-emptioner May Attack.—If the state selects as a part of a grant land in the possession of a *bona fide* pre-emptioner at the time of the selection, the pre-emptioner is in such privity with the common source of title that he can attack a patent granted by the state for the land in an action of ejectment brought by the patentee or his assignee. *Terry v. Megerle*, 24 Cal. 610.

In *Edwards v. Rolley*, 96 Cal. 408, it is held that a patent for land the sale of which is unauthorized may always be shown invalid by one holding adversely, although the title be merely that of naked possession.

Patent Issued in Violation of Law.—A patent issued in violation of law is void, and may be shown to be so in a court of law. *Hit-tuk-ho-mi v. Watts*, 7 Smed. & M. (Miss.) 363.

1. *U. S. v. Beebe*, 127 U. S. 338; *Moore v. Robbins*, 96 U. S. 530; *Hoofnagle v. Anderson*, 7 Wheat. (U. S.) 212; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *Brush v. Ware*, 15 Pet. (U. S.) 93; *Miller v. Kerr*, 7 Wheat. (U. S.) 1; *Bodley v. Taylor*, 5 Cranch (U. S.) 196; *U. S. v. Williams*, 30 Fed. Rep. 309; *U. S. v. Pratt Coal, etc., Co.*, 18 Fed. Rep. 708; *U. S. v. White*, 17 Fed. Rep. 561; *U. S. v. Throckmorton*, 98 U. S. 68; *Shepley v. Cowan*, 91 U. S. 330; *U. S. v. Wenz*, 34 Fed. Rep. 154; *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307; *Vance v. Burbank*, 101 U. S. 514; *Smith v. Ewing*, 23 Fed. Rep. 741; *Garland v. Wynn*, 20 How. (U. S.) 6; *Johnson v. Towsley*, 13 Wall. (U. S.) 72; *Warren v. Van Brunt*, 19 Wall. (U. S.) 648; *Lee v. Johnson*, 116 U. S. 48; *U. S. v. Minor*, 114 U. S. 233; *U. S. v. Maxwell Land-grant Case*, 121 U. S. 325; *Meador v. Norton*, 11 Wall. (U. S.) 442; *Atty.-Gen. v. Vernon*, 1 Vern. 277. In England the proceeding was originally by scire facias, but a bill in chancery is found to be a more convenient remedy. *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Atty.-Gen. v. Vernon*, 1 Vern. 277.

Land Department Officers May Not Cancel.—In no case have the officers of the land department any power to cancel or set aside a patent after it has once issued. Upon its issuance a patent passes completely beyond the scope of their jurisdiction. *Moore v. Robbins*, 96 U. S. 530; *Shepley v. Cowan*, 91 U. S. 340; *Field v. Seabury*, 19 How. (U. S.) 323.

When U. S. Circuit Court Is Without Jurisdiction.—In *Craig v. Leitensdorfer*, 123 U. S. 189, it was held that the United States Circuit Court is without jurisdiction of a suit attacking for fraud the action of a patentee of public land and the officers of the land department, where the plaintiff does not claim an equitable interest in the land, but merely avers that such action has deprived him of an appeal from a decision of the land department touching his own claims. See also *Garland v. Wynn*, 20 How. (U. S.) 6.

intendment will be made in favor of the patent, and fraud will not be presumed.¹

2. Who May Bring Suit — a. THE GOVERNMENT. — The government has the same right to demand a cancellation of its conveyances obtained by fraud as exists in the case of an individual.² The government must, however, as in the case of a private citizen, show that it has such an interest in the relief sought as entitles it to move.³ There must appear to be some obligation on the part of the United States to the public, or to some individual, or some interest of its own.⁴

1. See, however, the case of *Moffat v. U. S.*, 112 U. S. 24, in which the court said: "It may be admitted, as stated by counsel, that if upon any state of facts the patent might have been lawfully issued, the court will presume, as against such collateral attacks, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud." See also *U. S. v. Minor*, 114 U. S. 241; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307; *Winter v. Crommelin*, 18 How. (U. S.) 87; *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579.

State Patents. — This rule applies as well in case of patents issued by a state as when issued by the United States. *Hebborn v. Graves*, 78 Cal. 380; *Fuller v. Coddington*, 74 Tex. 334.

2. *U. S. v. Iron Silver Min. Co.*, 128 U. S. 673; *U. S. v. Rose*, 24 Fed. Rep. 196; *U. S. v. Minor*, 114 U. S. 233; *U. S. v. Beebee*, 17 Fed. Rep. 36; *Moore v. Robbins*, 96 U. S. 535; *U. S. v. Pratt Coal, etc., Co.*, 18 Fed. Rep. 708; *U. S. v. Williams*, 30 Fed. Rep. 309; *U. S. v. Throckmorton*, 98 U. S. 68; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *U. S. v. Leavenorth, etc., R. Co.*, 1 McCrary (U. S.) 610.

3. *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273.

4. "If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who

will be benefited to sustain an action for his use, * * * it can no more sustain such an action than any private person could under similar circumstances." *Miller, J.*, in *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273. See also *U. S. v. Beebee*, 17 Fed. Rep. 36.

"If it should come to the knowledge of the government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent." *Harlan, J.*, in *U. S. v. Missouri, etc., R. Co.*, 141 U. S. 381.

In *U. S. v. San Jacinto Tin Co.*, 125 U. S. 305, *Field, J.*, in his concurring opinion, said: "I cannot admit that the attorney-general can, at the request of private parties, rightfully allow the use of the name and power of the United States in proceedings for the annulment of patents, upon such parties executing a bond as security for costs, or upon any other stipulation of indemnity to them. If the United States have not sufficient interest in property to justify the expenses of proper litigation for its maintenance, they had much better let it go."

Prosecution by Parties in Interest in Name of U. S. — In *U. S. v. Rose*, 24 Fed. Rep. 196, upon an indemnity against costs being given to the government by parties in interest, the indemnifying parties were permitted to prosecute a suit in the name of the United States against the defendant, to set aside a United States patent.

b. THE STATE.—In the case of state patents the state may properly bring suit to annul a patent in a case where the matter involved in the suit immediately concerns the rights and interests of the state.¹

c. INDIVIDUALS.—When a patent has been wrongfully issued to one who is not entitled to it, any one claiming adversely as a purchaser or as a donee of the United States may maintain a suit to have the patent canceled.² Such a proceeding by an individual has been held to be in the nature of a bill to quiet title, or to enforce a transfer of the patentee's interest on the ground of mistake or fraud,³ rather than

1. *People v. Stratton*, 25 Cal. 244; *People v. Center*, 66 Cal. 551; *People v. Jacob*, (Cal. 1886) 12 Pac. Rep. 222; *Day Land, etc., Co. v. State*, 68 Tex. 526. See also *State v. Morgan*, 52 Ark. 150.

2. *Lee v. Summers*, 2 Oregon 268; *People v. Stratton*, 25 Cal. 242; *McGhee v. Wright*, 16 Ill. 555; *Garner v. Willett*, 18 Ill. 456; *Burrows v. Rutledge*, 76 Wis. 22; *Moore v. Robbins*, 96 U. S. 530; *Patterson v. Winn*, 11 Wheat. (U. S.) 380; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436; *U. S. v. Missouri, etc., R. Co.*, 141 U. S. 358.

In *Shepley v. Cowan*, 91 U. S. 340, the court said: "If they [the land officers] err in the construction of the law applicable to any case, or if fraud is practiced upon them, * * * their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions."

Action by Subsequent Patentee.—"The question whether a patent was procured from the commissioners through fraud is not exclusively one between the state and its patentee, but it may be raised by a subsequent patentee, who is clothed, under the law, with the right of the state to inquire into the matter. The state clothes him with full power to attack and avoid a prior patent, on the ground of fraud in procuring it, as fully as itself might do in an action brought for the purpose." *Cole, C. J.*, in *Burrows v. Rutledge*, 76 Wis. 22.

Requisites to Maintain Action.—In order to maintain an action to annul a patent issued by the land department of a state, the plaintiff must connect himself with the source of title, and must show that his rights are injuriously affected by the patent. *Davidson v. Cucamonga Fruit, etc., Co.*, 78

Cal. 4. See also *Zumwalt v. Dickey*, 92 Cal. 156; *Doll v. Meador*, 16 Cal. 295; *Johnson v. Drew*, 34 Fla. 130.

In Whose Favor a Patent May be Set Aside.—A patent can only be set aside in favor of those whose title was at the time such as to enable them to resist successfully any action of the government respecting it. *Moore v. Wilkinson*, 13 Cal. 488; *Waterman v. Smith*, 13 Cal. 373; *Lee v. Summers*, 2 Oregon 260.

Joinder of Parties.—Parties who have a common interest in annulling a patent, although they have no joint interest in the land adverse to the patentee, may be joined as plaintiffs in an action to procure its cancellation. *People v. Morrill*, 26 Cal. 336.

Patent Issued for Land Held by Another.—In *Illinois* it is held that where a patent is issued for land which is held by another patentee, under a paramount title, it is void, and may be set aside in a court of equity at the suit of the person having the paramount right. *Danforth v. Morrical*, 84 Ill. 456 [*citing* *Cunningham v. Ashley*, 14 How. (U. S.) 377; *Stoddard v. Chambers*, 2 How. (U. S.) 284].

3. "The proceeding by bill in equity which an individual is allowed to take to set aside a patent, or control its operation, is in the nature of a bill to quiet title—to determine an estate held adversely to him—to remove what would otherwise be a cloud upon his own title; or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud, acquired a title in his own name which he should in equity hold for the benefit of the complainant. The individual complainant must, therefore, possess a title superior to that of his adversary, and, of course, to that of the govern-

absolutely to annul it.¹

3. Manner of Instituting Proceedings. — Proceedings by the government to annul a patent are by a bill in equity filed by the attorney-general or by his order in the name of the United States.² It is essential to such a suit that without special regard to form, but in some way which the court can recognize, it should appear that the attorney-general has brought it himself, or has given such order for its institution as will make him officially responsible for it and will show his control of the cause.³ An action by a state to cancel a land patent is instituted by the attorney-general of the state in the name of such state.⁴ In *California* the proceeding is by an information in the nature of a bill in equity in the name of the state,⁵ or, upon the authoriza-

ment through whom his adversary claims, or he must possess equities which will control the title in his adversary's name." Field, C. J., in *Boggs v. Merced Min. Co.*, 14 Cal. 363. See also *McGhee v. Wright*, 16 Ill. 555; *Danforth v. Morrical*, 84 Ill. 456.

1. "To annul a patent absolutely, proceedings can only be taken by the government, or some individual in its name, and that by scire facias, or by bill, or information. Individuals can maintain no proceedings to that effect, the question being one exclusively between the sovereignty issuing the patent and the patentee." Field, C. J., in *Boggs v. Merced Min. Co.*, 14 Cal. 365. To the same effect see *Jackson v. Lawton*, 10 Johns. (N. Y.) 24.

2. *U. S. v. Beebe*, 127 U. S. 338; *U. S. v. Tichenor*, 12 Fed. Rep. 416; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *U. S. v. Hughes*, 11 How. (U. S.) 552; *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579; *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307.

Nature of Bill. — "A bill in chancery, brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for a rehearing in chancery, or as if it were a mere retrial of the case as it was before the land office, with such additional proof as the parties may be able to produce." Miller, J., in *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579.

Information in Nature of a Bill. — In *U. S. v. Hughes*, 11 How. (U. S.) 552, it was held that a land patent fraudulently obtained from the government by one knowing that another person has a prior right to the land may be set aside by an information in the nature of a bill in equity, filed by the attorney

of the United States for the district in which the land lies, although a simple bill in equity by the United States would be a more proper remedy.

3. "The practice of the English courts and of the American courts also has been to require the name of the attorney-general, as indorsing the suit, before it will be entertained. The reason of this is obvious, namely, that in so important a matter as impeaching the grants of the government under its seal, its highest law officer should be consulted and should give the support of his name and authority to the suit. He should also have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill." Miller, J., in *U. S. v. Throckmorton*, 98 U. S. 61.

Objection Must be Taken Below. — In *Western Pac. R. Co. v. U. S.*, 108 U. S. 510, it was objected for the first time on appeal that it did not appear that a suit brought by a United States district attorney to set aside a land patent was brought under authority from the attorney-general. It was held that the objection, not having been taken below, could not be raised on appeal.

4. *Day Land, etc., Co. v. State*, 68 Tex. 526.

5. *People v. Stratton*, 25 Cal. 242; *People v. Center*, 66 Cal. 551; *People v. Jacob*, (Cal. 1886) 12 Pac. Rep. 222.

An information is, in its substantive characteristics, a bill in equity, and when it concerns only the rights of a government, or those whose rights are under the particular protection of the government, is exhibited in the name of the attorney-general as the informant; and in the former case a relator is

tion of the attorney-general, the action may be brought in the name of the people upon the relation of the real party in interest.¹

An Action by a Private Individual to set aside a patent is by a bill in equity or complaint.²

4. **Averments of Bill or Complaint.** — In an action to annul a patent the mistake or fraud for which the patent is attacked should be specifically averred.³ A complaint in an action in the name of the people, on the relation of a private individual, must state the facts upon which such individual bases his right to attack the patent.⁴

5. **Return of Purchase Money.** — In accordance with the rule that when the government of the United States seeks relief from a court of equity, it is as much bound as an individual by the rules of equity,⁵ where it seeks to cancel a patent on the ground of a mere error in the issuance thereof, the patentee being guiltless of fraud, the government must offer to return the purchase money.⁶

In Case of Fraud. — It has been held in at least one case that this

sometimes, and in the latter case always, named, who in reality sustains and directs the suit. *People v. Stratton*, 25 Cal. 244.

1. *People v. Clark*, 72 Cal. 289; *People v. North San Francisco Homestead, etc., Assoc.*, 38 Cal. 564.

Authorization Cannot be Revoked. — When a suit has been instituted in the name of the state, by the permission of the attorney-general, upon the relation of the real party in interest seeking relief, and the state has no direct interest in the event of the suit, the attorney-general *as such* has no power to control the conduct of the suit or to withdraw his consent to the use of the name of the people, to the prejudice of the relator. *People v. North San Francisco Homestead, etc., Assoc.*, 38 Cal. 564. See also *People v. Jacobs*, (Cal. 1886) 12 Pac. Rep. 222; *People v. Clark*, 72 Cal. 289.

2. *Lee v. Summers*, 2 Oregon 260; *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Burrows v. Rutledge*, 76 Wis. 22.

3. *Maxwell Land-Grant Case*, 121 U. S. 325; *U. S. v. Tichenor*, 12 Fed. Rep. 415; *U. S. v. McGraw*, 12 Fed. Rep. 449.

In *U. S. v. Tichenor*, 12 Fed. Rep. 415, which was a proceeding to set aside a patent to a "settler," the bill alleged that the patent was "fraudulently" obtained by means of "false proof," but in what the fraud consisted, or wherein the proof was false, was not stated. The allegation was held insufficient on demurrer. The

bill should have gone further, and set forth the substance, at least, of the acts constituting the fraud, or stated wherein the proof was false. See also *Oakland v. Carpentier*, 21 Cal. 663; *Semple v. Hagar*, 27 Cal. 166; *Kelley v. Wallace*, 14 Minn. 236.

4. *People v. Jackson*, 24 Cal. 630.

General Averment Insufficient. — A general averment that the relator has such status is insufficient. Whether he has or has not a sufficient status to attack the patent is a conclusion of law, to be drawn from the facts, and is a question for the court and not for the pleader. *People v. Jackson*, 24 Cal. 630.

5. *U. S. v. Budd*, 43 Fed. Rep. 630; *U. S. v. White*, 17 Fed. Rep. 561; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273.

6. *U. S. v. Budd*, 43 Fed. Rep. 630.

In *People v. Bryan*, 73 Cal. 376, it was held that the state cannot maintain an action for the cancellation of a patent to swamp land for an innocent mistake in the procedure, without first offering to return the purchase money. See also *State v. Morgan*, 52 Ark. 150, in which it was held that a complaint in equity by which the state seeks to cancel its patent and recover the possession of lands held thereunder is insufficient, unless it offers to restore to the defendant the purchase money and taxes received from him, and to pay the value of his improvements, less the rents and profits with which he ought to be charged.

is necessary also where it is sought to cancel the patent on the ground of fraud in its procurement.¹ Other and more recent decisions, however, hold that such a case is not within the reason of the ordinary rule, and that the United States is not bound to offer in the bill to return the purchase money. The patentee loses not only the land but his money, as a penalty for the perjury.²

6. Defense of Innocent Purchaser. — Although a fraud on the part of the patentee in procuring the patent will justify the cancellation of the patent as against the patentee or those claiming under him with notice of the fraud, yet to a bill in equity to cancel upon these grounds alone, the defense of a *bona fide* purchaser for value without notice is good.³

III. CAVEATS — 1. In General. — A caveat to prevent the issuing of a land patent is in use in certain states.⁴ In its nature the caveat is a species of equitable process resembling an injunction, and is to be governed by equitable rules.⁵ It is simply a notice filed with the register of the land office, objecting to the issue of a certain grant, for reasons therein set out.⁶ The person entering

1. *U. S. v. White*, 17 Fed. Rep. 561. In this case it was held that if the United States desire to enforce the penalties under Rev. Stat. U. S., § 2262, which provides that "if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same," it must proceed in some appropriate mode at law, where the defendant may have a jury trial upon the question of false testimony.

2. *U. S. v. Minor*, 114 U. S. 233; *U. S. v. Trinidad Coal, etc., Co.*, 137 U. S. 160. In the latter case (p. 171) the court said: "The proposition that the defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain. Let the wrongdoer first restore what it confesses to have obtained from the government by means of a fraudulent scheme formed by its officers, stockholders, and employees, in violation of law."

3. *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307. See also *U. S. v. Minor*, 114 U. S. 243.

In *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307, the court said: "It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it or those claiming under them with notice of it to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value without notice is perfect."

4. See *Wilcox v. Calloway*, 1 Wash. (Va.) 38; *Currie v. Martin*, 3 Call (Va.) 28; *Harper v. Baugh*, 9 Gratt. (Va.) 508; *Caruthers v. Eldridge*, 12 Gratt. (Va.) 670; *Hamilton v. McNeil*, 13 Gratt. (Va.) 389; *Trotter v. Newton* 30 Gratt. (Va.) 582; *Cunningham v. Browning*, 1 Bland (Md.) 299.

To Set Aside Patent. — The object of a caveat is to prevent the issuance of a patent, not to set one aside. *Wilcox v. Calloway*, 1 Wash. (Va.) 38.

5. *Preston v. Harvey*, 3 Call (Va.) 501; *Harper v. Baugh*, 9 Gratt. (Va.) 510.

6. "The caveat is entered in the

the caveat then takes from the register a certified copy thereof, and from the register or surveyor a certified copy of the certificate and plat of survey, and, within the time prescribed by law, delivers such copies to the clerk of the Circuit Court of the county in which the land lies.¹

2. Procedure — Summons. — The clerk, having entered the copy of the caveat, issues a summons reciting the cause for which the caveat is entered and requiring the defendant to appear and defend his right.²

Trial. — On return of the process, the court determines the right of the case, in a summary manner.³ The trial may be before a jury, to determine any facts not agreed on,⁴ or the jury may be dispensed with.⁵

Grounds of Claim. — The caveat must state the grounds on which the caveator claims the better title, and he cannot, on the trial, abandon such grounds and prove a different right.⁶

Show Better Right. — The caveator must show a better right to the land in controversy to be in himself; he cannot recover upon the weakness of his adversary's title.⁷

Effect of Judgment. — Where the caveat is dismissed upon its merits, the caveatee, upon filing a copy of the judgment in the land office, may obtain a patent.⁸ If, however, the judgment be in favor of the caveator, he will, upon delivering a copy of the same to the land office, together with a plat and certificate of the survey, be entitled to a grant of the land.⁹

land office, being a caution against any grant being issued to the party, for reasons plainly and definitely set forth in the caveat itself. The caveat is by the register certified to the County or Circuit Court of the county in which the land lies," etc. 4 Minor's Inst., pt. i., p. 58.

1. Code Va., 1887, § 2328; 4 Minor's Inst., pt. i., p. 58.

In Maryland the proceeding is before the chancellor. *Cunningham v. Browning*, 1 Bland (Md.) 299.

2. Code Va., 1887, § 2329; *Cunningham v. Browning*, 1 Bland (Md.) 299.

3. Code Va., 1887, § 2330.

4. *Archer v. Saddler*, 2 Hen. & M. (Va.) 370; *Hamilton v. McNeil*, 13 Gratt. (Va.) 389.

5. *Hamilton v. McNeil*, 13 Gratt. (Va.) 389.

Where a jury is dispensed with and the whole case submitted to the court, it is not necessary for the losing party to file a bill of exceptions to the judgment of the court, or to move for a new trial and, upon refusal, to except to the opinion of the court; it is suffi-

cient that the court below shall make the facts agreed and ascertained, or the evidence, where the parol evidence is in no respect conflicting, a part of the record by its order. *Hamilton v. McNeil*, 13 Gratt. (Va.) 389.

6. *Harper v. Baugh*, 9 Gratt. (Va.) 508; *Trotter v. Newton*, 30 Gratt. (Va.) 582.

If the grounds on which the caveator claims the better title are not stated the caveatee may move the court either to dismiss the caveat or to require the caveator to file a specification of the alleged better right. It is too late, however, after the jury is sworn, to object to the form of the caveat. *Clements v. Kyles*, 13 Gratt. (Va.) 468.

7. *Harper v. Baugh*, 9 Gratt. (Va.) 508; *Trotter v. Newton*, 30 Gratt. (Va.) 582.

Unless he can show such better right the caveatee is entitled to the judgment. *Walton v. Hale*, 9 Gratt. (Va.) 194.

8. *Wilson v. Daggs*, 8 Leigh (Va.) 681.

9. Code Va., 1887, § 2332.

3. Equity Jurisdiction. — A court of equity may entertain jurisdiction even where the regular remedy is by caveat, under circumstances which render such interposition just and proper.¹

1. *Depew v. Howard*, 1 Munf. (Va.) 293; *Lyne v. Jackson*, 1 Rand. (Va.) 114. In the latter case it was held that where a party applies to a court of chancery to prevent the issuing of a patent or an assignment of a survey, and alleges a fraud committed by the defendant in forging an agreement between him and the complainant, the court of chancery has jurisdiction without the party's resorting to a caveat in the first instance. See also *Noland v. Cromwell*, 4 Munf. (Va.) 155.

12 Encyc. Pl. & Pr. — 60

Although one may be let into a court of equity on grounds which he could not have used on the trial of a caveat, and which, in fact, make another case, or upon a case suggesting and proving that he was prevented by accident or fraud from prosecuting his caveat, he will not be sustained in equity on such grounds as were or might have been brought forward on the trial of the caveat. *Noland v. Cromwell*, 4 Munf. (Va.) 155. See also *Gooseman v. Martin*, 4 Munf. (Va.) 533.

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CROSS-REFERENCES.

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I. DEFINITION. — Larceny is the fraudulent taking and carrying away of the personal property of another without claim or right, with the intention of converting it permanently to a use other than that of the owner, without his consent.¹

II. JURISDICTION — TERRITORIAL SOVEREIGNTY — 1. **In General.** — As a general rule, the courts of one state cannot take cognizance of a crime committed in another state. This general principle has been considered elsewhere,² but other questions of a like character have developed from this general principle which are in a sense peculiar to the offense under treatment.

2. **Property Stolen in One County and Conveyed into Another.** — If property is stolen in one county and carried into another, jurisdiction to try the offender is in either county.³ To this extent

1. Whart. Criminal Law (10th ed.), § 862.

For a full discussion of what constitutes larceny, see article *Larceny*, Am. and Eng. Encyc. of Law.

2. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

3. *Alabama.* — *Aaron v. State*, 39 Ala. 684; *Kidd v. State*, 83 Ala. 58.

California. — *People v. Garcia*, 25 Cal. 531; *People v. Robles*, 29 Cal. 421; *People v. Scott*, 74 Cal. 96.

Indiana. — *Jones v. State*, 53 Ind. 235.

Kansas. — *State v. Price*, 55 Kan. 606.

Louisiana. — *State v. McCoy*, 42 La. Ann. 228.

Massachusetts. — *Com. v. Rubin*, 165 Mass. 453; *Com. v. Rand*, 7 Met. (Mass.) 475.

Missouri. — *State v. Smith*, 66 Mo. 62; *State v. Ware*, 62 Mo. 597; *State v. Hatch*, 91 Mo. 568.

Nebraska. — *Hurlburt v. State*, (Neb. 1897) 72 N. W. Rep. 471.

Nevada. — *State v. Brown*, 8 Nev. 208.

New York. — *Haskins v. People*, 16 N. Y. 348; *People v. Gardner*, 2 Johns. (N. Y.) 477.

South Carolina. — *State v. Bryant*, 9 Rich. L. (S. Car.) 113.

the authorities are in harmony, following the common-law doctrine, it being considered that the laws of the same sovereignty have been violated, no matter in which of several counties the larceny may have been committed.¹

3. Property Stolen in Foreign Country or Sister State. — There is an irreconcilable conflict of authority upon the question as to whether, in the absence of statute, a person who steals property in one state or country and conveys it into another may be prosecuted in the state or country into which it is conveyed. In *England* the question was resolved in the negative, without, it seems, any dissent.² In several of the *United States* the English doc-

Texas. — *Connell v. State*, 2 Tex. App. 422; *Roth v. State*, 10 Tex. App. 27; *McElmurray v. State*, 21 Tex. App. 691; *Cox v. State*, 43 Tex. 101.

Virginia. — *Com. v. Cousins*, 2 Leigh (Va.) 708.

Property Taken into County by Accomplices. — Where stolen goods are brought into a county by accomplices of the thief, who afterwards joins them, he may be convicted in the latter county. *Com. v. Dewitt*, 10 Mass. 154.

Train Passing through Counties. — One who entered a railroad car in a county with intent to commit larceny therein, and with the same intent remained therein until the car passed into another county, and there committed the offense, may be tried for the offense in the latter county. *Powell v. State*, 52 Wis. 217.

From One District to Another of Same County. — The rule as to counties is applied to the bringing of stolen property from one district to another of the same county. *Henry v. State*, 7 Coldw. (Tenn.) 331.

Statutory Offense Falling within Rule. — In *State v. Kyle*, 14 Wash. 550, it was held that the offense of stealing neat cattle, under a statute providing for such offense, fell within the meaning of the statute which provided that a prosecution for larceny might be had either in the county where the property was first taken or in one into which it was brought by the thief after it had been taken in another county.

When Only Part of Property is Carried Out of County. — "If defendant stole twenty dollars in Guadalupe county, but the proof showed him in possession of only ten dollars in Comal, whilst he might be convicted of a felony in Guadalupe, if there tried, he could, under such proof, be only con-

victed of a misdemeanor in Comal, the amount found to have been in his possession in Comal being less than the sum (twenty dollars) necessary to constitute felony under the statute."

Roth v. State, 10 Tex. App. 29.

Compound Larceny. — Where the statute provides that the jurisdiction is in either county when property is stolen in one county and carried to another, it is but an affirmation of the common-law rule, and not an enlargement of it, and does not extend to compound larceny. If goods are stolen from a dwelling house in one county and carried into another, the only prosecution that can be instituted in the latter is for simple larceny. *Smith v. State*, 55 Ala. 59. See also *Gage v. State*, 22 Tex. App. 123.

1. *State v. Le Blanch*, 31 N. J. L. 82; *Simmons v. Com.*, 5 Binn. (Pa.) 617; *Henry v. State*, 7 Coldw. (Tenn.) 333. See also the cases in the next succeeding section, which, in the main, indicate the same rule where property is carried from one county to another, though a different question is adjudicated by them.

It Requires No Statute to authorize a prosecution in the county into which stolen goods are brought when the theft was committed in another county. *Hurlburt v. State*, (Neb. 1897) 72 N. W. Rep. 471.

2. *Reg. v. Madge*, 9 C. & P. 29, 38 E. C. L. 23; *Butler's Case*, 13 Coke 53; *Rex v. Anderson*, 2 East P. C. 772; *Rex v. Parry*, 2 East P. C. 773; *Rex v. Prowes*, 1 Moo. C. C. 349; the last four being cited in *Worthington v. State*, 58 Md. 408, in which case it was said that the goods in each of those cases had been stolen in countries to which the common law did not extend, and had been brought into England; that the law of England had been since changed

trine has been followed,¹ in some until the practice was altered by statute.² In other states the opposite rule has obtained in analogy to the common-law rule as to property stolen in one county and conveyed into another, it being considered that the continued wrongful possession in the state into which the property is brought is a fresh offense or a new taking against the laws of the latter, and that evidence of the original taking is proper to evince the *animus furandi* in the state where the property is conveyed.³

by Act of Parliament, and that it seemed, therefore, that the decisions in those cases would have been different if the common law of England had formed a part of the law of the country in which the goods had been stolen.

So far as respects goods stolen in Scotland, it was said that this inconvenience was remedied by statute of 13 George III., c. 31. *La Vaul v. State*, 40 Ala. 45; *Simmons v. Com.*, 5 Binn. (Pa.) 617.

In Canada.—By statute one who brings into Canada goods stolen in any other country, knowing them to have been so stolen, and in such manner that the laws of Canada would constitute it a felony, is guilty of larceny there, and punishable in the same manner as if the stealing had taken place in Canada. 32 & 33 Vict., c. 21, § 112; 24 & 25 Vict., c. 96, § 114; *Reg. v. Hennessy*, 35 U. C. Q. B. 603.

1. *Lee v. State*, 64 Ga. 203; *Beal v. State*, 15 Ind. 378; *State v. Reonnals*, 14 La. Ann. 276; *State v. Le Blanch*, 31 N. J. L. 82; *State v. Brown*, 1 Hayw. (N. Car.) 100; *Simmons v. Com.*, 5 Binn. (Pa.) 617; *Com. v. Dunn*, 8 Phila. (Pa.) 605; *Strouther v. Com.*, 92 Va. 789.

In *Beal v. State*, 15 Ind. 378, it was said: "Our criminal law is entirely statutory, and not of common-law origin. Our grand jury is a local tribunal and cannot inquire into offenses committed out of its jurisdiction." But it is also held in Indiana that obtaining money in Ohio and accompanying the prosecutrix with it into Indiana, without any other act, would hardly warrant the conclusion of felonious taking; but that if the accused left the prosecutrix after reaching Indiana and took the money with him, it might be held a felonious taking, if the original attempt of obtaining the money in Ohio, with the intent of so taking it in Indiana, was felonious, and that in such a case the taking would amount to a lar-

ceny committed in the state of Indiana. *Kiser v. Woods*, 60 Ind. 541.

2. *People v. Burke*, 11 Wend. (N. Y.) 129; *Haskins v. People*, 16 N. Y. 348; *People v. Gardner*, 2 Johns. (N. Y.) 477; *Henry v. State*, 7 Coldw. (Tenn.) 331; *Simpson v. State*, 4 Humph. (Tenn.) 456; *State v. Mathews*, 87 Tenn. 690.

3. *Connecticut*.—*Rex v. Peas*, 1 Root (Conn.) 69; *State v. Ellis*, 3 Conn. 185. *Illinois*.—*Stinson v. People*, 43 Ill.

397. *Iowa*.—*State v. Bennett*, 14 Iowa 479.

Kentucky.—*Ferrill v. Com.*, 1 Duv. (Ky.) 153.

Maine.—*State v. Underwood*, 49 Me. 181.

Maryland.—*Cummings v. State*, 1 Har. & J. (Md.) 340; *Worthington v. State*, 58 Md. 408.

Massachusetts.—*Com. v. Cullins*, 1 Mass. 116; *Com. v. Andrews*, 2 Mass. 14; *Com. v. White*, 123 Mass. 433. *Com. v. Holder*, 9 Gray (Mass.) 7.

Mississippi.—*Watson v. State*, 36 Miss. 593.

Nevada.—*State v. Newman*, 9 Nev. 48; *State v. Brown*, 8 Nev. 208.

Oregon.—*State v. Johnson*, 2 Oregon 115; *State v. Barnett*, 15 Oregon 77.

Vermont.—*State v. Morrill*, 68 Vt. 60; *State v. Bartlett*, 11 Vt. 650. See also *U. S. v. Tolson*, 1 Cranch (C. C.) 269; *U. S. v. Haukey*, 2 Cranch (C. C.) 65; *U. S. v. Mason*, 2 Cranch (C. C.) 410.

Further Conflict.—There is a further conflict in the authorities in the United States, in that in some of them, while the common-law doctrine as to counties is applied between the states, it is not applied when the property is brought from a foreign country into the state. *Com. v. Uprichard*, 3 Gray (Mass.) 434; *Stanley v. State*, 24 Ohio St. 166.

But, on the other hand, in several of the states the courts have refused to

Statutory Remedy. — This conflict of authorities has been very generally overcome by statute, the legislature undertaking to punish as an offense the bringing of stolen property into the state, thus codifying the settled principle of the common law which was applicable to counties and extending it to neighboring states and foreign countries.¹

4. Jurisdiction of Local Courts. — The jurisdiction of local courts is generally governed by statute, and is usually made dependent upon the grade of the offense, regulated by the value of property involved or otherwise.²

recognize any distinction between the case of property stolen in a foreign country and brought into the state and the case of property stolen in a sister state and brought into the state. *State v. Underwood*, 49 Me. 189; *State v. Bartlett*, 11 Vt. 650; *State v. Morrill*, 68 Vt. 60. See also *Worthington v. State*, 58 Md. 408.

1. See generally *La Vaul v. State*, 40 Ala. 44; *Alsey v. State*, 39 Ala. 664; *State v. Seay*, 3 Stew. (Ala.) 123; *People v. Staples*, 91 Cal. 23; *People v. Williams*, 24 Mich. 166; *Hemmaker v. State*, 12 Mo. 453; *State v. Butler*, 67 Mo. 61; *State v. Kief*, 12 Mont. 92; *Haskins v. People*, 16 N. Y. 348; *People v. Burke*, 11 Wend. (N. Y.) 129; *State v. Mathews*, 87 Tenn. 690. See also *supra*, II. 2. *Property Stolen in One County and Conveyed into Another.*

Validity of Statutes. — Whenever questioned, such statutes have been held to be valid. *State v. Mathews*, 87 Tenn. 691; *People v. Burke*, 11 Wend. (N. Y.) 129; *Alsey v. State*, 39 Ala. 664; *State v. Butler*, 67 Mo. 61; *Hemmaker v. State*, 12 Mo. 453; *People v. Williams*, 24 Mich. 156, in which case Cooley, J., said: "Now, it may be true that this wrong would not have been an offense within this state at the common law; but that does not prevent its being made so by statute. Many trespasses upon individual rights are made punishable because the interest society has in suppressing such disorders is such that they may properly be treated as offenses against society. The present is a case of trespass upon private right, begun, indeed, in another state, but continued into our own, and which the paramount law of the land requires that we should see righted on demand of the party aggrieved. The persistence in the wrong here, then, as against the right of one whom the state is bound to pro-

tect to the full extent that it must protect one of its own citizens, is not only not a matter of indifference to the state, but is a flagrant contempt of its authority, and it is eminently proper that the state should treat it as a crime, if, in the opinion of the legislature, the peace and good order of the state demand its punishment."

2. *People v. Rawson*, 61 Barb. (N. Y.) 619; *Com. v. Byce*, 8 Gray (Mass.) 461.

For Example, in *Florida* the code provision giving justices of the peace jurisdiction of larceny cases where the value of the property does not exceed twenty dollars was held to be constitutional, and one charged with such offense is not entitled to presentation before a grand jury. The term "petit larceny," as used in the constitution, does not thereby establish the grade of crime as at common law. *Ex p. Bell*, 19 Fla. 608.

In *South Carolina*, by statute, the larceny of live stock was made a separate offense and punishable by imprisonment in the penitentiary, without regard to the value of the animal. Such offense was held not to come within the statute conferring jurisdiction of all larcenies, where the property is of less value than twenty dollars, on justices of the peace. *State v. Moore*, 30 S. Car. 69.

Merging Petit Larcenies. — If a justice of the peace has jurisdiction of petit larcenies, he cannot merge distinct petit larcenies so as to constitute grand larceny, and then bind the offender over to the grand jury for that offense. *Brown v. State*, 105 Ala. 117.

Second Offense. — An indictment charging a second offense of petit larceny charges a felony, and a county or corporation court has no jurisdiction to try the offense. *Rider v. Com.*, 16 Gratt. (Va.) 499.

5. Jurisdictional Facts Determined by Indictment. — Jurisdictional facts are determined by the value of the property as laid in the indictment, and not by the value as ascertained by the verdict of the jury.¹

III. THE INDICTMENT, INFORMATION, OR COMPLAINT — 1. Form. — As to the caption, conclusion, and other matters of form, see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

2. Rule of Certainty in Charging Offense — a. GENERALLY. — The indictment, information, or complaint should state such facts as necessarily import the crime with which the defendant is charged,² with such certainty as to enable the accused to prepare his defense or to plead a judgment in bar of another prosecution for the same offense.³

b. IMMATERIAL INACCURACY, INFORMALITY, OR IMPERFECTION. — Certainty to a certain intent in every particular, as at common law, is not required under statutes defining the offense.⁴ Neither a mere informality⁵ nor other imperfection which does not tend to prejudice the substantial rights of the defendant will vitiate the indictment or information.⁶

c. STATUTORY OFFENSE — LANGUAGE OF STATUTE. — If the indictment is for a statutory offense, it is generally sufficient to

1. McLean v. State, 23 Fla. 281; State v. Stingley, 10 Iowa 488; Harberger v. State, 4 Tex. App. 26.

2. People v. Williams, 35 Cal. 671; People v. Moore, 37 Hun (N. Y.) 84; State v. Miller, 34 Tex. 535.

See generally, for a treatment of the general principles stated in this section, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

3. People v. Williams, 35 Cal. 671; Norris v. State, 33 Miss. 373.

Charge by Inference. — A charge must be in direct terms, and the allegation must not be inferentially made. Smith v. State, (Tex. Crim. App. 1897) 42 S. W. Rep. 302.

Matters of Judicial Knowledge. — An indictment for the theft of a horse need not allege that the horse is corporeal property, because all courts judicially know this fact. Damron v. State, (Tex. Crim. App. 1894) 27 S. W. Rep. 7.

Statutory Abridgment of Rule. — The legislature has no power to prescribe a form of indictment which dispenses with the allegation of the facts which constitute the offense and permits the allegation of a mere conclusion of law instead. This principle was applied to a statutory form making it sufficient

for an indictment to charge that the defendant stole, without alleging any other facts or ingredients of the offense, and indictments thereunder were held to be insufficient. Williams v. State, 12 Tex. App. 395; Young v. State, 12 Tex. App. 614; Hodges v. State, 12 Tex. App. 554; Brown v. State, 13 Tex. App. 347; Flores v. State, 13 Tex. App. 337. The principle has also been applied to a form omitting a sufficient description of the property stolen. Randall v. State, 132 Ind. 539.

4. State v. Miller, 34 Tex. 535.

5. King v. State, 44 Ind. 285; Heath v. State, 101 Ind. 512; State v. White, 129 Ind. 153.

6. Oats v. U. S., (Indian Ter. 1897) 38 S. W. Rep. 673; State v. Sweeney, 56 Mo. App. 409.

Verbal and Grammatical Inaccuracies and Misnomers. — Verbal and grammatical inaccuracies and misnomers will not render the indictment invalid where they do not affect the sense, and the words as well as the meaning can be determined from the context by persons of ordinary intelligence. See generally article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

charge it in the language of the statute,¹ though it is not absolutely necessary, but a full and clear description will suffice if none of the essentials of the offense are omitted.²

d. ALLEGATIONS IN THE DISJUNCTIVE. — Allegations in the disjunctive form are not generally sufficiently certain, unless connecting synonymous phrases, in which case they are permissible.³

e. SURPLUSAGE. — Unnecessary and irrelevant matter in an indictment may generally be treated as surplusage if, when stricken out, enough remains sufficiently to charge the larceny.⁴

1. *State v. Leavitt*, 66 Me. 440; *People v. Moore*, 37 Hun (N. Y.) 84; *State v. Benjamin*, 7 La. Ann. 47; *People v. Garcia*, 25 Cal. 531; *Aiken v. State*, 73 Ga. 812; *State v. Reis*, 9 Wash. 329.

Reference to Statute. — An indictment for a particular kind of larceny under a special statute need not allege that it was found under that statute, but it is sufficient if it charges the offense for which the statute provides. *Mukes v. Com.*, (Ky.) 1893) 21 S. W. Rep. 529.

2. *State v. Crawford*, 38 S. Car. 330. See generally article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

Equivalent Words are sufficient. *People v. Lopez*, 90 Cal. 571; *Holly v. State*, 54 Ala. 238; *State v. Hickman*, 8 N. J. L. 299; *State v. Vanderlip*, 4 La. Ann. 444; *Spittorff v. State*, 108 Ind. 171. Except where the statute uses technical words in describing the offense, as "feloniously," which cannot be dispensed with. *Dull v. Com.*, 25 Gratt. (Va.) 965.

Statutory and Common-law Offense. — Where, under statute, larceny may be committed in several ways, some of which would not constitute the offense at common law, the indictment should inform the accused in which of the ways he is charged, and an indictment in the common form will not be good for a statutory larceny not existing at the common law. *State v. Henn*, 39 Minn. 464 [*criting* *People v. Dumar*, 106 N. Y. 502; *People v. Dimick*, 107 N. Y. 13]. But see the contrary view in *Anable v. Com.*, 24 Gratt. (Va.) 566; *Dowdy v. Com.*, 9 Gratt. (Va.) 727; *Leftwick v. Com.*, 20 Gratt. (Va.) 716; *Price v. Com.*, 21 Gratt. (Va.) 846.

Common-law Terms Interjected — Surplusage. — Where the offense charged is not larceny at common law, the fact that several terms or formal words which are used in indictments for larceny at common law are interjected into the indictment does not change

the nature of the case, but such words may be rejected as surplusage. *State v. Comings*, 54 Minn. 364.

3. *Potter v. State*, 39 Tex. 388.

"Or," Connecting Synonymous Phrases in a statute, may be used in an indictment. *State v. Harper*, 64 N. Car. 129; *State v. Brookhouse*, 10 Wash. 88, where the information charged that the defendant did "take, steal, drive, or lead away twenty-five head of cattle," etc., in the language of the statute; *People v. Smith*, 15 Cal. 408. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

Alternative Allegation as to Disposition of Property. — Where the indictment charged that the defendant fraudulently converted the property to his own use "or otherwise [did] dispose of the same," it was held bad pleading and insufficient when objection was taken by special demurrer. *Sanders v. State*, 86 Ga. 717.

4. *Sanders v. State*, 55 Ark. 365; *State v. White*, 129 Ind. 153; *Travis v. Com.*, 96 Ka. 77; *Com. v. Simpson*, 9 Met. (Mass.) 138; *McCarney v. People*, 83 N. Y. 408; *State v. Darden*, 117 N. Car. 697; *State v. Lee Ping Bow*, 10 Oregon 27. See also the various sections throughout this article.

When the offense charged in the indictment is petit larceny set out in the precise terms, "feloniously did take, steal, and carry away," the addition of the words "and kill" does not change the character of the offense. These two words might be stricken out as mere surplusage. *State v. Johnson*, 30 La. Ann. 305.

Unvalued Articles in an indictment may be rejected as surplusage. *State v. Vanderlip*, 4 La. Ann. 444. See also *State v. McClung*, 35 W. Va. 285.

"Of the Goods and Chattels," added to a charge of larceny of money or bank bills, may be treated as surplusage. *Eastman v. Com.*, 4 Gray (Mass.) 416; *Reg. v. Radley*, 2 C. & K. 974, 61 E. C.

If, however, the indictment contains unnecessary specifications as material description of the offense, the proof must correspond with such allegations.¹

f. ATTEMPT TO COMMIT LARCENY. — See article ATTEMPTS, vol. 3, p. 97.

3. Particular Allegations and Averments — a. THE TAKING AND CARRYING AWAY. — The Taking, being one of the ingredients of the offense of larceny, must be alleged in some way sufficient to show the trespass.²

The Asportation must also be alleged, though in several cases the courts have given conflicting constructions to the sufficiency of this allegation.³

L. 974; Reg. v. Saunders, 10 U. C. Q. B. 544.

The Word "Full," in the expression "took and carried away a sack full of corn," is surplusage. *Newsom v. State*, 107 Ala. 133.

1. *Morris v. State*, 97 Ala. 82. See also article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

2. *Hawkins*, in his Pleas of the Crown, vol. 1, p. 134, cited in *State v. McCoy*, 89 N. Car. 468, lays down the doctrine that "every indictment of larceny must have the words *felonice cepit*, as well as *asportavit*; from whence it follows that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away."

"The Word 'Take' has a definite and well-understood significance in connection with the offense of larceny, and implies a trespass, and the averment 'did wrongfully and feloniously take, steal, and carry away' involves the possession and the wrongful taking of the property from the actual or constructive possession of the owner, general and special, and without his consent." *State v. Friend*, 47 Minn. 449.

The Word "Steal" is sometimes held sufficient under statutory definitions to charge the whole offense; see *infra*, III. 3. *f. The Intent*; while, on the other hand, the word "steal" will not of itself charge the offense, but is taken to be the allegation of a mere conclusion of law; see *supra*, III. 2. *a. Generally*.

The omission of the word "steal" is not fatal to the indictment if the trespass is otherwise sufficiently alleged, and the charge that the defendant "feloniously took and carried away" was held to be sufficient for this purpose without the word "stole."

State v. Lee Yan Yan, 10 Oregon 365. See also *Damwood v. State*, 1 How. (Miss.) 262.

3. "Carry Away." — The allegation that the accused "did steal, take, and carry" has been held sufficient though the word "away" was by oversight omitted after the word "carry," because the word "steal" implied a carrying away. *State v. Parry*, 48 La. Ann. 1483; *State v. Mann*, 25 Ohio St. 668. *Contra*, *Com. v. Adams*, 7 Gray (Mass.) 43. In *Alabama* also it was held that the omission of the word "away" rendered an indictment bad in a case where, though it was not alleged that the defendants stole, took, and carried, it was alleged that they "feloniously took and carried."

Rountree v. State, 58 Ala. 383.

Asportation Included in Taking. — In *Texas*, by statute, a taking of the property includes a carrying away thereof. In other words, the theft is complete when the property has gone into the possession of the thief, and it is not essential to the completion of the offense that the property be carried away, and an allegation of the carrying away is not essential. *Dukes v. State*, 22 Tex. App. 193; *Prim v. State*, 32 Tex. 157; *Musquez v. State*, 41 Tex. 226; *Jorasco v. State*, 6 Tex. App. 238; *Austin v. State*, 42 Tex. 345.

Equivalent Words. — The word "haul" may be used instead of the statutory word "carry," the two words being in a sense equivalent to each other, though the latter is the proper and better expression. *Spittorff v. State*, 108 Ind. 171.

So it is held sufficient to use the word "carry" instead of "drive" or "lead" in an indictment for the larceny of an animal, *People v. Strong*, 46 Cal. 302; *State v. Gomer*, 6 La.

b. TIME. — Time is not of the essence of the offense of larceny, and therefore it need not be truly laid in the indictment or information, but it is sufficient if laid before the filing of the indictment or information and within the period of limitation.¹

c. VENUE. — Laying venue has been sufficiently treated elsewhere.²

d. PLACE AS DESCRIPTIVE OF OFFENSE. — The place may be so connected with the act of stealing as to be a part of the description of the offense in certain cases, as where a separate punishment is provided when the larceny is committed in or from a dwelling house or other building, in which event the offense must be brought within the prohibition of the statute.³ And where the larceny is alleged to have been committed from a certain place as descriptive of the offense, the evidence must conform to the allegation.⁴

Ann. 311; although in such a case the thief causes himself to be carried instead of carrying away. *State v. Gomer*, 6 La. Ann. 311.

1. *Fisher v. State*, 73 Ga. 595; *State v. Kane*, 33 La. Ann. 1269; *State v. Charlot*, 8 Rob. (La.) 529; *State v. Clark*, 8 Rob. (La.) 533; *Com. v. Sego*, 125 Mass. 210; *Snowden v. State*, 62 Miss. 100; *Oliver v. State*, 5 How. (Miss.) 14; *State v. Howard*, 32 S. Car. 91; *Johnson v. State*, 1 Tex. App. 118; *Shuman v. State*, 34 Tex. Crim. Rep. 69.

Under a statute an information or indictment may not be defective for omitting to state the time when the offense was committed. *Rema v. State*, (Neb. 1897) 72 N. W. Rep. 474; *Fleming v. State*, 136 Ind. 149. See further upon this question article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 511.

Alibi as a defense does not make the time laid of the essence of the offense so as to restrict the proof to that particular day. *People v. Wright*, 11 Utah 41; *Snowden v. State*, 62 Miss. 100; *State v. Kane*, 33 La. Ann. 1269.

2. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 520. See also *infra*, III. 3. *o. Property Stolen in Another Jurisdiction*.

3. *State v. Savage*, 32 Me. 584, holding that under a statute providing against the breaking and entering into and stealing within any building in which goods, merchandise, or any valuable thing is kept for use, sale or deposit, the indictment should bring the building within the description of the statute, which was intended to

throw around buildings of such description a stronger protection than was deemed necessary for some other classes of buildings. See *infra*, III. 3. *c. (1) In General*.

Stealing from a refreshment saloon does not necessarily imply a stealing from a building, and a charge in the former terms will only justify a sentence for simple larceny. *Com. v. Mahar*, 8 Gray (Mass.) 469.

Words Construed in Usual Acceptation. —

The usually accepted definition of a hotel is a house for entertaining strangers and travelers. Where an indictment charging larceny alleges the crime to have been committed "in a dwelling, namely, the Riverside Hotel," it sufficiently charges the offense to have been committed in a house, the words used in the indictment being construed in their usual acceptation. *State v. O'Neil*, 21 Oregon 170.

4. *Thompson v. State*, 92 Ga. 448, holding that an allegation in an indictment that a grindstone was stolen from a "wagon shed-house" is not supported by evidence showing that the grindstone was stolen from under a "buggy shed-house."

The term "storehouse" includes a "warehouse" where goods are stored for the purpose of being sold, either in the warehouse itself, or in a building near by within which trade is conducted. Consequently, there is no substantial variance where the indictment charges a larceny from a storehouse and the evidence shows that it was from such a warehouse. *Martin v. State*, 95 Ga. 478.

c. OWNERSHIP AND POSSESSION¹ — (1) *In General* — *Possession*. — In the absence of a statute, possession in the owner at the time of the larceny is a part of the essence of the crime, but it is a matter of evidence not necessary to the validity of the indictment and not generally stated therein.²

Ownership. — It being necessary that property alleged to have been stolen should belong to one other than the person alleged to have stolen it, the ownership must be set forth in the charge or indictment so that it may appear that the accused is not charged with taking his own property.³

1. As to alleging names and conformity of pleading and proof in this regard, see article NAMES.

2. *State v. Gallimore*, 7 Ired. L. (N. Car.) 150; *Thompson v. Com.*, 2 Va. Cas. 135; *Angel v. Com.*, 2 Va. Cas. 228; *State v. Cass*, 12 Wash. 675.

Possession as Well as Ownership must be alleged under the practice in *Texas*. *Tinney v. State*, 24 Tex. App. 112; *Alexander v. State*, 24 Tex. App. 126; *Conner v. State*, 24 Tex. App. 245; *Williams v. State*, 26 Tex. App. 131; *Duren v. State*, 15 Tex. App. 624; *Bailey v. State*, 18 Tex. App. 426; *Frazier v. State*, 18 Tex. App. 441; *Alexander v. State*, 4 Tex. App. 261. And if at the time the property is stolen it is in the care and management of a person other than the general owner, the possession in the former must be alleged. *Garner v. State*, 36 Tex. 693; *Watts v. State*, 6 Tex. App. 264; *Garcia v. State*, 26 Tex. 211; *Gadson v. State*, 36 Tex. 350; *O'Brien v. State*, 27 Tex. App. 448; *Thomas v. State*, 1 Tex. App. 289.

Where in one count possession and ownership are alleged to be in C., and in another count the ownership is alleged to be in C. and the possession in another, a conviction on the first count cannot be sustained upon proof of the ownership in C. and the possession in another, but both the possession and the ownership must be shown to be in C. *Dawson v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 414.

Where the indictment charged that the theft was of money from the house of P., said money being then and there the property of said P. and in the possession of W., it was held that while the language was objectionable in a philological sense, in a legal sense it sufficiently imported the possession from which the property was taken. *Morgan v. State*, 34 Tex. 681. See also *Williams v. State*, 33 Tex. 345.

Temporary Possession. — If the property is only temporarily in the possession of a third person, it may be alleged to have been taken from the possession of the owner. *Garling v. State*, 2 Tex. App. 44.

The Possession of a Servant is the possession of the master, and in an indictment the possession may be alleged in the master. *Thomas v. State*, 1 Tex. App. 289.

Person in Possession Unknown. — The indictment may charge that the property was taken from the possession of an unknown person. *Jorasco v. State*, 6 Tex. App. 238.

The ownership and possession may be alleged in one count to be in one person and in another count the ownership may be alleged to be in one person and the possession to have been in another. *Shuman v. State*, 34 Tex. Crim. Rep. 69.

Possession in Guardian. — It will be sufficient to allege ownership in a ward and possession in the ward's natural guardian. *Trafton v. State*, 5 Tex. App. 482.

3. *Alabama*. — *Bowen v. State*, 106 Ala. 178; *Harris v. State*, 60 Ala. 50; *Underwood v. State*, 72 Ala. 220.

California. — *People v. Hanselman*, 76 Cal. 460.

Delaware. — *State v. Fitzpatrick*, 9 Houst. (Del.) 388.

Georgia. — *Thomas v. State*, 96 Ga. 311.

Kentucky. — *Hensley v. Com.*, 1 Bush (Ky.) 11.

Michigan. — *People v. Stewart*, 44 Mich. 484.

North Carolina. — *State v. Hadcock*, 2 Hayw. (N. Car.) 162.

South Carolina. — *State v. Dwyre*, 2 Hill L. (S. Car.) 287.

Texas. — *Pitts v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 410; *Ganoway v. State*, (Tex. Crim. App. 1893) 21

Ownership of Building Descriptive of Offense. — Where larceny after breaking and entering is made an aggravated form of the offense, ownership of the building must be laid in some person other than the accused.¹

Reason of the Rule. — The reason of the rule requiring the allegation of the ownership of stolen property, or that the owner is unknown, is to the end that the court may judicially determine that the property was not in fact that of the person accused, and therefore that the taking and carrying away were wrongful,² as well as that the accused may know exactly what charge he is to meet at the trial.³

S. W. Rep. 46; *Stone v. State*, 12 Tex. App. 193.

Virginia. — *Alexander v. Com.*, 90 Va. 811; *Barker v. Com.*, 2 Va. Cas. 122.

United States. — *U. S. v. McNamara*, 2 Cranch (C. C.) 45.

An Affidavit Before a Magistrate, charging larceny, should allege the ownership of the property in the affiant, and it is not sufficient to allege that the property was taken from the land of the affiant, such land being a plantation, it being commonly known that such property as that in question is usually owned by other persons than the owners of such plantations. *Hughes v. State*, 74 Miss. 368.

Complaint Before Examining Magistrate. — If an affidavit charging a person with petit larceny be filed before a justice of the peace, it will authorize his arrest and an inquiry into such complaint, and he may be recognized to the proper court, and such proceedings will confer jurisdiction on the latter court if the complaint describes substantially the commission of the offense; and the failure to insert in such affidavit the name of the owner of the property stolen will not be cause for reversal of the proceedings. *Montgomery v. State*, 7 Ohio St. 107.

Variance between Information and Complaint. — In *People v. Wallace*, 94 Cal. 497, the defendant was charged in the complaint with larceny of "three certain steers, the personal property * * * of one Joseph Wright and E. G. Jones," while in the information he was charged with stealing "the personal property of one Joseph Wright, to wit, two certain steers." This was held to be a fatal variance, because it was manifest that the offense charged in the information could not have been the same as that charged in the com-

plaint. This case was distinguished in *People v. Smith*, 112 Cal. 333, where it was held that there was no such variance between an information charging the stealing of property belonging to "Joseph Elledge and Mrs. M. J. Elledge, as executor and executrix of the estate of W. C. Elledge, deceased," and a complaint charging the ownership in "the estate of W. C. Elledge, deceased."

Theft After Purchase and Before Actual Possession by Purchaser. — A. went to buy a piece of meat. A piece was cut for him and put on the counter and he had paid for it, but it was stolen before he took it up. It was held that the delivery was complete, and that ownership was properly laid in A. *State v. Robinson*, 35 La. Ann. 964.

Different Owners Alleged. — See *infra*, IV. *Duplicity* — *Joinder of Counts and Offenses*.

1. *Com. v. Perris*, 108 Mass. 3; *Rex v. White*, 1 Leach C. C. 252. See article BURGLARY, vol. 3, p. 736. And see *supra*, III. 3. *d. Place as Descriptive of Offense*.

2. *Thomas v. State*, 96 Ga. 311; *State v. Harris*, 42 La. Ann. 980; *People v. Hanselman*, 76 Cal. 460; *State v. McCoy*, 89 N. Car. 466.

3. *State v. Fitzpatrick*, 9 Houst. (Del.) 388.

Check Indorsed in Blank. — The ownership of a stolen check may be laid in him who was in possession at the time it was stolen, although it was only indorsed in blank by the payee. *State v. Bishop*, 98 N. Car. 773.

House. — The name of the owner of the house or one who occupied it or some description of the building should be averred in the indictment. *Lamkin v. State*, 42 Tex. 416.

Sufficiency of Averment. — "The words 'the dwelling house of Oscar C.

(2) *Sufficiency of Allegation.*—Such ownership must be alleged directly and not by way of inference,¹ and is properly laid as of the date when the offense was committed.²

Sufficiency of Words Importing Ownership.—“Of the goods and chattels” of the owner are the usual words employed to lay the ownership. A charge in this usual form is held to be proper and sufficient³ without further or more positive allegation that the

Ferris,’ mean that the building broken and entered was his place of residence and that he occupied it as such at the time of the breaking and entry. An averment in this form is good in the common-law indictment for burglary and larceny, and under the English statute, and the same is true under our statute.” *Bell v. State*, 20 Wis. 601. See also *Butler v. Com.*, 81 Va. 162; *Speers v. Com.*, 17 Gratt. (Va.) 570.

Ownership in Husband.—Ownership of a dwelling house may be laid in the husband, though it belongs to the wife, the husband being considered by law as having such possession and ownership as will support the allegation in an indictment for larceny. *Yarborough v. State*, 86 Ga. 396.

Assumed Name of Corporation.—Where an employee of a corporation enters its service and performs labor for it in a business which it conducts under a name other than its corporate name upon certain premises, and he commits a larceny from the house in which such business is conducted and in which his services are performed, on being indicted for the larceny the ownership of the house may be laid in the name which the corporation has assumed and he has recognized, and proof of such ownership will uphold the indictment in that particular. *Jackson v. State*, 93 Ga. 165, citing *Reg. v. Atkinson*, 2 Moo. C. C. 278.

Railroad Car.—An indictment under the Georgia Act of Sept. 27, 1883, for a felony by breaking and entering a railroad car with intent to steal, and, after entering, stealing therefrom, must allege the ownership of the car, and such allegation is not included in an averment that the car was on a certain named railway in the county. Such an indictment was held defective in substance, and should have been quashed on special demurrer. *Cooper v. State*, 89 Ga. 222.

In *Missouri* it was held that “the variance between the charge in the indictment, that the oats was taken from

a car on the track of the Wabash railroad, and the proof, that it was taken from a car on the track of the Wabash Western railroad, was not such as could have operated prejudicially to defendant. It was shown that there was but one railroad in the county, and defendant could not have been misled by reason of the indictment omitting the word ‘Western’ from the name. Moreover, objections on account of such variance should, in the first instance, at least, be made to the trial court. ‘Such variance shall not be deemed grounds for an acquittal of the defendant unless the court before which the trial shall be had shall find that such variance is material to the merits of the case, and prejudicial to the defense of the defendant.’ Rev. Stat. 1879, § 1820; *State v. Sharp*, 71 Mo. 218; *State v. Ballard*, 104 Mo. 634.” *State v. Sharp*, 106 Mo. 109.

1. *State v. Ellis*, 119 Mo. 437; *Pitts v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 410.

2. *People v. Arras*, 89 Cal. 223; *People v. Lewis*, 64 Cal. 401.

“Then and There.”—In the cases last above cited the date was laid as “then and there,” but it has also been held that where a person is charged with larceny on a date named of property “belonging to” the owner, an objection that the indictment does not charge the ownership in another at the date of the alleged larceny, founded on the fact that it does not contain the words “then and there” before the averment of ownership, is untenable; that the insertion of such words is unnecessary, and to the common understanding the averment as made means that the person named was the owner when the property was stolen. *State v. Griffin*, 79 Iowa 568.

3. *People v. Kent*, 1 Dougl. (Mich.) 42. See also *Garber v. State*, 94 Ind. 219; *Choen v. State*, 85 Ind. 209; *State v. Williams*, 9 Ired. L. (N. Car.) 140; *People v. Holbrook*, 13 Johns. (N. Y.) 90; *State v. Bartlett*, 55 Me. 200, hold-

things are the owner's property, the word "chattel" in such case signifying property and ownership.¹

No Particular Words Essential. — But while every indictment for larceny must allege an ownership of the property stolen, and would be defective without such allegation, there are no particular words or phrases which the law requires to be used. The allegation may be made by a variety of words and phrases, any of which will be sufficient if it clearly conveys the idea that such persons are the owners.²

ing that such use of these terms, continued for so long a time, taken in connection with the very apparent fact that they clearly convey the idea of ownership, makes them sufficient for the purpose of alleging ownership.

Transposition of Terms. — An indictment charged that the accused did, on the 27th day of October, 1873, at, etc., "unlawfully and feloniously steal, take, and carry away, of the personal goods and chattels of one Elsberry E. Springer, then and there being of the value of four dollars, one pair of boots, contrary to the form of the statute," etc., and it was held that, while the language of the indictment was somewhat transposed and out of the usual form, it substantially and sufficiently charged a larceny of the personal goods of the party named. *King v. State*, 44 Ind. 285.

Words Equivalent to Those of Statute. — Where the indictment charges the articles stolen to be the goods and chattels of another it is sufficient, although the words of the statute are "belonging to another." *State v. Ware*, 62 Mo. 597. So "property" instead of "corporeal personal property" may be used. *Sansbury v. State*, 4 Tex. App. 99.

1. *Garfield v. State*, 74 Ind. 60; *People v. Kent*, 1 Dougl. (Mich.) 42; *State v. Vanderlip*, 4 La. Ann. 444; *State v. Bartlett*, 55 Me. 200; *People v. Holbrook*, 13 Johns. (N. Y.) 93.

Banknotes and Money. — The words "goods and chattels of," etc., sufficiently lay the ownership of banknotes. *Garfield v. State*, 74 Ind. 60; *People v. Kent*, 1 Dougl. (Mich.) 42; *State v. Vanderlip*, 4 La. Ann. 444; *State v. Bartlett*, 55 Me. 200; *People v. Holbrook*, 13 Johns. (N. Y.) 93. When such banknotes are held to be improperly designated as property, goods, or chattels, the designation of them as such in laying the ownership may be rejected as surplusage. *Com. v. Moseley*, 2 Va. Cas. 154; *Turner v. State*, 1 Ohio St. 422, holding that

while bank bills were neither money, goods, nor chattels, it was impossible that the inaccuracy should have misled or prejudiced the accused.

Money or Coin is embraced under the term chattels in the statutes generally. *State v. Boston* (Sussex 1834); *State v. Bonwell*, 2 Harr. (Del.) 529; *Collins v. People*, 39 Ill. 233; *Garfield v. State*, 74 Ind. 60; *Bryant v. State*, 16 Tex. App. 148; *Merwin v. People*, 26 Mich. 298, wherein it is said that money, when otherwise sufficiently described, may be alleged to be "the goods and chattels" of the owner, though it is much more properly described as his money. See also, for such description generally, *McKane v. State*, 11 Ind. 195; *McDivit v. State*, 20 Ohio St. 231; *Carden v. State*, 89 Ala. 130; *Grant v. State*, 55 Ala. 201; *State v. Carro*, 26 La. Ann. 377; *U. S. v. Rigsby*, 2 Cranch (C. C.) 364. But see *State v. Parker*, *Houst. Cr. Cas.* (Del.) 10, holding that, the statute on which the indictment was founded recognizing and making a distinction between coin or specie and other personal property, denominating the former as money and the latter as goods and chattels, the prisoner should be acquitted, because the indictment alleged the money to be the goods and chattels of the owner instead of the money of the owner.

2. *State v. Bartlett*, 55 Me. 209.

"Goods and Chattels of" are not essential words, others conveying the allegation of ownership being sufficient. *McBride v. Com.*, 13 Bush (Ky.) 337, holding that "the property of" sufficiently lays ownership; *State v. Williams*, 9 Ired. L. (N. Car.) 140, holding that "the property of" and "goods and chattels of" have the same meaning and are properly used indifferently, and following a like form approved in *State v. Sparrow*, *Term* (N. Car.) 93; *Mathews v. State*, 17 Tex. App. 472, wherein ownership was held to be sufficiently laid where it was alleged that

(3) *Name Acquired by Reputation.* — The ownership may be laid in one by the name by which he is usually known, though it is not his proper name, and the evidence on the trial showing his proper name will not create a fatal variance,¹ the question whether the owner alleged and the owner proven are the same being for the jury to determine.²

(4) *Effect of Rule — Variance.* — It is held that as a general rule the ownership as laid in the information or indictment must be strictly proved; that a variance in this regard is fatal, if the evidence shows the property to have belonged to an entirely different person.³ Sometimes, however, while as a matter of pleading ownership must be alleged,⁴ under statutory provisions an erroneous allegation in this regard is not material.⁵

(5) *Necessity of Laying Ownership in True Owner* — (a) *Ownership Unknown.* — If the ownership of property alleged to have been stolen is to the grand jury unknown, it is necessary that the indictment should allege this fact,⁶ and when this condition exists the indictment or information is sufficient as a pleading if it charges the ownership to be in a person unknown.⁷

Effect of Allegation. — But the proof must show the fact to be true

the property was taken from the possession of "Jesse French, the owner thereof."

Larceny from Money Drawer. — An allegation that the defendant took money from the money drawer of the complainant was held equivalent to the statement that the money was taken out of the possession of the complainant, and as against the wrongdoer the complainant must be presumed to be the "true owner" of the money. *People v. Smith*, 86 Hun (N. Y.) 488.

1. *Lyon v. State*, 61 Ala. 224; *People v. Leong Quong*, 60 Cal. 107; *People v. Armstrong*, 114 Cal. 570; *Hix v. People*, 157 Ill. 384; *Com. v. Williams*, 161 Mass. 442; *State v. Bell*, 65 N. Car. 313; *State v. Godet*, 7 Ired. L. (N. Car.) 210; *Lott v. State*, 24 Tex. App. 723.

2. *State v. Godet*, 7 Ired. L. (N. Car.) 210.

3. *Harris v. State*, 60 Ala. 50; *Underwood v. State*, 72 Ala. 220; *People v. Frank*, 1 Idaho 200; *State v. Taylor*, 15 Kan. 420; *McBride v. Com.*, 13 Bush (Ky.) 337; *Hensley v. Com.*, 1 Bush (Ky.) 11; *Reed v. Com.*, 7 Bush (Ky.) 641; *People v. Stewart*, 44 Mich. 484; *State v. Dwyre*, 2 Hill L. (S. Car.) 287; *Stone v. State*, 12 Tex. App. 193; *Pitts v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 410. See the succeeding subsections as to ownership in particular cases.

4. *State v. Harris*, 42 La. Ann. 980; *People v. Hanselman*, 76 Cal. 460.

5. "The ownership in a particular person of the property stolen is not of the essence of the crime of larceny, though it is of its essence that it should be alleged and proven to have been the property of another than the accused." *State v. Harris*, 42 La. Ann. 980. See also *People v. Leong Quong*, 60 Cal. 107; *People v. Smith*, 112 Cal. 333; *People v. Wallace*, 94 Cal. 501; *State v. Crow*, 54 Mo. App. 212; *State v. Barker*, 64 Mo. 282; *State v. Myers*, 82 Mo. 558; *State v. Hall*, 97 Iowa 400.

6. *Thomas v. State*, 96 Ga. 311; *Reed v. Com.*, 7 Bush (Ky.) 641; *Unger v. State*, 42 Miss. 642; *Com. v. Morse*, 14 Mass. 217; *Culberson v. State*, 2 Tex. App. 324. See also article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 344.

7. *Indian Territory*. — *Oxier v. U. S.*, (Indian Ter. 1896) 38 S. W. Rep. 331.

Iowa. — *State v. McIntire*, 59 Iowa 264.

Kentucky. — *Reed v. Com.*, 7 Bush (Ky.) 642.

Massachusetts. — *Com. v. Morse*, 14 Mass. 217.

Missouri. — *State v. Stowe*, 132 Mo. 199; *State v. Casteel*, 53 Mo. 124; *State v. Wiseback*, 139 Mo. 214.

North Carolina. — *State v. Bell*, 65 N. Car. 313.

and that the grand jury could not ascertain the true owner by the use of due diligence, because if the proof shows that the name was known or could have been known by the use of due diligence, the variance is held to be fatal to a conviction.¹

(b) **General and Special Ownership.** — If the general property is in one

Texas. — Culberson *v.* State, 2 Tex. App. 324; Taylor *v.* State, 5 Tex. App. 1; McVey *v.* State, 23 Tex. App. 661; Mackey *v.* State, 20 Tex. App. 603; Swink *v.* State, 32 Tex. Crim. Rep. 530; McCarty *v.* State, 36 Tex. Crim. Rep. 135.

Surname Unknown. — Where the Christian name only of the owner of stolen property is known to the jury it is proper to allege the ownership by the Christian name and that the surname is unknown. Shockley *v.* State, (Tex. Crim. App. 1897) 42 S. W. Rep. 972.

Sufficiency of Allegation. — An indictment charging the larceny of property whose owner was unknown need not add that the owner was unknown to the grand jury. Culberson *v.* State, 2 Tex. App. 324.

It need not be alleged that the unknown owner was some person other than the defendant. Reed *v.* State, 32 Tex. Crim. Rep. 139.

Ownership of Coffin After Interment. — In State *v.* Doecke, 5 Mo. App. 590, it was held that "after a coffin containing a corpse has been buried no one can assert such ownership in it as will support a claim against another in a civil action; but such an ownership as is sufficient to support a charge of larceny will be taken to exist somewhere, and the property is sufficiently laid where the indictment charges that the coffin is the property of some person to the jurors unknown." But this ruling was reversed in 68 Mo. 208, the court there saying: "Roscoe, in his work on Criminal Evidence, says: 'A shroud stolen from the corpse must be laid to be the property of the executor, or of whoever else buried the deceased' (p. 604, 6th Am. ed.); 1 Chitty's Crim. Law (5th Am. ed.) 44; 1 Hawkins's P. C. 144, 148; 4 Sharswood's Blackstone 235. All these authorities, it is true, speak only of shrouds and ornaments buried with the dead, but the principle upon which these may be alleged to be the property of the executor, or of the person who buried the deceased, will certainly sustain an allegation that the coffin is the property of the person who buried the

deceased." See also Haynes's Case, 12 Coke 113.

1. *Alabama.* — Underwood *v.* State, 72 Ala. 220.

Connecticut. — State *v.* Wilson, 30 Conn. 500.

Georgia. — Thomas *v.* State, 96 Ga. 311.

Indiana. — Widner *v.* State, 25 Ind. 234.

Indian Territory. — Oxier *v.* U. S., (Indian Ter. 1896) 38 S. W. Rep. 331.

Kentucky. — Reed *v.* Com., 7 Bush (Ky.) 641.

Maine. — State *v.* Pollard, 53 Me. 124.

Massachusetts. — Com. *v.* Manley, 12 Pick. (Mass.) 173; Com. *v.* Morse, 14 Mass. 217.

Mississippi. — Unger *v.* State, 42 Miss. 642.

Missouri. — State *v.* Stowe, 132 Mo. 199; State *v.* Wiseback, 139 Mo. 214.

North Carolina. — State *v.* Hadcock, 2 Hayw. (N. Car.) 162.

Texas. — Brewer *v.* State, 18 Tex. App. 456; Jorasco *v.* State, 6 Tex. App. 238; Swink *v.* State, 32 Tex. Crim. Rep. 530.

Virginia. — Barker *v.* Com., 2 Va. Cas. 122.

England. — Rex *v.* Robinson, 110t 595, 3 E. C. L. 233.

In Unger *v.* State, 42 Miss. 642, it was held that no conviction could be had on an indictment charging the larceny of property from an unknown owner if the name of the owner was discovered during the trial.

Sufficiency of Proof. — It was held in *Texas* that the failure of the grand jury to ask the witness before it the name of the owner of stolen property, when the witness in fact knows it, is evidence of the want of due diligence to ascertain the name of such owner. Shockley *v.* State, (Tex. Crim. App. 1897) 42 S. W. Rep. 972.

The state need not go further and prove diligent inquiry on the part of the grand jury to ascertain ownership after proof that there was no known owner of the property. McCarty *v.* State, 36 Tex. Crim. Rep. 135.

person, and another and the one from whom the possession is taken has a special property therein, the indictment charging the larceny may properly allege the ownership to be in either the general or the special owner.¹ This special ownership may exist

1. *Alabama*. — *Ellis v. State*, 76 Ala. 91; *Jones v. State*, 13 Ala. 153.

Delaware. — *State v. Fitzpatrick*, 9 Houst. (Del.) 385.

Florida. — *Kennedy v. State*, 31 Fla. 428.

Illinois. — *Murphy v. People*, 104 Ill. 528.

Indian Territory. — *Murray v. U. S.*, (Indian Ter. 1896) 35 S. W. Rep. 240.

Maine. — *State v. Somerville*, 21 Me. 14.

Massachusetts. — *Com. v. Butts*, 124 Mass. 449.

New York. — *People v. Bennett*, 37 N. Y. 117.

Tennessee. — *Renfro v. State*, 6 Baxt. (Tenn.) 517; *Yates v. State*, 10 Yerg. (Tenn.) 549.

Texas. — *Billard v. State*, 30 Tex. 367; *Dignowitty v. State*, 17 Tex. 521; *Gatlin v. State*, 39 Tex. 130; *Cox v. State*, 43 Tex. 101; *Gaines v. State*, 4 Tex. App. 330; *Jinks v. State*, 5 Tex. App. 68; *Crockett v. State*, 5 Tex. App. 526; *Fore v. State*, 5 Tex. App. 251; *Littleton v. State*, 20 Tex. App. 168; *Langford v. State*, 8 Tex. 115; *Moseley v. State*, 42 Tex. 78.

Full Possession with Responsibility to the Owner is sufficient ownership upon which to predicate an indictment for larceny of the property. *Markham v. State*, 25 Ga. 52; *State v. Addington*, 1 Bailey L. (S. Car.) 310; *Blackburn v. State*, 44 Tex. 457; *Duren v. State*, 15 Tex. App. 624; *Hill v. State*, 11 Tex. App. 132; *Williams v. State*, 26 Tex. App. 131; *U. S. v. Jones*, 31 Fed. Rep. 719.

Principal in Delivery Bond. — If property be stolen from one who has given a delivery bond to the state for its return, the indictment may lay the ownership in such person. *Jones v. State*, 13 Ala. 153.

Cashier of Bank. — Where notes stolen had been intrusted to one in his official capacity as cashier of a bank, and the true owner is unknown, the cashier has such special property in the notes that the indictment may lay the ownership in him. *Com. v. Butts*, 124 Mass. 449.

Coachmaster and Driver. — Where the coach glass was stolen from a

coach while standing in the coachmaster's yard, the ownership of the stolen property was held to be well laid in the coachmaster. *Rex v. Taylor*, 1 Leach C. C. 356.

The law, on an indictment against the driver of a stagecoach, on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor. *Rex v. Deakin*, 2 Leach C. C. 876. To the same effect is *State v. Nelson*, 11 Nev. 339.

Money Collected by One for Himself and Another. — Where one collected money for himself and another, for whom he acted as agent, and to whom he had given credit for his share, ownership was properly alleged, in an indictment for larceny of the money, in him who had collected it. *State v. Grant*, 22 Me. 171.

Ownership in Consignee of Property Stolen in Transmission. — Ownership may be laid in the consignee of goods where they are stolen while in the course of transmission by a carrier. *Com. v. Sullivan*, 104 Mass. 552; *Walker v. State*, 9 Tex. App. 38.

Separate Allegation of Ownership and Possession. — Where the ownership is laid in the general owner, it is held in *Texas* that the indictment should also allege that the property was stolen from the possession of the special owner, where such is the case. *Otero v. State*, 30 Tex. App. 450; *Thurmond v. State*, 30 Tex. App. 539; *Turner v. State*, 7 Tex. App. 596; *Trafton v. State*, 5 Tex. App. 480; *Blackburn v. State*, 44 Tex. 457; *Bailey v. State*, 18 Tex. App. 426; *Frazier v. State*, 18 Tex. App. 441.

And where the offense shows that the property was taken from one holding it for the real owner, the latter never having had the possession thereof and never having known of the possession of the person holding it for him, the indictment should allege the ownership and possession in the party from whose possession it was taken, or it should

in a variety of cases, and, in general terms, any one who has the actual care, control, and management of the property,¹ or is the ostensible or apparent owner thereof, is such special owner in whom ownership may be laid,² except servants having only the temporary custody and use of the property, subordinate to the owner or persons having the actual care, control, and management of the same,³ the possession of the servant being the pos-

allege the ownership in the real owner and the possession in the party holding it for him. *Otero v. State*, 30 Tex. App. 450.

Possession to Be Resumed at Will of Owner.—A further distinction is drawn between the parting with the right of possession by the general owner for a definite time and the parting with nothing but the possession, to be resumed at the will of the owner, *Petre v. State*, 35 N. J. L. 70; and the case of the larceny of whisky stored in a government warehouse is placed in the latter class, and the ownership of such whisky held properly laid in the general owner, who had the right to take it away as soon as the lien was satisfied. *State v. Harmon*, 104 N. Car. 792.

1. *Morning Star v. State*, 52 Ala. 405; *State v. Farris*, (Idaho 1897) 51 Pac. Rep. 772; *State v. Bishop*, 98 N. Car. 776; *State v. Hardison*, 75 N. Car. 203; *Ledbetter v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 1084, 35 Tex. Crim. Rep. 195; *Morrow v. State*, 22 Tex. App. 239; *Dreyer v. State*, 11 Tex. App. 503; *Moore v. State*, 8 Tex. App. 496; *Swink v. State*, 32 Tex. Crim. Rep. 530. See generally the cases cited in the notes to this section.

Special Ownership in Innkeeper or Keeper of Public House.—*Clark v. State*, 23 Tex. App. 612; *Barnes v. People*, 18 Ill. 52; *Todd's Case*, 1 Leach C. C. 357, note *a*.

A box belonging to a benefit society was stolen from a room in a public house. Two of the stewards had keys of this box, and by the rules of the society the landlord ought to have had a key, but in fact he did not. It was held that the prisoner might be convicted on a count laying the property in the landlord alone. *Rex v. Wymer*, 4 C. & P. 391, 19 E. C. L. 436.

Agistor.—If property be stolen from an agistor, the ownership may be laid in him. *People v. Buelna*, 81 Cal. 135; *Woodward's Case*, 1 Leach C. C. 357, note *a*.

Ownership in Guardian.—Property in

the hands of a guardian and stolen from him may be laid in the indictment to be the property of the guardian, who has a special property in it. *Thomasson v. State*, 22 Ga. 499. Or the ownership may be laid in the ward and the possession in the guardian. *Trafton v. State*, 5 Tex. App. 482.

2. The felonious taking of more than the perfect title of the alleged owner forms the essence of the issue presented to the jury. *State v. Lewis*, 49 La. Ann. 1208; *State v. Everage*, 33 La. Ann. 120; *State v. Kane*, 33 La. Ann. 1270. See also *infra*, III. 3. *c.* (5) (*f*) *Estrays*.

3. *Heygood v. State*, 59 Ala. 49; *Murray v. U. S.*, (Indian Ter. 1896) 35 S. W. Rep. 241; *People v. Bennett*, 37 N. Y. 117; *Wilson v. State*, 28 Ind. 393; *State v. Jenkins*, 78 N. Car. 478; *Com. v. Rubin*, 165 Mass. 453; *Com. v. Lawless*, 103 Mass. 425; *Com. v. Morse*, 14 Mass. 217; *Thomas v. State*, 1 Tex. App. 289; *Garling v. State*, 2 Tex. App. 44; *Reg. v. Ashley*, 1 C. & K. 198, 47 E. C. L. 198; *Reg. v. Green*, 37 Eng. L. & Eq. 597.

Principal and Agent.—A person, having bought goods of a merchant, handed him a twenty-dollar gold piece out of which to take his pay and return the change. The merchant, being unable to make the change, handed the money to a third person standing by to take it and get the change. The taker never returned with either the money or the change. It was held that in a prosecution for the larceny, the ownership was properly laid in the customer, the merchant simply being his agent in attempting to make the change, and the stealing from the agent being stealing from the principal. *Murphy v. People*, 104 Ill. 528.

Ownership was laid in a person as agent. There was no exception that there was a variance or that the evidence failed to show a special property in the person in whom the ownership was alleged, and it was held that the general verdict established all the ma-

session of the master,¹ and the person occupying such position not being one who could maintain trespass as a bailee for an injury to the property.²

Bailor and Bailee. — If the person in whom the ownership is alleged was in possession of the property at the time of the alleged larceny, either as a conditional purchaser or as a bailee, the ownership is properly laid in him,³ though the ownership may be laid either in the bailor or in the bailee,⁴ or in separate counts

terial facts charged in the indictment, including that of ownership. *State v. Carter*, 113 N. Car. 640, *distinguishing* *State v. Jenkins*, 78 N. Car. 478, in that the exception in that case was taken on the trial that the evidence did not show special property in the agent in whom the ownership was laid.

In *Oklahoma* it was held that ordinarily and in the absence of a statute the variance would be fatal where the indictment charged ownership in a person whom the proof showed to be merely the agent of the real owner, but the statute in *Oklahoma* providing that an erroneous allegation as to the injured, etc., is not material saved the objection in this case. *Martin v. Territory*, 4 Okla. 105.

Wife as Husband's Agent. — Where the wife acts as agent for her husband, ownership is properly laid in the husband. *Hill v. State*, 1 Head (Tenn.) 454; *Rex v. Roberts*, 7 C. & P. 485, 32 E. C. L. 594.

In *Massachusetts* it was held that under the statute in that state an indictment charging the larceny of property of a wife would be sustained by proof of the larceny of property of the husband in the possession of the wife. *Com. v. McLaughlin*, 103 Mass. 435.

1. *Thomas v. State*, 1 Tex. App. 289; *Clark v. State*, 23 Tex. App. 612; *Com. v. Rubin*, 165 Mass. 453.

2. *Heygood v. State*, 59 Ala. 49. See also the cases generally in this section and *infra*, III. 3. c. (5) (4) *Property in Custodia Legis*.

3. *Fowler v. State*, 100 Ala. 96; *State v. Pettis*, 63 Me. 126; *State v. Ayer*, 23 N. H. 301.

Borrowed Property. — The allegation of property in a complaint for an alleged larceny of goods is sustained if the complainant at the time the larceny was committed held possession of the goods under a loan from the owner. *State v. Pettis*, 63 Me. 126.

Ownership may be laid in the bailee having possession at the time of the

theft although the bailment be gratuitous. *Wimbish v. State*, 89 Ga. 294.

One Who Hires Property for a term is *pro hac vice* the owner thereof during the time for which it is hired, and may therefore be described as the owner. *State v. Wisdom*, 8 Port. (Ala.) 521.

Variance. — Proof of the character in which the bailee holds will not create a variance though the ownership is laid in him absolutely. *Edson v. State*, 148 Ind. 283.

4. *Florida.* — *Kennedy v. State*, 31 Fla. 428.

Indiana. — *Edson v. State*, 148 Ind. 283.

Iowa. — *State v. Mullen*, 30 Iowa 203.

Massachusetts. — *Com. v. O'Hara*, 10 Gray (Mass.) 469; *Com. v. Morse*, 14 Mass. 217.

Missouri. — *State v. Moore*, 101 Mo. 316; *State v. Hall*, 85 Mo. 669.

New Hampshire. — *State v. Gorham*, 55 N. H. 152.

New York. — *People v. Smith*, 1 Park. Cr. Rep. (Columbia Oyer & T. Ct.) 329; *Phelps v. People*, 6 Hun (N. Y.) 401.

North Carolina. — *State v. Allen*, 103 N. Car. 433; *State v. Hardison*, 75 N. Car. 203; *State v. Powell*, 103 N. Car. 424.

South Carolina. — *State v. Addington*, 1 Bailey L. (S. Car.) 310.

Tennessee. — *Hill v. State*, 1 Head (Tenn.) 454; *Owen v. State*, 6 Humph. (Tenn.) 330.

Texas. — *State v. Stephens*, 32 Tex. 155.

United States. — *U. S. v. Burroughs*, 3 McLean (U. S.) 405.

Property may be described as the goods of either the bailee or the bailor, although it was never in the real owner's possession, but in that of the bailee merely. *State v. Gorham*, 55 N. H. 152.

Pledged Property falls within the rule that ownership may be laid in the general or the special owner. *Com. v.*

the ownership may be laid both in the legal owner and in the bailee, at the option of the pleader.¹

(c) *Larceny by General from Special Owner.* — It is impossible, under ordinary circumstances, for one to commit larceny in taking possession of his own property, and the general owner of goods, in their lawful possession, has full dominion and control over such goods; but it seems to be well settled in the law that larceny may be committed by a man stealing his own property, if the taking be *animo furandi*, or with a fraudulent design to charge the bailee with the value of it. In such case the property is laid in the special owner.²

(d) *Ownership in Minor.* — How ownership should be laid when property provided to a minor by his parent is stolen from the former, is not always recognized to rest upon settled principle. It seems that at an early date the ownership was required to be laid in the child.³ Later cases also recognize the propriety of laying the ownership in the child.⁴ But indictments laying ownership in the parent have been sustained,⁵ though it was held

O'Hara, 10 Gray (Mass.) 469, wherein the ownership was laid in the pledgor.

In *Smith v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 785, the ownership was laid in the pledgee.

1. *Kennedy v. State*, 31 Fla. 438; *Owen v. State*, 6 Humph. (Tenn.) 330; *State v. Wisdom*, 8 Port. (Ala.) 511.

2. *State v. McCoy*, 89 N. Car. 466; *Palmer v. People*, 10 Wend. (N. Y.) 166; *Adams v. State*, 45 N. J. L. 448.

True Ownership Laid and Facts Charged. — In *Texas* an indictment charged that "Samuel Stephens, late of the county of Smith, on the thirteenth day of September, A. D. 1868, did, in the said county of Smith, fraudulently take from the possession of William H. Pate one silver watch of the value of two dollars and fifty cents, the said watch being then and there deposited with the said William H. Pate for repairs, and was then and there held for security for the repairs that had then and there been made on said watch, said watch being then and there the corporeal personal property of the said Samuel Stephens. Said watch was taken from the possession of the said William H. Pate without his consent, with intent to deprive the said William H. Pate of the value of said repairs, and to appropriate it to the use of the said Samuel Stephens, against the peace and dignity of the state," and it was held sufficient, the court saying that: "A general charge, alleging

time and place, that the owner of a watch of any designated value, rightfully in the possession of a bailee, and held by him as a security for work and labor bestowed upon it, had fraudulently taken it, without the consent of the bailee, from his possession, with the intent of depriving him of the value of such repairs, would be entirely sufficient in this species of theft." *State v. Stephens*, 32 Tex. 155.

3. See note to *Rex v. Forsgate*, 1 Leach C. C. 463.

Difference between Apparel on Dead Body and on Child. — "If apparel be put upon a boy, this is a gift in law, for the boy hath capacity to take it; but a dead body, being but a lump of earth, hath no capacity." *Haynes's Case*, 12 Coke 113.

4. *Phillips v. State*, 85 Tenn. 551; *State v. Koch*, 4 Harr. (Del.) 570.

5. *State v. Williams*, 2 Strobb. L. (S. Car.) 229; *Reg. v. Hughes, C. & M.* 593, 41 E. C. L. 323. See also, as recognizing that the ownership may be laid in either the parent or the child, *People v. McCarty*, 5 Utah 281.

Property in the possession of a widow and her infant children may be laid in the widow. *Crockett v. State*, 5 Tex. App. 528, citing *Henry v. State*, 45 Tex. 84.

Child as Bailee. — The child's possession and right are more that of a bailee, and the parent's right that of a bailor, than anything else. *State v. Williams*, 2 Strobb. L. (S. Car.) 231.

that they might also have laid the ownership in the child.¹ The decisions seem to stand each upon its own facts and to be influenced by the character of the property stolen, as well as by the age of the minor.²

(e) *Tenant in Possession*. — In an indictment for larceny from a building, ownership may be laid in a tenant in possession of the building.³

(f) *Estrays*. — Consistently with the real facts, it is proper to allege that the owner of an estray is unknown and that the animal is an estray, where no special ownership attaches except by compliance with the estray statute.⁴ When the animal is taken up as an estray, the ownership may be laid in the estrayer or in the true owner,⁵ and it is held that where an indictment alleges the ownership to be unknown, proof of constructive possession and special ownership of an estrayer is a fatal variance.⁶

1. See last cases cited. This is said to be the safer practice. *Reg. v. Hughes*, C. & M. 593, 41 E. C. L. 323.

Exception. — Where the son is apprenticed to his father and is furnished with his clothes in pursuance of his indentures, an indictment for stealing such clothes must lay them to be the property of the son, and not of the father. *Rex v. Forsgate*, 1 Leach C. C. 463, cited in *State v. Williams*, 2 Strobb. L. (S. Car.) 232.

2. For Example, in *Phillips v. State*, 85 Tenn. 551, it was said that "it was proper to charge the ownership of the property to Miss Roberta Seawell, though a minor, she being eighteen years of age and owning and using the clothing as her own."

In *State v. Lee*, Houst. Cr. Cas. (Del.) 335, it was said that as the articles stolen were mere ornaments and not necessities, and belonged not to the father but to the daughter, ownership of them could not be laid in the father.

In *State v. Williams*, 2 Strobb. L. (S. Car.) 229, upholding an indictment which laid the ownership of a saddle in the father, it was said that the indictment would be good if the ownership were laid either in the father or son, adding: "This would seem to be the end of the matter, if a saddle be necessary for an infant son."

In *Texas* it was held that a minor living with her parent could not be considered as having exclusive care, management, and control of such property as jewels given to her by her parent, and that the ownership of such property should be laid in the parent; but at the same time it was said to be the better

and safer practice to present an indictment in two counts, charging in one the ownership in the parent and in the other the ownership in the child. *Wright v. State*, 35 Tex. Crim. Rep. 470.

In *Bazan v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 100, it was held that where it appeared that horses alleged to have been stolen belonged to a minor living with his mother and that both the mother and son had possession, control, and management thereof it was correct practice to allege the property in the mother.

3. *State v. Golden*, 49 Iowa 48. See article BURGLARY, vol. 3, p. 736.

4. *Baxter v. State*, (Tex. Crim. App. 1897) 43 S. W. Rep. 87.

5. *Jinks v. State*, 5 Tex. App. 68; *Cox v. State*, 43 Tex. 101; *Quinn v. People*, 123 Ill. 333.

So when an animal is not taken up as an estray, but, having wandered into another's field, is captured and put up by the owner of the field to prevent destruction of growing corn, the ownership may be laid in the owner of the field as bailee. *Owen v. State*, 6 Humph. (Tenn.) 330.

Animal Irregularly Estrayed. — It is held that the record showing the special ownership of the estrayer is sufficient, though some of the proceedings appear to be irregular. *Jinks v. State*, 5 Tex. App. 72.

6. *Thomason v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 121; *Swink v. State*, 32 Tex. Crim. Rep. 532.

Where special ownership is not in the estrayer by reason of his noncompliance with the statute in regard to

(g) **Joint Ownership — Partnership Property.** — At common law, if stolen goods are the property of partners or joint owners, the names of all the partners or joint owners must be stated in alleging the ownership thereof,¹ or if one of the partners or joint

estrays, an allegation that the person from whom the animal had been taken had estrayed it, which is required by law, is not a descriptive averment and comes within the rule which authorizes courts to disregard surplusage, and the indictment alleging ownership in an unknown person is good. *Smith v. State*, 7 Tex. App. 382; *Lowe v. State*, 11 Tex. App. 253.

Cattle Running upon Accustomed Range. — In the absence of other proof, cattle running upon their accustomed range are in the possession of their owner. *Murray v. U. S.*, (Indian Ter. 1896) 35 S. W. Rep. 240; *Deggs v. State*, 7 Tex. App. 359; *Jones v. State*, 3 Tex. App. 498; *Cameron v. State*, 44 Tex. 652; *Huffman v. State*, 28 Tex. App. 174; *Moore v. State*, 8 Tex. App. 496. And it has also been held that where cattle are ranging in one county in the care, management, and control of an agent who looks after them, milks the cows, and marks and brands the calves, while the owner lives in a county remote therefrom, the cattle are in the possession of such agent in a sense that will support the allegation of ownership in him. *Williams v. State*, 26 Tex. App. 131; *Littleton v. State*, 20 Tex. App. 169, *distinguishing* *Deggs v. State*, 7 Tex. App. 359 and *Cameron v. State*, 44 Tex. 652, *supra*, in that in those cases there was no third person or special owner intervening.

1. *Arkansas.* — *McCowan v. State*, 58 Ark. 17; *Scott v. State*, 42 Ark. 73.

California. — *People v. Bogart*, 36 Cal. 245 [*citing* *State v. Owens*, 10 Rich. L. (S. Car.) 169; *Hogg v. State*, 3 Blackf. (Ind.) 326; *Com. v. Trimmer*, 1 Mass. 476].

Delaware. — *State v. Frame*, 4 Harr. (Del.) 569.

Illinois. — *Wallace v. People*, 63 Ill. 451; *Hix v. People*, 157 Ill. 384.

Massachusetts. — *Com. v. O'Brien*, 12 Allen (Mass.) 183.

Mississippi. — *McDowell v. State*, 68 Miss. 348.

New Hampshire. — *State v. McCoy*, 14 N. H. 364.

Oregon. — *State v. Wilson*, 6 Oregon 428.

South Carolina. — *State v. Ryan*, 4

McCord L. (S. Car.) 16; *State v. London*, 3 S. Car. 230.

Texas. — *Henry v. State*, 45 Tex 84.

In *McCowan v. State*, 58 Ark. 17, the rule that joint ownership must be laid in the joint partners was held to prevail, notwithstanding a statutory provision that an indictment is sufficient if it contains a statement of acts constituting the offense, in ordinary and concise language and in such manner as to enable a person of ordinary understanding to know what is intended, etc., though under similar statutes elsewhere it has been held differently. *Reed v. Com.*, 7 Bush (Ky.) 641; *People v. Goggins*, 80 Cal. 229; *People v. Ah Sing*, 19 Cal. 598.

Trustees Not Incorporated must be described by name as individuals with the addition of the character in which they are authorized to act. *Rex v. Sherrington*, 1 Leach C. C. 513.

Variance in Alleging Joint Ownership. — Where the ownership is laid in two persons jointly and the proof shows ownership in but one, the variance has been held to be fatal. *Brown v. State*, 35 Tex. 691; *Parmer v. State*, 41 Ala. 416.

An indictment against a tenant for stealing a crop raised by him on shares is insufficient if it lays the ownership in both the landlord and tenant. *State v. McCoy*, 89 N. Car. 466.

If the ownership is laid in two persons jointly and the proof shows the ownership in one of such persons and another not alleged, the variance is fatal. *Blankenship v. State*, 55 Ark. 244.

Contingent Interest. — In larceny of the goods of partners, a contingent interest in the goods stolen, by one of the partners, is not sufficient to authorize laying them as the goods of the partners, but they should be laid in the indictment as the sole property of the partner who has the legal interest in them. *People v. Romaine*, 1 Wheel. Cr. Cas. (N. Y.) 369; *Hix v. People*, 157 Ill. 384.

Ownership of Landlord and Tenant. — Where a crop raised on shares is stolen, the property should be laid in both the

owners has a special property in the goods stolen, by reason of separate possession, such allegation of ownership would be sufficient and should be made.¹ To avoid this difficulty the statute 7 Geo. IV., c. 64, § 14, was passed, providing that where the stolen goods were the property of partners, joint tenants, parceners, or tenants in common, it should be sufficient to charge the property in one of them by name and another or others, according to the fact.² In some of the United States the common-law rule is likewise changed by statute,³ under which an indictment will be sufficient if it lays the ownership in one of several joint owners,⁴ or in one by name and another or others, according to the fact.⁵

¹ Landlord and the tenant. *State v. Frame*, 4 Harr. (Del.) 569.

Ownership of Landlord and Tenant. — Where a crop was in the possession of the landlord, though undivided, it is held that an indictment charging the larceny thereof by the tenant properly lays the ownership in the landlord alone. *State v. King*, 98 N. Car. 648.

So in an indictment against share croppers for the larceny of a part of the crop, the ownership was held to be properly laid in the landlord, the latter having been entitled to the possession and control of the crop until certain advances had been paid. *Connell v. State*, 2 Tex. App. 422.

Tenants in Common. — Where by contract each party is bound to furnish certain portions of material for making a crop upon the land of one of them, and they agree on the proportion of the crop which is to belong to each at the end of the enterprise, this is a cultivation of land upon shares and will result as a tenancy in common of the crop, for the larceny of which the ownership is properly laid in both. *McNealy v. State*, 17 Fla. 205.

1. *Scott v. State*, 42 Ark. 73; *McCowan v. State*, 58 Ark. 17 [citing *People v. Schwartz*, 32 Cal. 160; *Hogg v. State*, 3 Blackf. (Ind.) 327; *Com. v. Trimmer*, 1 Mass. 476]; *State v. Wilson*, 6 Oregon 428; *Henry v. State*, 45 Tex. 84; *Samora v. State*, 4 Tex. App. 508; *Wilson v. State*, 3 Tex. App. 206; *Calloway v. State*, 7 Tex. App. 585, and *Hannahan v. State*, 7 Tex. App. 664, holding that while the common-law doctrine was changed in Texas by the code, as to offenses committed before the provision of the code referred to the old doctrine prevailed as announced in *Henry v. State*, 45 Tex. 84, *supra*.

2. In the absence of a statute of this

nature the common law prevails. *People v. Bogart*, 36 Cal. 248. See also the cases in the last preceding note; *Reg. v. Wortley*, 2 C. & K. 283, 61 E. C. L. 283.

3. *The Firm Name* has been held sufficient under statutes providing that an indictment is not fatally defective if it is sufficient to be intelligible to a person of common understanding, or that an indictment is not insufficient by reason of any defect which does not tend to prejudice the substantial rights of the defendant on the merits. *People v. Goggins*, 80 Cal. 229; *People v. Ah Sing*, 19 Cal. 598. And an allegation that the property was "the property of the Tennessee River Packet Company, D. W. Swan, Little Brothers, and others," was held to be sufficient under such a statute. *Reed v. Com.*, 7 Bush (Ky.) 641.

A Bail Bond Is Not Void because ownership is laid in a firm name in the indictment. *People v. Barnes*, 65 Cal. 16.

4. *Williams v. State*, 67 Ala. 187, which was a prosecution for burglary, but the decision rests upon a general statute, *Wantland v. State*, 145 Ind. 38; *Marcus v. State*, 26 Ind. 101; *Widner v. State*, 25 Ind. 234; *State v. Riley*, 100 Mo. 493; *Lasure v. State*, 19 Ohio St. 43; *Coates v. State*, 31 Tex. Crim. Rep. 257; *Clark v. State*, 26 Tex. App. 486; *Terry v. State*, 15 Tex. App. 66.

But if the ownership is laid in two persons jointly, proof that it is the separate property of one will not support the indictment. *Widner v. State*, 25 Ind. 234.

5. *State v. Capps*, 71 N. Car. 96; *State v. Patterson*, 68 N. Car. 292; *State v. Edwards*, 86 N. Car. 666; *State v. Harper*, 64 N. Car. 130, holding that under the code provision permitting an

(h) **Property of Feme Covert.** — When stolen property belongs to a married woman, whether or not the ownership should be laid in her or in her husband has been variously decided, depending upon the character of the woman's estate or her status under the various statutes prevailing. As a general proposition it was early decided that the property of the woman being that of the husband, ownership must be laid in him.¹ On the other hand, it is held that while the property of the wife which is, in the ordinary way, in the use of the husband and his family may be laid in either the husband or the wife,² when the title and possession are both in the wife under statutes recognizing her separate existence for this purpose, the courts recognize this separate existence; and in some states it is required that the ownership of the separate estate be laid in the wife,³ while in others ownership in such

indictment to allege ownership in one joint owner only "and another or others, as the case may be," an indictment which charges the property as that of one of the owners named "and another or others" is fatally defective, the alternative "or" in the statute not being used in the sense of "to wit."

1. Thus, **Wearing Apparel or Money Contributed for the Support** of the wife and family belong to the husband, and ownership thereof must be laid in him. *State v. Hays*, 21 Ind. 176; *Com. v. Davis*, 9 Cush. (Mass.) 283; *Com. v. Cullins*, 1 Mass. 116; *Hughes v. Com.*, 17 Gratt. (Va.) 565; *U. S. v. Murphy*, 4 Cranch (C. C.) 681. See also *People v. McCarty*, 5 Utah 282; *Reg. v. Whitehead*, 9 C. & P. 429, 38 E. C. L. 175.

Husband's Property in Wife's Possession. — In *Massachusetts*, under Gen. Stat., c. 172, § 12, an indictment charging the larceny of property of a wife may be sustained by proof of the larceny of property of the husband in the possession of the wife. *Com. v. McLaughlin*, 103 Mass. 435, *distinguishing Com. v. Davis*, 9 Cush. (Mass.) 283, *supra*, in that the indictment in that case was for cheating by false pretenses, and that that offense not being enumerated in Rev. Stat., c. 133, § 11, the common-law rule applied to it, and it was therefore necessary to allege the property to be in the husband. And attention is called to the further fact that the provisions of Gen. Stat., c. 172, § 12, *supra*, are broader than the corresponding provisions of the Revised Statutes above referred to, though this difference was not considered as affecting the decision of the case.

Absence of Husband. — In *Com. v.*

Cullins, 1 Mass. 116, it was held that the absence of the husband for a number of years was not sufficient to authorize the laying of ownership in the wife in an indictment for the larceny of property stolen from her. But in *U. S. v. Parsons*, 4 Cranch (C. C.) 726, where it appeared that the husband was absent seeking employment and was not contributing to the support of his wife, under an indictment charging larceny of the goods from the wife the court refused to instruct for an acquittal, Cranch, C. J., dissenting.

Property Laid in Queen. — Where property was laid in a woman in one count, and in the queen in another count, and the proof showed that the woman in whom the property was laid in the first count was a married woman whose husband had been convicted of a felony, and who was still in prison under his sentence, and that the article stolen belonged to him before his conviction, but had remained in the house thereafter, his wife continuing in the possession of the house and goods until the latter were stolen, it was held that the prisoner might be convicted of the larceny on the second count, which laid the goods in the queen, but that he could not be convicted on the count which laid the goods in the married woman. *Reg. v. Whitehead*, 9 C. & P. 429, 38 E. C. L. 175.

2. *Petre v. State*, 35 N. J. L. 64.

3. *Petre v. State*, 35 N. J. L. 64; *Com. v. Martin*, 5 Clark (Pa.) 245, 1 Am. L. Reg. 434; *Pratt v. State*, 35 Ohio St. 514; *Stevens v. State*, 44 Ind. 469, holding that property acquired by a married woman by a gift after marriage must be laid in her.

property may be laid either in the husband or in the wife.¹

Curative Statutes. — Again, the question may lose much of its importance under statutes which expressly provide that when an offense involves the commission of a private injury and is

In *Alabama* it had been frequently decided before the Act of February 28, 1888 (Code of 1886-7, § 2341), that an indictment for larceny might lay the ownership in either the husband or the wife, though the property constituted the separate estate of the wife. *Davis v. State*, 17 Ala. 416; *Lavender v. State*, 60 Ala. 60; *Ellis v. State*, 76 Ala. 90; *Robinson v. State*, 84 Ala. 434. But under that law the ownership of the wife is as complete and independent of the husband as that of the husband is of the wife, and as the ownership of property belonging to the husband cannot be laid in the wife, with equal propriety the ownership of property belonging to the wife cannot be laid in the husband. *Bolling v. State*, 98 Ala. 80, holding further that difficulties of this character might be obviated by laying the ownership in the wife in one count and in the husband in the other count.

Necessary and Suitable Clothing furnished by the husband does not become the separate property of the wife, but such clothing purchased by the wife with her separate money is made her separate estate by statute, and an indictment charging the larceny of such clothing must lay the property in the wife. *Pratt v. State* 35 Ohio St. 514.

Respective Ownership in Husband and Wife in Several Articles. — Where several articles of separate value were laid in an indictment as the property of the husband, and upon the trial it appeared that one of the articles belonged to the wife, and there was no testimony tending to show that the other two articles belonging to the husband were of less value than the amount necessary to bring the offense within the degree of the crime of which the defendant was convicted, it was held not necessary to decide the question whether the ownership of the first article was properly alleged to be in the husband. *State v. En*, 10 Nev. 277.

1. *Holmes v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 979; *Alexander v. State*, 9 Tex. App. 48; *Wilson v. State*, 3 Tex. App. 210; *State v. Jackson*, Houst. Cr. Cas (Del.) 561; *People v. McCarty*, 5 Utah 282, referring to

the Act of 33 & 34 Vict., cc. 5, 9, and 11, under which the wife's separate property may be laid in her husband.

Separate Property in Common Use. — A husband living with his wife has a special property as bailee in the wife's separate estate which is in common use by them, and such property may be laid in the husband. *State v. Wincroft*, 76 N. Car. 38; *State v. Matthews*, 76 N. Car. 41.

In *Petre v. State*, 35 N. J. L. 64, it is said that "in case the married woman puts her property in use in the family of her husband, such acts give the husband, who is still the head and master of the household, such a possession as will warrant the allegation of title in him. Under these circumstances the wife does not part with the general right of possession, but with the qualified right of possession, which she can put an end to at will. But this qualified right in the husband is clearly sufficient, if it exists, * * * to support the averment in the pleading of ownership in him."

Character of Property — Province of Jury. — In *State v. Pitts*, 12 S. Car. 180, an instruction that "if the jury believed the clothes were the property of Mrs. John T. Duncan [the wife of the person in whom the property was laid], the prisoner should be found not guilty," was held to be improperly refused. The fact that the person in whom the property was laid, and his wife, bore to each other the relation of husband and wife may have been calculated to raise the presumption that the husband had such a possession of the articles as to warrant the allegation of property in him as made in the indictment, but this would give rise to a question of fact which the jury and not the judge should decide.

Community Property may be laid in the husband. *People v. Swalm*, 80 Cal. 46. And in *Texas* it is held that such property must be laid in the husband. *Wilson v. State*, 3 Tex. App. 210; *Merrweather v. State*, 33 Tex. 789.

But Where the Husband Had Deserted the Wife, it was held that the ownership might be laid in the wife. *Ware v. State*, 2 Tex. App. 549.

described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material.¹

(i) **Property Belonging to Estate of Decedent.** — As a dead man cannot have property in goods and chattels, it is held that an indictment laying the ownership in the deceased, as "one A B, deceased," cannot be supported,² but ownership in such a case should be laid in the executor or administrator³ or in the person entitled to the immediate possession and control of the property.⁴

(j) **Property of Religious and Fraternal Societies.** — Where the subject of the larceny is the property of a religious or fraternal society, ownership is laid in such officers as trustees, or otherwise, who hold the title thereof for the society.⁵

1. *People v. Watson*, 72 Cal. 403, holding that under such a statute an information for larceny might lay the property in a married woman, though the property stolen from her possession was bought with the money of her husband.

2. *U. S. v. Mason*, 2 Cranch (C. C.) 410.

3. *State v. Davis*, 2 Law Repos. (N. Car.) 291; *Walker v. State*, 111 Ala. 29.

In Estate of Decedent. — It is improper to lay ownership in the estate of the decedent. *State v. Woodley*, 25 Ga. 235, holding that the description of property as that "of the estate of R. H., deceased," in a recognizance is bad; *People v. Hall*, 19 Cal. 425, which was afterwards referred to in *People v. Smith*, 112 Cal. 333, in which last case it was decided, under section 956 of the Penal Code of California, providing that "when an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material," that a variance between a complaint alleging ownership in a person deceased, and an information based thereon alleging ownership in the executor and executrix of the estate of said deceased person, was not material, however the law might have been before said statute and at the time the case referred to was decided.

Executor Refusing to Prove Will. — Where the executor refused to prove the will, it was held that the ownership should be laid in the ordinary, and not in persons who had taken out letters with the will annexed after the com-

mission of the offense, but before the indictment was returned, because the rights of administrators only commence from the date of the letters of administration. *Rex v. Smith*, 7 C. & P. 147, 32 E. C. L. 473. See also *Reg. v. Tip-pin*, C. & M. 545, 41 E. C. L. 297. But see *Walker v. State*, 111 Ala. 29, which indicates that the administrator is the proper person in whom to allege ownership, though the theft be committed after the death of the owner and before the grant of administration. To the same effect is *Wonson v. Sayward*, 13 Pick. (Mass.) 404.

4. *Walker v. State*, 111 Ala. 29, holding that an indictment charging the property in the widow and her minor child jointly was erroneous, the possession devolving upon the mother upon the death of the husband.

The law being that where one person owns property and another person has possession, charge, or control of the same the ownership may be alleged to be in either, and it being sufficient under statutory provision when property belongs to the estate of a deceased person to lay the ownership in the executor or heirs of such deceased person or in any one of such heirs, the possession by the son of the deceased father, or the fact that the person alleged to be the owner had control or management of property alleged to have been stolen, would be sufficient allegation of ownership, although the deceased father's estate or the mother of the son in control held the title. *Dreyer v. State*, 11 Tex. App. 508.

5. *Rex v. Boulton*, 5 C. & P. 537, 24 E. C. L. 445; *Reg. v. O'Brien*, 13 U. C. Q. B. 436, holding that an indictment for stealing vestments from a church

(k) *Property in Custodia Legis.* — A Receiver has such special property in goods which are in his hands as an officer of the court as will support an indictment for larceny thereof laying the property in him.¹

Property Taken in Execution or Attachment. — So a sheriff who takes property in attachment or execution acquires a special property therein, and an indictment charging the larceny thereof may lay the ownership in the officer,² but not in one to whom the officer delivers the possession to be held by him as bailee of the officer;³ and the levy of the execution or attachment must be a valid one in order to vest the officer with such a title as will support an indictment laying the property in him.⁴

(l) *Property Stolen from Public Servants — Ownership of County.* — Where property of a county is stolen from a public officer, it is held proper to allege ownership thereof to be in the county.⁵

should lay the ownership in some person or persons individually, and not in the parishioners of the said church.

In *Reg. v. Ashley*, 1 C. & K. 198, 47 E. C. L. 198, it was held that an indictment against a member of a club for stealing some of the plate belonging to the club, which laid the ownership of the plate in the house steward, could not be sustained, and it seems that the case turned upon the point that the steward was a mere servant having the bare possession and not such control and management as to give him a special property.

Landlord in Possession. — In *Rex v. Wymer*, 4 C. & P. 391, 19 E. C. L. 436, a box belonging to a benefit society was stolen from a room in a public house, and it was held that a conviction might be had on a count laying the property in the landlord.

Addition of Title. — Where it is proper to lay the ownership in the vicar and the churchwardens, an allegation that the property was that of a person named "and others," the person named being the vicar, is sufficient without alleging that the person named was the vicar, or that the others were the wardens. *Reg. v. Wortley*, 2 C. & K. 283, 61 E. C. L. 283. And where the property is laid in one by name, being a trustee of a religious society, it need not be added that the person in whom the property is laid was such trustee. *Rex v. Boulton*, 5 C. & P. 537, 24 E. C. L. 445.

1. *State v. Rivers*, 60 Iowa 381.
Under a general statute providing that if the offense is otherwise sufficiently described the name of the party

injured is not material, an indictment is good which charges the ownership to be in receivers, though one of them is misnamed. *State v. Hall*, 97 Iowa 400.

Ownership in General Owner. — An indictment may allege ownership in the general owner, though the larceny was from the possession of a receiver; and the fact that the ownership is laid in a railroad company and the possession in the receiver is not material, since it is not necessary to allege the possession. *State v. Coss*, 12 Wash. 673.

2. *Brooks v. State*, 5 Baxt. (Tenn.) 607; *Norton v. People*, 3 Cow. (N. Y.) 137; *Palmer v. People*, 10 Wend. (N. Y.) 165; *Com. v. Morse*, 14 Mass. 217; *State v. Clapper*, 59 Iowa 279; *State v. Cornelius*, 5 Oregon 46.

3. *Com. v. Morse*, 14 Mass. 217; *Norton v. People*, 8 Cow. (N. Y.) 137; *Brooks v. State*, 5 Baxt. (Tenn.) 607.

4. Ownership cannot be laid in an officer who has not complied with the statute requiring an attachment to be levied by taking the personal property into his custody. *State v. Cornelius*, 5 Oregon 46. To the same effect see *Brooks v. State*, 5 Baxt. (Tenn.) 607.

5. *People v. Bennett*, 37 N. Y. 117, which was an indictment charging the larceny of goods purchased for the support of the poor by direction of the superintendent of the poor, and which contained two counts, one laying the ownership in the county and the other laying the ownership in a person who was a servant of the superintendent of the poor. In the two opinions delivered the count laying the ownership in the county was upheld, but one of the judges thought that the count laying

Larceny from the Mails. — Property stolen from the mails may be laid in the sender¹ or in the person to whom the mail is addressed.²

(m) **Ownership of Corporate Property.** — As has been heretofore shown, when it is necessary to set out the name of a corporation, it is generally sufficient to describe the corporation by its corporate name, and it is not necessary to allege the fact of incorporation;³ and this general rule is often applied to allegations of ownership in larceny.⁴

the ownership in the servant of the superintendent of the poor was insufficient, while the other took a different view of the first count, but reached the same result by reason of the fact that the count alleging the ownership in the county was held sufficient. In *Phelps v. People*, 6 Hun (N. Y.) 424, the court seems to approve the view that the ownership may be laid in the state or in the public officer having the custody of the property.

In *State v. Rollins*, 28 Ind. 390, an indictment charging larceny of goods, alleging them to be the property of "the overseers of the poor in said county of K." was quashed because under the statute personal goods purchased for the benefit of persons described therein became the property of the county, and the overseer of the poor was a township trustee, and in his official capacity he could not hold such property.

1. *U. S. v. Burroughs*, 3 McLean (U. S.) 405.

2. Proof that the contents of a letter were for the benefit of the person to whom it was addressed is sufficient to support an allegation of ownership in him. *U. S. v. Jones*, 31 Fed. Rep. 718; *U. S. v. Jackson*, 29 Fed. Rep. 503, which was an indictment alleging ownership in a person to whom a registered letter had been addressed, the court holding that the custody by the post-office department was for the benefit of the addressee and supported the allegation of ownership.

Ownership in Postmaster. — In *Reg. v. Rathbone*, C. & M. 220, 41 E. C. L. 124, it appeared that the post-office authorities, in order to fasten guilt upon a person who had been suspected of stealing from the mails, put a marked coin in a letter and placed the letter where it would come under the control of the suspected person. The indictment charged the stealing of a post letter containing a sovereign, and also the stealing of the sovereign, the property

of the postmaster-general. It was held that a conviction could not be had on the first count, as the letter was not put into the post-office in the ordinary way, and the statute applied only to letters so deposited in the mail, but that the second count was good for a simple larceny, and properly charged the ownership in the postmaster-general.

3. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 509.

4. *State v. Fitzpatrick*, 9 Houst. (Del.) 388; *State v. Shields*, 89 Mo. 259; *Braithwaite v. State*, 28 Neb. 832; *Fisher v. State*, 40 N. J. L. 169; *State v. Grant*, 104 N. Car. 908; *Stanly v. Richmond, etc., R. Co.*, 89 N. Car. 331; *Reg. v. Stokes*, 8 C. & P. 151, 34 E. C. L. 333.

But the rule is not of uniform application. In *Texas* an indictment for theft of property of a corporation must not only describe the corporation by its correct corporate name, but must allege it to be a corporation, because the Code of Procedure is silent upon the subject and the court must be governed by the common-law rule. *Thurmond v. State*, 30 Tex. App. 540; *White v. State*, 24 Tex. App. 231.

So it has been held that an indictment charging ownership in a firm name is insufficient unless it sets out the names of the individual members of the firm or alleges the corporate character. *Wallace v. People*, 63 Ill. 452; *McCowan v. State*, 58 Ark. 17; *People v. Bogart*, 36 Cal. 248. See also *supra*, Ill. 3. c. (5) (g) *Joint Ownership — Partnership Properly*.

Proof of Corporate Character. — It is unnecessary to produce the charter in order to prove the corporate character of the corporation in whom the ownership is laid; the existence of such corporation is sufficiently proved by evidence that it carries on business in the name as charged and by which it is commonly known. *State v. Grant*, 104

(a) *Property Stolen or Purchased from Thief.* — An innocent purchaser from one who has acquired possession of property by theft acquires such property therein as will support an allegation of ownership in an indictment charging the larceny from such innocent purchaser.¹ And where property is stolen from one who himself stole it, an indictment for the last larceny may lay the ownership in the original owner or in the first thief from whom the property was last stolen.²

f. *THE INTENT* — (1) *In General.* — The unlawfulness of an act must appear from the charge in the prosecution therefor,³ and when the intent is a part of the essence of this unlawfulness it must be alleged.⁴

(2) *Felonious Intent.* — As in other felonies, under the general rule as at common law, a larceny which amounts to a felony must be alleged to have been feloniously done.⁵ On the other hand,

N. Car. 908; *Braithwaite v. State*, 28 Neb. 832; *Smith v. State*, 28 Ind. 321; *State v. Fitzpatrick*, 9 Houst. (Del.) 388.

If the indictment lays the ownership of the stolen property in a corporation, the expression "organized and existing under and by virtue of the laws of the state of New York" may be treated as surplusage. *McCarney v. People*, 83 N. Y. 408.

Assumed Name of Branch Office. — Where an employee of a corporation enters its service and performs labor for it in a business which it conducts under a name other than its corporate name, and such servant commits larceny from the house where such company does business and in which his services are performed, an indictment for the larceny may lay the ownership of the property in such assumed name of the corporation which the defendant had recognized. *Jackson v. State*, 93 Ga. 165, citing *Reg. v. Atkinson*, 2 Moo. C. C. 278.

1. *King v. State*, 43 Tex. 351; *Com. v. Bowers*, 3 Brews. (Pa.) 350; *Gooch v. State*, 60 Ark. 5.

2. *Gooch v. State*, 60 Ark. 7 [citing 1 Hale P. C. 507, 2 East P. C. 54]; *Ward v. People*, 3 Hill (N. Y.) 395, affirmed in 6 Hill (N. Y.) 144, and cited with approval in *People v. Bennett*, 37 N. Y. 131; *State v. Wincroft*, 76 N. Car. 40; *Com. v. Finn*, 108 Mass. 466, which was a prosecution for receiving stolen property, and the same rule was applied; *Rex v. Wilkins*, 1 Leach C. C. 522, in which case Mr. Justice Gould said: "It is a rule of law, equally well known and established, that the possession of the true owner cannot be

divested by a tortious taking; and therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property, because these acts of theft do not change the possession of the true owner."

3. *Without Authority of Law.* — The offense is sufficiently charged by an allegation "feloniously did steal, take, and lead away," without alleging it to have been committed "without authority of law." *State v. Jones*, 7 Nev. 408.

4. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 491 *et seq.*

5. *Mason v. State*, 32 Ark. 238; *Moore v. Watts*, 1 Ill. 42, an action for assault and battery and false imprisonment committed under a warrant of arrest held to be fatally defective under the rule stated in the text, and no defense to the officer; *Sovine v. State*, 85 Ind. 576; *Gregg v. State*, 64 Ind. 223; *Com. v. Pratt*, 132 Mass. 246; *State v. Casteel*, 53 Mo. 124; *State v. Weldon*, 70 Mo. 572; *Barker v. Com.*, 2 Va. Cas. 122; *Reg. v. Morrison*, 18 New Bruns. 682.

To Distinguish Trespass. — Without a charge that the act was feloniously done nothing is charged but a mere trespass. *State v. Casteel*, 53 Mo. 124; *Moore v. Watts*, 1 Ill. 42; *Sovine v. State*, 85 Ind. 576. And this is held to be so though a misdemeanor is charged. *Wolverton v. Com.*, 75 Va. 911.

it is held that the word "steal" in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been denominated a felony and imports the common-law felony, and that under such a statute the indictment need not charge that the act was feloniously done.¹

(3) *Intent to Deprive Owner of Property.* — It is held in some jurisdictions that the intent on the part of the accused to deprive the owner of the value of the property and to appropriate it to the use of the former, being an ingredient of the offense under statutory definitions, must be specifically charged.² In other juris-

1. *Gardner v. State*, 55 N. J. L. 17; *Randall v. State*, 53 N. J. L. 486; *State v. Eldridge*, 12 Ark. 608; *People v. Lopez*, 90 Cal. 571; *State v. Chambers*, 2 Greene (Iowa) 308; *State v. Griffin*, 79 Iowa 568; *State v. Benjamin*, 7 La. Ann. 47. See also *State v. Casteel*, 53 Mo. 124; *State v. Fitzpatrick*, 9 Houst. (Del.) 386; *State v. Shelton*, 90 Tenn. 539.

An indictment which charged that on a certain day, in a certain county, the defendant did "unlawfully and with force and arms" "privately take and carry away, with intent then and there to steal," certain specified property, was sufficient, though the taking was not in terms declared to be wrongful and fraudulent. *Yates v. State*, 67 Ga. 770.

Use of "Felonious" when Not Employed in Statute. — Under the Act 31 & 32 Vict., c. 116, § 1, it was provided that "if any person, being a member of any copartnership, * * * shall steal or embezzle any such money, goods, or effects, * * * or other property of or belonging to any such copartnership, * * * every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such copartnership," etc. An indictment charging a partner under this statute in the words "feloniously did steal, take," etc., was objected to on the ground that the statute created a new offense, and not providing that the offense should be a felony the indictment was bad for using the word "feloniously." It was held that the indictment properly charged the act to have been feloniously done, under the terms of the statute that a person offending against its provisions should be tried, convicted, and punished as other individuals who committed larceny. *Reg. v. Butterworth*, 12 Cox C. C. 132, 2 Moak 195.

Word "Steal" Not Indispensable. — It is not always absolutely necessary that the word "steal" should be used. Thus, while, as above shown, the word "steal" is held to mean the felonious taking, conversely, where the felonious taking is charged, it is held that the stealing is covered by the charge and that the word "steal" is not necessary. *State v. Lee Yan Yan*, 10 Oregon 365 [citing *Damewood v. State*, 1 How. (Miss.) 262; *Engleman v. State*, 2 Ind. 91]. See also *Eaton v. State*, (Tex. Crim. App. 1897) 41 S. W. Rep. 604.

"Fraudulently." — In other cases the intent may be characterized by other words, as where the word "fraudulently" is used instead of "feloniously," and it is held that the act must be charged to have been fraudulently done and that "feloniously" will not suffice. *Eaton v. State*, (Tex. Crim. App. 1897) 41 S. W. Rep. 604; *McPherson v. State*, 20 Tex. App. 194; *Ortis v. State*, 18 Tex. App. 282; *Muldrew v. State*, 12 Tex. App. 617; *Spain v. State*, 19 Tex. App. 469; *Ware v. State*, 19 Tex. App. 13; *Sloan v. State*, 18 Tex. App. 225 [overruling *Musquez v. State*, 41 Tex. 226]; *Chance v. State*, 27 Tex. App. 441, holding that the taking must be alleged to be fraudulent and the omission is not supplied by the allegation that the appropriation was fraudulent; *Doxey v. State*, (Tex. App. 1889) 12 S. W. Rep. 412.

2. *Lawless v. State*, (Tex. App. 1892) 19 S. W. Rep. 676; *Jones v. State*, 12 Tex. App. 424; *Ridgeway v. State*, 41 Tex. 231; *Chance v. State*, 27 Tex. App. 441; *Peralto v. State*, 17 Tex. App. 578; *State v. Sherlock*, 26 Tex. 106; *Jones v. State*, 25 Tex. App. 621. See also *Ward v. Com.*, 14 Bush (Ky.) 233.

Appropriation to Use of Owner Charged by Mistake. — An indictment which charges that the property was taken

dictions this is not necessary, the charge of the felonious taking being held to supply that element of the ordinary definition of larceny implying this criminal intent, and to be sufficient without an allegation of intent to deprive the owner of the property stolen.¹

g. GUILTY KNOWLEDGE. — When a guilty knowledge is a material ingredient of an offense, it must be alleged,² and where the unlawfulness of a taking in a particular case is made to depend upon such knowledge, this rule applies.³

h. WANT OF OWNER'S CONSENT. — It is not necessary that an indictment for larceny should aver *in hæc verba* that the goods were taken without the consent or against the will of the owner;⁴

from the possession of the owner with intent to appropriate it to the use of the owner, instead of to the use of the defendant, is carelessly drawn and fatally defective. *Lawless v. State*, (Tex. App. 1892) 19 S. W. Rep. 676; but see *infra*, this note, *Brown v. State*, 28 Tex. App. 379.

Equivalent Words.—"With the fraudulent intention * * * to deprive the said A B out of the use and benefit of the same," is not equivalent to a charge in the language of the statute that the property was taken "with intent to deprive the owner of the value of the same," and an indictment using the first expression was held to be fatally defective. *Jones v. State*, 12 Tex. App. 424.

If the Names of the Owner and the Defendant Are the Same, the indictment will be sufficient if it appears therefrom that they are different persons. Thus, where the indictment charged that "Mack Brown, on or about the 30th day of May, one thousand eight hundred and eighty-nine, and anterior to the presentment of this indictment, in the county and state aforesaid, did then and there unlawfully and fraudulently take from the possession of Mack Brown five head of cattle, the same being the corporeal personal property of the said Mack Brown, without the consent of the said Mack Brown, and with the intent to deprive the said Mack Brown of the value of the same, and to appropriate them to the use and benefit of him the said Mack Brown, contrary," etc., it was held that the word "said," or the words "him the said Mack Brown," referred to the above-mentioned Mack Brown who was charged with the fraudulent taking of the animals, and not the Mack Brown who was alleged to be the owner, plain

sense and meaning excluding the idea that a thief stole property of another with the intent to appropriate it to the use and benefit of such other who was the owner. *Brown v. State*, 28 Tex. App. 379.

Particular Intent as Ingredient of Statutory Larceny. — If a statute makes it an offense to do a certain act with a designated intention, in charging the offense the intention as well as the act must be alleged. Thus, under a statute against the cutting and carrying away of timber with the intention of converting the same to the use of the person committing the act, the intent as well as the act must be alleged. *McCord v. State*, 79 Ala. 269.

Where a statute provides for theft in a particular case, and the offense as punishable by that statute is wanting in an ingredient made necessary to constitute the crime of theft generally by another statute, in that the intent to appropriate the property to the use of the taker is not mentioned, it is held that such intent need not be alleged in charging the offense under the particular statute. *Smith v. State*, 34 Tex. 616.

1. *Hamilton v. State*, 142 Ind. 276; *State v. Hackett*, 47 Minn. 425; *Com. v. Butler*, 144 Pa. St. 568; *State v. Moultrie*, 34 La. Ann. 489, which was an indictment for receiving stolen property; *State v. De Serrant*, 33 La. Ann. 980. See also *State v. Shelton*, 90 Tenn. 539.

2. See article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 495.

3. *Gatewood v. State*, 4 Ohio 386; *Rich v. State*, 8 Ohio 111.

4. *People v. Davis*, 97 Cal. 194; *State v. Jones*, 41 La. Ann. 784; *Com. v. Butler*, 144 Pa. St. 569; *Wedge v. State*, 7 Lea (Tenn.) 688.

but as in other cases where by statute the ingredients of the offense are expressly declared, it is also held that under a statute declaring the want of consent to be one of the essential ingredients of larceny, an indictment is not good unless such want of consent is alleged.¹

i. DESCRIPTION OF PROPERTY — (1) General Rule as to Certainty. — The indictment or information should describe the property alleged to have been stolen with certainty to a common intent, that is, with sufficient particularity to enable the court to determine that such property is the subject of larceny² or to bring

Notwithstanding the taking might not be larceny if the consent of the owner does not exist, as in such event there would be no trespass. *Wedge v. State*, 7 Lea (Tenn.) 688.

1. *Long v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 674; *Swink v. State*, 32 Tex. Crim. Rep. 530; *Johnson v. State*, 39 Tex. 393.

Sufficiency of Allegation — Language of Statute. — "Without the knowledge and consent" of the owner is sufficient, though the words in the statute are "without the knowledge or consent." *Hammel v. State*, 14 Tex. App. 326.

Want of Wife's Consent. — It is not necessary that the evidence should show want of consent of the wife to the taking of her property which in the indictment is alleged to be that of her husband. *Holmes v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 979.

Where the Property Belongs to a Corporation. — The indictment must allege the property to have been owned by the corporation, must set out the fact of the incorporation, that the property was taken from the possession of some one who was holding the same for the corporation, without the consent of the party holding for the corporation and with intent to deprive the owners of the value, etc. *Thurmond v. State*, 30 Tex. App. 540; *White v. State*, 24 Tex. App. 231.

Consent of Joint Owners must be negatived jointly; that is, consent of each must be negatived. *Williams v. State*, 23 Tex. App. 619 [citing *Taylor v. State*, 23 Tex. App. 639; *McIntosh v. State*, 18 Tex. App. 284].

Without the Consent of "the Owner" was held sufficiently to negative the consent of both parties of a firm in whom the ownership was laid. *Williams v. State*, 19 Tex. App. 276.

Different Owners of Separate Articles. — Where an indictment for the theft of a

certain number of cattle belonging to one owner, and a certain other number belonging to another, avers the want of consent as "without the consent of the said owners," it is sufficient. *Smith v. State*, 21 Tex. App. 96; *Smith v. State*, 21 Tex. App. 133.

Where Both Ownership and Possession Alleged. — Where the property is owned by one party and the possession is held by another, the indictment may so allege, but in this event it must negative the consent of both, though it would be sufficient, in order to constitute the indictment a valid one, to allege ownership and possession in the party having the actual care and control of the property. *Swink v. State*, 32 Tex. Crim. Rep. 530; *Bailey v. State*, 20 Tex. App. 68; *Rangel v. State*, 22 Tex. App. 642; *Bland v. State*, 18 Tex. App. 12.

Nonconsent of One in Possession. — Where ownership is alleged in one who was in the actual and exclusive possession, care, management, and control of the property, although he was not the real owner, this constitutes him, in contemplation of the statute regarding theft, the owner, and nonconsent of the real owner need not be alleged. *Von Emons v. State*, (Tex. Crim. App. 1893) 20 S. W. Rep. 1106, and the cases last above cited.

Negating Consent of "the Owner" in effect negatives the consent of both the owner and the person alleged to be in possession. *Burns v. State*, 35 Tex. 724.

2. *Chisolm v. State*, 45 Ala. 66; *State v. Parker*, 34 Ark. 158; *People v. Williams*, 35 Cal. 671; *People v. Freeman*, 1 Idaho 322; *State v. McAnulty*, 26 Kan. 536; *Com. v. James*, 1 Pick. (Mass.) 375; *Barnes v. State*, 40 Neb. 545; *State v. Liles*, 78 N. Car. 496; *State v. Nipper*, 95 N. Car. 653; *People v. Jackson*, 8 Barb. (N. Y.) 637; *State*

the case under the prohibition of the particular statute under which the offense is attempted to be charged,¹ to identify the

v. Holmes, 9 Wash. 528, 37 Pac. Rep. 283; *McCarty v. State*, 1 Wash. 377; *Reg. v. Cox*, 1 C. & K. 494, 47 E. C. L. 494.

Thus an indictment which charged that the prisoner stole "three eggs, of the value of twopence, of the goods and chattels of S. H." was held bad for not stating the species of eggs, because it did not show that the eggs stolen might not have been such as were not the subject of larceny. *Reg. v. Cox*, 1 C. & K. 494, 47 E. C. L. 494. This decision was afterwards doubted, though it was not necessary to overrule it in the particular case. *Reg. v. Gallears*, 2 C. & K. 981, 61 E. C. L. 981.

Personal Property.—The word "property" includes personal property, *State v. Bayonne*, 36 La. Ann. 761; *State v. Odum*, 11 Tex. 12; *Sansbury v. State*, 4 Tex. App. 99; as does "goods and chattels," *Choen v. State*, 85 Ind. 209.

Character of Property Apparent.—It is not necessary to aver that the subject of the larceny was "personal property" when that fact appears from the character of the property otherwise described. *Mountjoy v. State*, 78 Ind. 172; *Jones v. State*, 51 Miss. 718.

Ore.—A description of property as "a quantity of specimens of gold and silver ores," etc., was held to be sufficient under objection that the property described savored of realty, the word "specimen" having a well understood meaning in mining countries and sufficiently importing that the property is personal. *People v. Freeman*, 1 Idaho 322. So "silver-bearing ore" was held to be sufficient over the same objection, the words here used being held to have reference to a portion of vein matter which had been extracted from a lode, assorted and separated from the mass of waste rock and earth, and thrown aside for milling or smelting purposes, or taken away from the ledge. *State v. Barryman*, 8 Nev. 262. In both these cases *People v. Williams*, 35 Cal. 671, is distinguished. The indictment in the last case was for taking and carrying away "fifty-two pounds of gold-bearing quartz rock," and it was held bad because the indictment was "entirely silent as to whether the rock was a part of a ledge,

and was broken off and immediately carried away by the defendant; or whether, finding it already severed, he afterwards removed it," the indictment in this respect being capable of a double interpretation, for which uncertainty it was set aside.

1. Growing Crops.—In an indictment for the larceny of crops, under statutes providing against this form of larceny, it should be made to appear that the property alleged to have been stolen was a part of an outstanding crop of growing vegetables. *State v. Bragg*, 86 N. Car. 687; *State v. Shuler*, 19 S. Car. 140, holding that under the statute making it a felony to steal corn "from the field," the offense is insufficiently charged as stealing the corn "in the field," although it may be good as a charge of simple larceny.

Where the statute makes it larceny to steal any vegetables or other product "cultivated for food or market," an indictment which charges the larceny of watermelons, but does not allege that they were thus cultivated, cannot support a conviction. *State v. Thompson*, 93 N. Car. 537; *State v. Liles*, 78 N. Car. 496.

Sufficiency.—An indictment which charged the defendant with stealing fifty ears of corn, the same being a part of an outstanding crop of corn, sufficiently shows that the ears, when stolen, were a part of an outstanding crop. *Schamberger v. State*, 68 Ala. 543.

Words Equivalent to Statute.—Where the statute uses the word "part" in describing the offense, and the indictment uses the word "portion" for the same purpose, it will be sufficient, the two words being used interchangeably. *Holly v. State*, 54 Ala. 238.

The word "corn" and the phrase "outstanding crop" are not technical in meaning, but have a public signification which cannot be misunderstood. *Sullins v. State*, 53 Ala. 474.

If the vegetable alleged to have been stolen is specially mentioned in the statute, the indictment need not allege that it was cultivated for food, but otherwise if it is some vegetable not specially mentioned in the statute. *State v. Ballard*, 97 N. Car. 443.

Degree of Offense.—An indictment describing the property as "one peck

particular transaction charged as criminal and to advise the accused with reasonable certainty of the property intended, that he may be able to meet the charge at the trial,¹ and that a judgment may be pleaded in bar of a subsequent prosecution for the same offense.²

of corn, a part of an outstanding crop of corn, of the value of twenty-five cents, the personal property of A." is insufficient in not showing whether the offense was grand or petit larceny. *Smitherman v. State*, 63 Ala. 24.

1. *Chisolm v. State*, 45 Ala. 70; *Glover v. State*, 22 Fla. 493; *State v. McAnulty*, 26 Kan. 536; *State v. Dawes*, 75 Me. 51; *Merwin v. People*, 26 Mich. 299; *Territory v. Shipley*, 4 Mont. 472; *Barnes v. State*, 40 Neb. 545; *People v. Jackson*, 8 Barb. (N. Y.) 637; *State v. Nipper*, 95 N. Car. 653; *State v. Smart*, 4 Rich. L. (S. Car.) 356; *Lewis v. State*, 3 Heisk. (Tenn.) 336; *Thomas v. State*, 2 Tex. App. 293.

In Charging Attempt to Commit.—The description need not be as particular in an indictment for an attempt to steal as in one for an accomplished larceny. "Where there is only an attempt it is not always possible to say what property the would-be thief meant to steal." *Reg. v. Johnson*, L. & C. 489, *approved* in *State v. Hughes*, 76 Mo. 323. See article ATTEMPTS, vol. 3, p. 97.

Bad Spelling will not vitiate the description when the sense is clear. *Thomas v. State*, 2 Tex. App. 293. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

Description in Annexed Schedule.—"The practice of referring to a schedule annexed is too loose and without precedent to support it. The description of the goods alleged to have been stolen should be contained in the body of the complaint. The schedule may be lost or detached, and then no certainty can exist as to the nature of the charge." *Cummings's Case*, 3 Me. 51.

2. *Chisolm v. State*, 45 Ala. 66; *Glover v. State*, 22 Fla. 493; *State v. Hoyer* 40 La. Ann. 745; *State v. Edson*, 10 La. Ann. 230; *Merwin v. People*, 26 Mich. 300; *State v. Nipper*, 95 N. Car. 653.

Constitutional Right.—Under the constitutional provision which guarantees to the person accused of crime the right to demand the nature and cause of the accusation against him, he has a right to require that the indictment or information for larceny should

describe the property alleged to have been stolen. A statute which should attempt to dispense with any description of the property alleged to have been stolen would be void, and an indictment or information purporting to charge larceny, but containing no description of the stolen property, would not charge a public offense; but the legislature may prescribe rules for the description of property and declare what shall be a sufficient description. *Randall v. State*, 132 Ind. 539. See also *Riggs v. State*, 104 Ind. 262.

Objection.—If the description is too general, objection should be made by demurrer or motion to quash, or it will be waived. *State v. Thomas*, 30 La. Ann. 601; *State v. Derst*, 10 Nev. 443; *People v. Jim Ti*, 32 Cal. 60, which case, however, was explained in *People v. Cox*, 40 Cal. 275, where it was said: "Though this court held in *People v. Jim Ti*, 32 Cal. 61, that a description of the money as being 'gold and silver coin * * * of the value of \$235.75' was sufficient, where no special demurrer to the indictment was interposed, I apprehend that the omission to state any description or character whatever of the stolen money is a fatal objection, whenever presented during the progress of the cause."

"There is no rule that restricts testimony to the limits of the indictment in describing stolen property." *Roberts v. State*, 83 Ga. 369, wherein it was sought to raise objection to the admission of testimony. To the same effect, see *Taylor v. State*, 44 Ga. 263, as construed in *Brown v. State*, 86 Ga. 635.

But it is also held that, where several articles are described, an objection which does not go to the description of all the articles should be raised by an objection to the admission of evidence, and not by a motion to quash. *Shafer v. State*, 74 Ind. 90. And a motion in arrest will not reach such an objection. *Com. v. Eastman*, 2 Gray (Mass.) 76; *State v. Anderson*, 42 La. Ann. 590, in which case there was a sufficient description of some articles in one count, and an objection by a motion in arrest

(2) *General Description — Usual Names by Which Articles Are Known.* — The property should be described by the name by which it is usually known and designated, with the number of articles intended to be included, a general description by such name and number being sufficient to comply with the rules of certainty hereinbefore mentioned.¹ If articles have, in common parlance,

to an insufficient description in another count was not held to prevail.

1. *California.* — *People v. Stanford*, 64 Cal. 27.

Georgia. — *Nightengale v. State*, 94 Ga. 395.

Idaho. — *People v. Freeman*, 1 Idaho 323.

Indiana. — *Williams v. State*, 25 Ind. 150.

Indian Territory. — *Oats v. U. S.*, (Indian Ter. 1897) 38 S. W. Rep. 673.

Maryland. — *State v. Dowell*, 3 Gill & J. (Md.) 310.

Massachusetts. — *Com. v. Brettun*, 100 Mass. 207.

Minnesota. — *State v. Friend*, 47 Minn. 449.

Missouri. — *State v. Logan*, 1 Mo. 532.

North Carolina. — *State v. Clark*, 8 Ired. L. (N. Car.) 226; *State v. Martin*, 82 N. Car. 672.

South Carolina. — *State v. Smart*, 4 Rich. L. (S. Car.) 356.

Tennessee. — *Lewis v. State*, 3 Heisk. (Tenn.) 333; *State v. Longbottoms*, 11 Humph. (Tenn.) 39; *Pyland v. State*, 4 Sneed (Tenn.) 357; *Baldwin v. State*, 1 Sneed (Tenn.) 411.

Texas. — *Barner v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 559; *Dignowitty v. State*, 17 Tex. 531.

"*Divers*" and "*Divers and Sundry*." — It is held that if several articles are alleged to have been stolen at the same time it is sufficient to refer to them as "*divers*" or "*divers and sundry*," without stating the specific number, where a more specific description is to the grand jury unknown. *Com. v. Sawtelle*, 11 Cush. (Mass.) 142; *Com. v. Grimes*, 10 Gray (Mass.) 470; *Com. v. Butts*, 124 Mass. 449; *Territory v. Anderson*, 6 Dakota 300; *State v. Taunt*, 16 Minn. 109. See also *People v. Evans*, 69 Hun (N. Y.) 226. But that a better description is unknown to the grand jury, is held to be a necessary averment in such a case. *Territory v. Shipley*, 4 Mont. 468. But in this connection reference should be had to the section *infra*, III. 3. i. (5) (e) *Money — Bank Notes and Bank Bills*.

"*A Quantity*" has been held to be as good as "*divers and sundry*." *Com. v. O'Connell*, 12 Allen (Mass.) 451.

Illustrations. — In addition to the cases in section III. 3. i. (5) *Application of Rules of Certainty to Particular Cases*, the following illustrations to the general rules above given may be noted:

Yards of Cloth. — "Ten yards of brocade silk," of a specified value, is a sufficient description. *Harrington v. State*, 76 Ind. 112; and an indictment for stealing "strain cloth" is supported by proof of the theft of "strainer cloth," *State v. Underwood*, 77 N. Car. 502; and a charge of the larceny of ten yards of "jeans" is supported by proof of the larceny of thirty and one-half yards, *State v. Martin*, 82 N. Car. 672.

Wearing Apparel. — "One pair of shoes," *Palmer v. State*, 136 Ind. 393; *State v. Curtis*, 44 La. Ann. 320; "one pair of boots," *King v. State*, 44 Ind. 285; and "four pairs of pants," *State v. Curtis*, 44 La. Ann. 320; *State v. Johnson*, 30 La. Ann. 904, are sufficient descriptions, the number of pairs being alleged. But this description is taken in its ordinary meaning, and two shoes or boots which are not mates may not be described as a pair. *State v. Harris*, 3 Harr. (Del.) 559.

A hat may be described by that name without further particulars. *State v. Martin*, 82 N. Car. 672.

An indictment describing the property stolen as "one watch and chain of the value of seventy-five dollars, and the property of," etc., was held sufficient. *Powell v. State*, 88 Ga. 32. To the same effect, *Williams v. State*, 25 Ind. 150. But in *Lucas v. State*, 96 Ala. 51, it was held that under the statute against larceny from a railroad car, a description of a watch simply as a watch is not sufficiently accurate, but it should be described as a gold watch or a silver watch.

Chest or Trunk Containing Articles. — In *Potter v. State*, 39 Tex. 388, a description as "one certain trunk or chest, containing various articles of

acquired names of their own, it would be wrong to describe them by the names of the material of which they are composed, but they may be described by the names by which they are known in trade; and the same principle extends to articles known by

clothing, jewelry," etc., was held to be insufficient; but in *State v. Derst*, 10 Nev. 443, where an indictment for larceny charged the defendant with stealing "one jewelry box, containing two gold watches and chains, of the value of one hundred and fifty dollars; * * * all of said property, viz., the jewelry box and its contents, was of the value of four hundred and fifty dollars, of the goods and chattels of one J.," it was held that an objection that the charge of stealing the box containing watches and chains was not a charge of stealing the watches except by way of inference was correct; but that the objection went to the form, and not to the substance of the allegation, and was waived by a failure to demur; that it could be implied by fair and reasonable intendment, from the allegations of the indictment, that the defendant was charged with stealing the watches and chains.

Household Goods.— "One feather bed" is a sufficient description of that article. *State v. Parker*, 47 Vt. 19.

Books.— Books are sufficiently described as so many books, and the titles thereof need not be designated. *Turner v. State*, 102 Ind. 425; *State v. Logan*, 1 Mo. 532.

Cotton in Bales may be described as so many bales of cotton. *Peters v. State*, 100 Ala. 10.

Articles of Food and Drink.— A description of articles of food and drink by their usual names is sufficient with a designation of the quantity thereof. *State v. Boon*, 4 Jones L. (N. Car.) 467; *Com. v. Eastman*, 2 Gray (Mass.) 76; *State v. Hupp*, 31 W. Va. 355; *Reg. v. Gallears*, 2 C. & K. 981, 61 E. C. L. 981, holding that a description of "one ham" was sufficient, though it did not state the animal of which the ham had formed a part; *State v. Hoyer*, 40 La. Ann. 744, holding that a description as "some bottled beer" is insufficient, and that while "a minute and detailed description of the property stolen is not required, * * * there must be such a description, numerically and specifically, as to individualize the property with legal certainty."

"Two hams of bacon and two shoulders of bacon, and eight jowls, weighing one hundred pounds, of the value of fifteen dollars," is sufficient, being as definite as the nature of the articles stolen will permit. *Taylor v. State*, 3 Heisk. (Tenn.) 460.

A charge of stealing "meat," which applies not only to the flesh of all animals used for food but in the general sense of all kinds of provisions, has been held to be too vague and uncertain. *State v. Morey*, 2 Wis. 494; *State v. Patrick*, 79 N. Car. 655, following the last case and saying upon this point: "We find no direct authority in our reports nor in the text books."

A Cord of Wood is a well-known measure and is of itself a well-known and sufficient description. Indictments must describe articles stolen by the name they usually bear and specify the number and value of each species or particular kind. This requirement is complied with where the indictment charges the theft of a specified number of "cords of wood, of the value," etc. *State v. Labauve*, 46 La. Ann. 548; *State v. Parker*, 34 Ark. 159.

Immaterial Variances.— An indictment for stealing "corn" is supported by proof of stealing "corn in the ear," *State v. Nipper*, 95 N. Car. 653; and an allegation of "corn in the ear" is supported by proof of "Indian corn" or "maize." *Com. v. Pine*, 3 Pa. L. J. 411.

An indictment for stealing a "plough" is not sustained by proof of stealing a "ploughshare." *State v. Cockfield*, 15 Rich. L. (S. Car.) 316.

An indictment charging the larceny of silverware is sustained by proof of stealing plated ware, where there was no finding under section 7216 of the *Ohio Revised Statutes* that the variance was material. *Goodall v. State*, 22 Ohio St. 203.

An indictment charging a larceny of a "bull tongue" is supported by proof of stealing a "ploughshare," it appearing from the evidence that the article stolen was known and designated in the neighborhood as a "bull tongue." *State v. Clark*, 8 Ired. L. (N. Car.) 226.

particular names in all the arts, pursuits, and employments of life.¹

(3) *Unnecessary Particularity*. — The pleader should never give a description unless he be furnished with the evidence to make it good, because, even though an indictment or information contains unnecessary specifications or describes the offense with more particularity than is necessary, the proof must correspond with the allegations.²

(4) *More Certain Description Unknown to Grand Jury*. — If a sufficiently certain description cannot be given, it may be alleged in the indictment or information that a better description is to the grand jury unknown.³

1. *State v. Clark*, 8 Ired. L. (N. Car.) 226.

Thus, ingots of tin or bars of iron may properly be designated in an indictment for larceny as so many pounds of tin or so many pounds of iron, but it would be wrong to describe cloth as so many pounds of wool, or sovereigns as so many ounces of gold. *Reg. v. Mansfield*, C. & M. 140, 41 E. C. L. 81.

Article Described by Name Before Destruction. — An indictment charging the larceny of a cast-iron balance wheel is sustained by evidence that the wheel was first broken in pieces and converted to old iron. *Gettinger v. State*, 13 Neb. 309.

"Three Horseshoes, * * * of the value of seventy-five cents," is a sufficient description. *Dougherty v. State*, 20 Ind. 442.

Books — Printed Sheets. — A charge of stealing "printed sheets" is not sustained by proof that they were stolen after they were folded, stitched, bound, and trimmed. The charge should have been for larceny of books. *Com. v. Merrifield*, 4 Met. (Mass.) 468.

2. *Alabama*. — *Morris v. State*, 97 Ala. 82.

Georgia. — *Robertson v. State*, 97 Ga. 206; *Crenshaw v. State*, 64 Ga. 449.

Maine. — *State v. Jackson*, 30 Me. 29; *State v. Noble*, 15 Me. 476.

Tennessee. — *Turner v. State*, 3 Heisk. (Tenn.) 452.

Texas. — *Rose v. State*, 1 Tex. App. 401; *Ranjel v. State*, 1 Tex. App. 461; *Scia v. State*, 2 Tex. App. 297; *Hill v. State*, 41 Tex. 257; *Allen v. State*, 8 Tex. App. 360; *Statum v. State*, 9 Tex. App. 273.

See article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 344.

3. *Du Bois v. State*, 50 Ala. 139; *Riggs v. State*, 104 Ind. 261; *State v.*

Hoke, 84 Ind. 137; *Hart v. State*, 55 Ind. 599; *Com. v. Grimes*, 10 Gray (Mass.) 470; *Com. v. Sawtelle*, 11 Cush. (Mass.) 142; *State v. Taunt*, 16 Minn. 109; *Territory v. Shipley*, 4 Mont. 468; *People v. Dimick*, 41 Hun (N. Y.) 616, 107 N. Y. 13; *Haskins v. People*, 16 N. Y. 344; *Statum v. State*, 9 Tex. App. 273.

Rather than Unnecessary Certainty it should be charged that a better description is unknown, because of the rule heretofore stated the evidence must correspond with the allegation. "Give such [description] as can be proved; if that is not sufficient, allege in the information that a better one cannot be given." *Statum v. State*, 9 Tex. App. 273.

Necessity for Excuse. — If such a description as will conform to the rules of certainty cannot be given, it is held that the indictment or information must allege this excuse. *State v. Hoke*, 84 Ind. 137; *State v. Tilney*, 38 Kan. 714; *State v. Dawes*, 75 Me. 51; *Territory v. Shipley*, 4 Mont. 468. See also *State v. McClung*, 35 W. Va. 280.

Allegation with Sufficient Description — Surplusage. — If a sufficient description is given, an allegation that a better description is unknown is immaterial and may be rejected as surplusage. *Carden v. State*, 89 Ala. 131.

Effect of Allegation — Variance. — In *Merwin v. People*, 26 Mich. 301, it was said that this allegation is not merely formal, but that on the contrary, if it be shown that a better description was, in fact, known to the grand jury, then — the excuse failing — it has been repeatedly held that the indictment is bad, or that the defendant should be acquitted, or the judgment arrested or reversed.

And where it appeared from the testimony that a witness who testified be-

(5) *Application of Rules of Certainty to Particular Cases* — (a) **General Statement.** — The determination of sufficiency of the description of property is but an application of the general rules stated in the preceding paragraphs. In the notes to those paragraphs many illustrations of these rules have already been given, but the subject has been before the courts so often and in so many phases that further notice of particular instances is necessary.

(b) **Description of Animals in General.** — It is not essential in an indictment for the larceny of an animal to describe it by earmarks, color, or the like.¹ If, however, a more detailed description than is necessary is attempted, the proof on the trial must support the allegations in the indictment in that regard.²

fore the grand jury knew just what articles had been stolen, it was held that this showed that ordinary diligence on the part of the grand jury would have enabled its members to have learned just what other articles besides those mentioned were stolen, and that the variance rendered the indictment fatally defective. *State v. Thompson*, 137 Mo. 620.

In *Com. v. Gallagher*, 126 Mass. 54, it was held that in the absence of evidence that the grand jury had a full description of the property, an instruction that, if the jury should find that the grand jury had a full description, they should acquit, was properly refused.

In *Com. v. Hussey*, 111 Mass. 432, which was an indictment for embezzlement of divers promissory notes, the notes were described as "of the amount and of the value of sixty-five dollars, a more particular description of which is to the jurors unknown," and upon the trial two witnesses testified that the notes taken were one bill for fifty dollars and two bills for ten dollars each, and that they so testified before the grand jury. The court held that under such a description it was not a material variance to prove the larceny of less than the alleged amount and value, the amount and value not being descriptive of the offense in such manner as to fix its identity.

Not Traversable. — It has been held that the averment in an indictment that a more particular description of the property is unknown is not traversable. *State v. Taunt*, 16 Minn. 109.

Particular Description of Enough to Constitute the Offense has been held to render immaterial any variance as to other articles of which a particular de-

scription is alleged to be unknown. *Davis v. State*, 32 Tex. Crim. Rep. 377.

1. *Perry v. State*, 37 Ark. 54; *People v. Stanford*, 64 Cal. 27; *Mizell v. State*, 38 Fla. 20; *Jones v. State*, 51 Miss. 718; *Turner v. State*, 3 Heisk. (Tenn.) 452; *Allen v. State*, 8 Tex. App. 360.

"One Mare" is sufficient description of the property stolen. It is well known and in common use, and is sufficiently definite and particular for the purposes of the indictment. *State v. Friend*, 47 Minn. 449.

Specific Description Required by Statute. — In *Georgia*, while a description by earmarks was not required, a statute made necessary a more specific description than a designation by generic name. The statute declared that such indictments should designate the nature, character, and sex of the animal and also add some other description fixing its identity. *Brown v. State*, 86 Ga. 633, *distinguishing* *Taylor v. State*, 44 Ga. 263, which seems to hold otherwise, as follows: "There, the defendant was indicted for stealing a 'chestnut sorrel horse,' entered his plea of not guilty, without making any objection to the indictment, and was convicted. He then moved in arrest of judgment, the motion was denied, and this court sustained the court below in so doing. Now, inasmuch as the word 'horse' may mean a male horse, of the horse species, and the defendant was satisfied with the description in the indictment, and did not, by demurrer or otherwise, demand any further or more particular description, it was too late, after verdict, to make his objection to the indictment. This is all the judgment in that case amounts to, and we think it was right."

2. *Robertson v. State*, 97 Ga. 206; *Ranjel v. State*, 1 Tex. App. 461. See

Generic Term. — The general rule now adopted seems to be that it is sufficient to describe an animal by the general name of the class to which it belongs.¹ This has been held to be the rule notwithstanding the statute may designate not only the genus but also the several species falling thereunder.² Thus a cow may be

supra, III. 3. i. (3) *Unnecessary Particularity*.

Color in the Alternative. — An indictment describing the property as "one black or brown mare or filly, branded with a small mule shoe on the left shoulder," was held sufficient, because, it being unnecessary to state the color, putting it in the alternative was not a fatal objection. *People v. Smith*, 15 Cal. 409. See also *State v. Gilbert*, 13 Vt. 647, holding further that "bay or brown" was a description of the same color.

Predominant Color. — Where the indictment charged the larceny of a red milch cow and the proof showed that the animal had small white spots, one on the face and one on the jaw, etc., and that the bushy part of her tail was white, the variance was held immaterial, the prevailing color being red. *Kennon v. Territory*, 5 Okla. 685.

If the color of the animal is alleged to be bay, it will be supported by proof that it was a bay or red sorrel. *Turner v. State*, 3 Heisk. (Tenn.) 452.

1. *Mizell v. State*, 38 Fla. 20.

"A Yearling," without further designation of the animal, is not sufficient. *Stollenwerk v. State*, 55 Ala. 142.

A "Chicken" is a sufficient description and will be supported by proof of the stealing of a hen. *State v. Bassett*, 34 La. Ann. 1108.

A Turkey may be described by that name. *State v. Turner*, 66 N. Car. 618, holding this fowl not to be *fera natura*.

Hogs may be described by that generic name. *People v. Stanford*, 64 Cal. 27; *State v. Carter*, 33 La. Ann. 1214; *State v. Stelly*, 48 La. Ann. 1478; *Robertson v. State*, 97 Ga. 206; *Barnes v. State*, 40 Neb. 545; *Grant v. State*, 2 Tex. App. 164; *State v. Mansfield*, 33 Tex. 129; *Lunn v. State*, 44 Tex. 85.

Hog for Pig, and Vice Versa. — It is held that an indictment for the larceny of a hog is supported by evidence of the larceny of a pig. *Lavender v. State*, 60 Ala. 60; *Washington v. State*, 58 Ala. 355. But in *State v. M'Lain*, 2 Brev. (S. Car.) 443, it was held that an indictment for larceny of a pig was

not sufficient, as the word "pig" was not in the statute against hog stealing.

Hog for Shoat. — An indictment for stealing a hog was sustained by proof of the stealing of a shoat. *State v. Godet*, 7 Ired. L. (N. Car.) 210.

Variance as to Sex. — It being alleged in the indictment that the hog stolen was a female, and the only evidence bearing on the question of sex as to the animal actually stolen showing that it was a male, there was a fatal variance between the charge and the proof, and consequently the verdict of guilty was contrary to law and the evidence. This is true although the prosecutor testified he had lost a female hog of like color and size about the same time, there being no proof whatever showing that the accused was in any manner connected with the larceny of this female hog, if in fact it was stolen at all. *Green v. State*, 95 Ga. 463.

Sheep. — An indictment for the larceny of a "rig" sheep described it as "one sheep," and the court held it to be immaterial whether the sheep was a rig or a wether. *Rex v. Stroud*, 6 C. & P. 535, 25 E. C. L. 529.

Proof that the accused stole a lamb or a ewe or a ram will support an indictment for stealing a sheep. *State v. Tootle*, 2 Harr. (Del.) 541; *Reg. v. Spicer*, 1 C. & K. 699, 47 E. C. L. 699. But see *Rex v. Birket*, 4 C. & P. 216, 19 E. C. L. 351.

Estrays. — If the animal stolen is an estray, it need not be described as coming within the meaning of the term. *McGee v. State*, 43 Tex. 662. See *supra*, III. 3. e. (5) (f) *Estrays*.

2. *Mizell v. State*, 38 Fla. 22; *People v. Pico*, 62 Cal. 50; *People v. Montieith*, 73 Cal. 7; *State v. Donnegan*, 34 Mo. 67; *People v. Butler*, 2 Utah 504; *Smythe v. State*, 17 Tex. App. 244; *State v. Gooch*, 60 Ark. 218 [*quoting* *Reg. v. Aldridge*, 4 Cox C. C. 143], the last seven cases holding that notwithstanding the statute mentions not only "horse," but also "mare" and "gelding," the word "horse" is a generic term and includes both mare and gelding. *Contra*, *State v. Brookhouse*, 10 Wash. 88; *State v. Plunket*, 2 Stew.

designated by the generic name of the class to which it belongs, as by calling it a cow,¹ and animals of the bovine class may generally be designated by the use of the term "cattle;"² or it may be sufficient to designate the animal by its specific name, or by the general class to which it belongs, followed by its specific name, as "neat cattle," "oxen," "steers," "beef cattle," and the like.³

(Ala.) 11; *Turley v. State*, 3 Humph. (Tenn.) 323, though later, under a statute in *Tennessee* providing that "the words horse, mule, ass, in the preceding section, include animals of both sexes and all ages, embraced under these generic terms, respectively," it was held that an indictment for taking a horse is supported by proof of the taking of a gelding. *Wiley v. State*, 3 Coldw. (Tenn.) 375. See also the cases generally following in the notes in this section.

In *England*, originally, the doctrine was that inasmuch as the statute mentions not only "horse, but also "mare" and "gelding," therefore the one really meant should be stated. This was at one time the rule in *England*. *Rex v. Puddifoot*, 1 Moo. 247 [cited in *State v. Gooch*, 60 Ark. 218]; *Rex v. Cook*, 1 Leach C. C. 105.

1. *State v. Charlot*, 8 Rob. (La.) 529; *Wein v. State*, 14 Mo. 125; *Johnson v. State*, 1 Tex. App. 118.

An information described the property stolen as "an animal of the cow kind," and the court criticised it as being too loose and indefinite, but held it sufficient on motion in arrest of judgment, saying that it might be cured by amendment. *State v. Johnson*, 29 La. Ann. 717.

Cow for Heifer.—*State v. Crow*, 107 Mo. 345; *Parker v. State*, 39 Ala. 365; *People v. Soto*, 49 Cal. 67. *Contra*, *Rex v. Cook*, 1 Leach C. C. 105, holding that proof of the stealing of a heifer would not support an allegation of the stealing of a cow.

Heifer for Cow.—An indictment charging the larceny of a heifer is supported by proof showing the larceny of a cow. *Garvin v. State*, 52 Miss. 207.

Cow for Bull.—An allegation of larceny of a cow is not sustained by proof of larceny of a bull. *State v. McMinn*, 34 Ark. 160.

2. *People v. Barnes*, 65 Cal. 16; *People v. Littlefield*, 5 Cal. 355; *State v. Lawn*, 80 Mo. 241; *State v. Murphy*, 39 Tex. 46; *McIntosh v. State*, 18 Tex. App. 284. *Contra*, *State v. Brookhouse*, 10 Wash. 88.

When Sex Is Alleged, an indictment for stealing a cow sufficiently designates the species to which the animal belongs, though in lieu of the word "cow" it uses the words "one animal of the female sex and of that species of animals known as cattle." *Nightengale v. State*, 94 Ga. 395.

3. **Neat Cattle.**—*State v. Hoffman*, 53 Kan. 700. The following descriptions were held sufficient: "Certain cattle, to wit, one cow," under a statute making it larceny to steal neat cattle. *State v. Crow*, 107 Mo. 341. "One head of neat cattle, of the value of twelve dollars." *State v. Murphy*, 39 Tex. 46.

Insufficient Description.—Where an indictment charging the larceny of cattle described them as "three head of neat stock or beeves," it was held insufficient for the reason that the word "beeves" may include neat stock, but that in common and legal parlance not all neat stock are beeves. *Castello v. State*, 36 Tex. 324.

Oxen.—An indictment for theft of cattle sufficiently describes them as "certain oxen" or "work oxen." *Camplin v. State*, 1 Tex. App. 108; *Robertson v. State*, 1 Tex. App. 311; *Henry v. State*, 45 Tex. 84; *Musquez v. State*, 41 Tex. 227; *Parchman v. State*, 44 Tex. 192.

Steer.—*State v. Lange*, 22 Tex. 591; *State v. Earp*, 41 Tex. 487. Under a statute providing for the larceny of "neat cattle," an indictment is sufficient which charges the larceny of "certain cattle, to wit, one steer," and the value need not be alleged. The court held that the term "cattle" includes domestic quadrupeds collectively; that the term "neat cattle" embraces only cattle of the bovine species; that the term "steer" applies to a class of "neat cattle;" and that it would be sufficient to employ the term "steer" without using in connection with it the term "cattle" or "neat cattle." *State v. Lawn*, 80 Mo. 241.

"One certain steer, * * * being then and there the corporeal personal property and neat cattle of," etc., was

But it is also held that the term "cattle" embraces only such animals as belong to that class known as bovine, and does not include others, such as sheep, goats, and the like.¹

Horses, Mares, Geldings, etc. — In charging the larceny of a horse, it is sufficient to describe the animal by that name,² and the word "horse" is held to be used in its generic sense and to include all animals of the horse species, without regard to sex or other description.³

held sufficient. *State v. Earp*, 41 Tex. 487.

Steer for Bull or Cow. — And where the indictment charges the larceny of a "steer" it is not sustained by proof of the larceny of a cow or a bull. *State v. Royster*, 65 N. Car. 539; *Territory v. Martinez*, (Arizona 1896) 44 Pac. Rep. 1089.

Bull Yearling. — Under the *Texas* statute for the theft of "cattle," it is sufficient to describe the animal stolen as "a bull yearling." *Berryman v. State*, 45 Tex. 1; also as "one beef steer," *Short v. State*, 36 Tex. 644.

Calf. — A description of a calf as "one certain calf of the neat cattle kind" was held to be sufficient. *Grant v. State*, 3 Tex. App. 1. And the description "two calves" was held sufficient over an objection that the term "calf" was as applicable to the young of buffaloes and other animals as to that of a domestic cow, under a statute that defects which do not prejudice substantial rights will not render an indictment invalid. *Oats v. U. S.*, (Indian Ter. 1897) 35 S. W. Rep. 673.

Beeves or Beef Cattle. — In an indictment for larceny of cattle, the following descriptions were held sufficient: "One beef steer, neat cattle." *Moore v. State*, 2 Tex. App. 350. "One beef, then and there being cattle." *Davis v. State*, 40 Tex. 134. "Beef steer." *Robertson v. State*, 1 Tex. App. 311. "One beef, of the value of fifteen dollars, of the property of," etc. *State v. Baden*, 42 La. Ann. 295. "Two beeves, the same being cattle." *Hubotter v. State*, 32 Tex. 479. "One beef cattle." *Duval v. State*, 8 Tex. App. 370.

1. *McIntosh v. State*, 18 Tex. App. 284; *State v. Murphy*, 39 Tex. 46.

2. *Barner v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 559; *Wright v. State*, 10 Tex. App. 476; *Smythe v. State*, 17 Tex. App. 244; *McBride v. Com.*, 13 Bush (Ky.) 337; *People v. Sensabaugh*, 2 Utah 473.

An indictment charged the theft of

"an animal of the horse species." The court said: "Why the pleader did not describe the property stolen simply as a horse 'passeth our understanding.' Perhaps he was experimenting to ascertain how closely he could approach to the pitfall of bad pleading without falling into it. But whatever may have been his reason for this novel form of description, it is a form not to be commended for its simplicity, however correct it may be in the technology of zoölogists. * * * In zoölogy the horse is a species of the genus *equus*. This genus, according to modern naturalists, consists of six distinct though nearly allied species, namely, the horse, the dzeggithia, the ass, the quagga, the mountain zebra, and the zebra of the plains. * * * If the indictment had described the property as 'an animal of the horse genus,' it would unquestionably have been bad, for this would have included an animal of either of the six species of the genus *equus*. But instead of the word 'genus' it uses the word 'species,' which means 'a sort, a kind, a class subordinate to a genus' (Webster's Primary Dictionary), while the word 'genus' signifies 'a class embracing many species' (*Ibid.*). The expression 'an animal of the horse species' would, therefore, only include the animals known as stallions, geldings, mares, fillies, and colts. It would not include any animal belonging to a distinct species, though of the same genus." *Smythe v. State*, 17 Tex. App. 251.

A Mule may be described as such. *State v. King*, 31 La. Ann. 179.

3. *State v. Gooch*, 60 Ark. 218; *Reg. v. Aldridge*, 4 Cox C. C. 143; *People v. Pico*, 62 Cal. 50; *People v. Monteith*, 73 Cal. 7; *Jones v. State*, 51 Miss. 718; *State v. Donnegan*, 34 Mo. 67; *Smythe v. State*, 17 Tex. App. 251; *People v. Butler*, 2 Utah 504; *Wiley v. State*, 3 Coldw. (Tenn.) 375.

Where the theft of a gelding was a specific offense, an indictment describing the animal as a gelding was held

(c) **Animals Fera Nature.** — Animals *fera nature* not being subjects of larceny unless when they are reclaimed or confined, or dead and valuable for food, or otherwise,¹ an indictment charging the larceny of such an animal must bring it within some of these conditions.²

(d) **Dead Animals.** — An indictment for the larceny of a dead animal must describe it as such, the law presuming the animal to be alive unless the contrary is stated.³

(e) **Money — Bank Notes and Bank Bills** — *aa.* DESCRIPTION OF MONEY GENERALLY. — In the absence of statute, it is not sufficient if money is

to be proper. *Johnson v. State*, 16 Tex. App. 402.

1. See article *Larceny*, 12 Am. and Eng. Encyc. of Law (1st ed.) 783.

2. **Tame Pigeons.** — In *Reg. v. Cheafor*, 15 Jur. 1065, it was held that in an indictment charging the larceny of tame pigeons, the word "tame" sufficiently showed that the pigeons were reclaimed. See also, for a similar averment, *Haywood v. State*, 41 Ark. 480.

In *Com. v. Chace*, 9 Pick. (Mass.) 15, the conviction was set aside because the evidence did not show whether the doves alleged to have been stolen were on the flight a mile from the grounds of the owner or mingled with the doves of other persons, enjoying their natural liberty, but it does not appear what description was given in the indictment.

Bees. — "Three beehives, of the value of five dollars; and three swarms of bees, of the value of three dollars; and forty pounds of honey, of the value of five dollars," with an allegation of ownership, was held to be good after verdict, it being taken by indictment that the bees were reclaimed and that the honey was the property of the alleged owner. *Harvey v. Com.*, 23 Gratt. (Va.) 941.

Exception — Oysters. — Under an indictment for stealing oysters, it was held that while the principle applying to the description of animals *fera natura* was not questioned, oysters, "though usually included in that description of animals, do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals, they continue perpetually in his occupation and will not stray from his house or person. Unlike animals *fera natura*, they do not

require to be reclaimed and made tame by art, industry, or education, nor to be confined in order to be within the immediate power of the owner." *State v. Taylor*, 27 N. J. L. 117.

3. *Com. v. Beaman*, 8 Gray (Mass.) 499 [citing 2 East P. C. 607; *Rex v. Halloway*, 1 C. & P. 128, 11 E. C. L. 342; *Rex v. Edwards*, R. & R. C. C. 497].

Same Name when Dead as when Alive. — It has been held that an indictment charging the larceny of a dead fish must allege the fish to be dead, notwithstanding it is called by the same name when dead as when alive. *State v. Krider*, 78 N. Car. 481. And the same ruling was made in *Com. v. Beaman*, 8 Gray (Mass.) 497, wherein it was said that though in several modern English books the rule is stated otherwise, they all refer to the case of *Rex v. Puckering*, 1 Moo. C. C. 242, and that if that case "can be justly considered to support any distinction between animals that have the same appellation when dead and when alive, and other animals, we do not incline, on the authority of that case alone, to depart from what we have always supposed to be the legal meaning of an indictment charging the theft of an animal without alleging it to be alive; namely, that it means a live animal."

In *State v. Donovan*, 1 Houst. Cr. Cas. (Del.) 43, it was held, in accordance with the English reports above referred to, that where animals *fera natura* are called by the same name whether dead or alive, it is competent to describe them by such name without alleging that they are dead.

Objection Must Be Saved on Appeal. — In *North Carolina* it was held that where it did not appear on the bill of exceptions that any question was made in the trial court as to whether the animal was alive or dead at the time it

described only by the aggregate amount, without any specification of the number, kind, or denomination of the pieces; the number of pieces and their denomination should be stated, as well as whether they are of gold or silver.¹ But a less strict rule

was stolen, it was too late on appeal to rely upon matter incidentally stated as going to show that the animal was dead when stolen. *State v. Jenkins*, 6 Jones L. (N. Car.) 19.

1. *Merwin v. People*, 26 Mich. 301; *Lord v. State*, 20 N. H. 404; *State v. Longbottoms*, 11 Humph. (Tenn.) 39; *Wells v. State*, 4 Tex. App. 24; *Boyle v. State*, 37 Tex. 360; *Lavarre v. State*, 1 Tex. App. 685; *People v. Ball*, 14 Cal. 101. See also *supra*, III. 3. c. (2) *Sufficiency of Allegation*.

Current Money of the United States. — An indictment describing the property stolen as "three hundred gold dollars," without alleging the value of the dollars or that they were of the lawful money or current coin of the United States, or other country, was held to be defective for want of sufficient description. *Lavarre v. State*, 1 Tex. App. 685. See also *Williams v. State*, 5 Tex. App. 117; *Merwin v. People*, 26 Mich. 298; *Barton v. State*, 29 Ark. 68.

Where an indictment charged the theft of "five ten-dollar bills, of the value of ten dollars each," etc., it was held that this was not an allegation that the bills were money. *Jackson v. State*, 34 Tex. Crim. Rep. 90. See also *Dukes v. State*, 22 Tex. App. 192.

So in an indictment for larceny, the description of the articles stolen as "one five and one two-dollar greenback bill United States currency, national bank bills, and money," was held to be bad. *Lewis v. State*, 3 Heisk. (Tenn.) 333.

And "sundry bank bills issued by the authority of the United States of America, usually known as 'greenbacks,' amounting in all to the sum of \$180, of the value of \$180," and "sundry bank bills issued by authority of the United States of America, usually known as 'greenbacks,' amounting in the aggregate to \$589, of the value of \$589," were held to be insufficient. *Territory v. Shipley*, 4 Mont. 472.

Presumption as to Kind of Coin. — In an indictment for stealing gold coin, to say "United States gold coin" is the same as to say "current gold coin of the United States," etc., and where the several denominations and the value of

such coin are alleged in dollars and cents it may be presumed that the court and jury will know that a coin of the value of ten dollars is an eagle, etc. *Daily v. State*, 10 Ind. 536.

Treasury Notes. — A description as "United States treasury notes and United States silver certificates, money of the amount and value of one thousand dollars," was held too general, the court saying that while the Criminal Code had relaxed somewhat the common-law rule respecting the matters of form in criminal pleadings, in matters of substance there had been practically no change. *State v. Tilney*, 38 Kan. 714.

"One Lot of Treasury Notes," without any specific statement of the denomination, number, or value, is too indefinite. *Rhodus v. Com.*, 2 Duv. (Ky.) 159.

Sundry Pieces of Silver Coin of the value of twenty-five dollars" was held to be too vague in *U. S. v. Kurtz*, 4 Cranch (C. C.) 674; but "one hundred silver coins of the value of seventy-five dollars" was held to be sufficient in *U. S. v. Barry*, 4 Cranch (C. C.) 606.

Objection. — If an indictment for stealing money fails to describe the money with sufficient particularity, the objection should be taken by demurrer, and if not so taken is waived. *People v. Jim Ti*, 32 Cal. 60.

Where the description was "national bank currency and United States treasury notes of the amount and value of one hundred and sixty-four dollars," and no motion was made to quash and no plea in abatement was interposed, but the defendant pleaded not guilty and went to trial upon the merits, it was held that while the description was too general and indefinite, yet it was a public offense to steal "national bank currency and United States treasury notes of the amount and value of one hundred and sixty-four dollars," whatever the description, or the denomination, or the number, or the aggregate amount of said currency or notes might be, and that the defendant, having taken his chances of an acquittal, could not thereafter object because the information did not state the offense as

has also been followed, under which it is held unnecessary to describe each piece of coin alleged to have been stolen,¹ or under statute a general description of money, as in the case of other property, by name, quantity, number, and ownership, is sufficient;² and sometimes money, United States currency, bank notes, etc., may be sufficiently described under statute in general terms, without specifying the coin, number, denomination, or kind thereof,³ it being sufficient to describe it simply as money of a certain amount, without specifying any particular kind or coin.⁴

definitely as it might have done. *State v. Henry*, 24 Kan. 457.

Proof.—Coin is not capable of the same specific description and identification as other property, and therefore the same exactness in proof cannot be had. It is therefore proper that the jury should be left to determine, from all the testimony and all the circumstances, whether the coin proved to have been stolen was the same kind of coin as that charged in the indictment; and if several kinds are stated in the indictment, then the proof should show that one or more of such kinds were among the kinds of coin stolen. *People v. Linn*, 23 Cal. 151. See also *Wilson v. State*, 66 Ga. 591.

1. *Com. v. Grimes*, 10 Gray (Mass.) 470; *Com. v. Sawtelle*, 11 Cush. (Mass.) 142; *McKane v. State*, 11 Ind. 195; *Porter v. State*, 26 Fla. 56; *Berry v. State*, 10 Ga. 511; *Cody v. State*, 100 Ga. 105; *Munson v. State*, 4 Greene (Iowa) 483; *Chisolm v. State*, 45 Ala. 70, holding that "the number of pieces of coin, the denomination, or the kind, whether gold, silver, copper, or other material, is not a necessary ingredient of a larceny of coin of the United States. Any coin of the United States is the subject of larceny, and the prisoner cannot object if he has his future defense as to any coin charged in this indictment."

Trade Dollars.—"Sixty silver coins (of the kind usually known as dollars), of the value of one dollar each," is a sufficient designation of trade dollars. *Miller v. People*, 21 Hun (N. Y.) 443.

2. *Bryant v. State*, 16 Tex. App. 148; *Bravo v. State*, 20 Tex. App. 178; *Kelley v. State*, 34 Tex. Crim. Rep. 412.

3. *Travis v. Com.*, 96 Ky. 77; *Jones v. Com.*, 13 Bush (Ky.) 356; *State v. Edson*, 10 La. Ann. 230, which holds that the statute creates an exception to the general rule that property must be described with such certainty as to enable the jury to decide whether the

chattel proved to have been stolen is the very same as that upon which the indictment was founded, to show judicially to the court that it could have been the subject of the offense charged, and to enable the defendant to plead the acquittal or conviction to a subsequent indictment relating to the same property; *People v. Reavey*, 38 Hun (N. Y.) 418.

Surplusage.—An indictment for the larceny of money or United States currency being good if it simply alleges the larceny of the same, without specifying the coin, number, denomination, or kind thereof, an indictment meets these requirements notwithstanding the words "of Kentucky" are added to the description "lawful currency of the United States," the words "of Kentucky" being merely surplusage and in no way calculated to mislead or prejudice the defendant. *Travis v. Com.*, 96 Ky. 77.

4. *Indiana.*—*Rains v. State*, 137 Ind. 83; *Randall v. State*, 132 Ind. 539; *Hammond v. State*, 121 Ind. 512; *Lewis v. State*, 113 Ind. 59.

Louisiana.—*State v. Walker*, 22 La. Ann. 425; *State v. Green*, 27 La. Ann. 598; *State v. King*, 37 La. Ann. 91. But see *State v. Monroe*, 30 La. Ann. 1241.

Michigan.—*Brown v. People*, 29 Mich. 232.

North Carolina.—*State v. Carter*, 113 N. Car. 640; *State v. Freeman*, 89 N. Car. 469.

Ohio.—*McDivit v. State*, 20 Ohio St. 231.

Texas.—*Otero v. State*, 30 Tex. App. 450; *Morris v. State*, (Tex. Crim. App. 1893) 20 S. W. Rep. 979; *Goldstein v. State*, (Tex. Crim. App. 1893) 23 S. W. Rep. 686.

Washington.—*State v. Hanshew*, 3 Wash. 12; *State v. Blanchard*, 11 Wash. 116.

"A Quantity of Money."—A description of money as "a quantity of money of the value of seventy-seven dollars,"

Excuse for Want of Accurate Description. — As has been shown, if a sufficient description of property cannot be given, it will be enough to state that a better description than that given is unknown to the grand jury, and this is the rule where the

would be insufficient at common law, but is sufficient under the Code of *Washington*. *State v. Hanshaw*, 3 Wash. 12.

"United States Paper Currency Money" includes treasury notes, commonly called greenbacks, silver certificates, and gold certificates. *Rucker v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 65.

United States Currency. — An indictment for larceny which describes the property stolen as "ninety dollars, in paper currency of the United States of America," is sufficiently specific. *State v. Ziord*, 30 La. Ann. 867. See also, to the same effect, *State v. Carro*, 26 La. Ann. 377; *Riggs v. State*, 104 Ind. 261.

"Currency of the United States" is the same thing as "United States currency." The addition of the word "national" can make no difference; if that word has no meaning it can be rejected as surplusage, and if it has any meaning at all it can only refer to the "nation" of the United States, and currency of the nation of the United States must mean currency of the United States. *Dull v. Com.*, 25 Gratt. (Va.) 965, holding that prior to the Act of Feb. 28, 1874, it had been decided in Virginia that in an indictment for larceny a description as "United States currency" was not sufficient (*Leftwich v. Com.*, 20 Gratt. (Va.) 716), and that in consequence of that decision the above act was passed by which, among other things, it was provided that "in a prosecution for the larceny of United States currency" "it shall be sufficient if the accused be proved guilty of the larceny of national banknotes or United States treasury notes."

"A ten-dollar bill of the currency of the country, commonly called paper money, of the value of ten dollars," is a sufficient specification of the article stolen. *State v. Evans*, 15 Rich. L. (S. Car.) 31, citing *State v. Smart*, 4 Rich. L. (S. Car.) 363.

"Seven \$100 notes, of the value and denomination of \$100 each, consisting of national banknotes and national currency notes called greenbacks, and all of the aggregate value of \$700," is sufficient. The only respect in which it could well be made more specific is

that it might have stated how many of the \$100 notes were national banknotes and how many were national currency notes. But this was wholly unnecessary, because if there was one of each, or of either, of the value of \$100, the indictment was sufficient. *State v. Graham*, 65 Iowa 617.

In Absence of Statute. — "Two ten-dollar bills of United States currency" is too general and uncertain in the absence of a statute declaring the stealing of United States currency *eo nomine* to be a public offense. *State v. Oakley*, 51 Ark. 112 [citing *Leftwich v. Com.*, 20 Gratt. (Va.) 720; *Boyle v. State*, 37 Tex. 360; *Martinez v. State*, 41 Tex. 164; *Merrill v. State*, 45 Miss. 651; *Barton v. State*, 29 Ark. 68; *State v. Ward*, 48 Ark. 36; *State v. Longbottoms*, 11 Humph. (Tenn.) 39; *State v. Morey*, 2 Wis. 494]; *Leonard v. State*, (Ala. 1897) 22 So. Rep. 564, holding that "sixty dollars in United States currency" is insufficient without an averment that a more certain description is unknown.

Necessity of Proof under Unnecessary Allegation. — It is held that although an indictment need not allege that the money was lawful currency of the United States, yet if the allegation be made, the description must be proved as laid, and proof of money without more would not support a conviction. *Blount v. State*, 76 Ga. 18, *Watson v. State*, 64 Ga. 61; *Hamilton v. State*, 60 Ind. 193.

But the fact that the money stolen was silver coin establishes beyond controversy that it was "lawful currency of the United States," and conforms to the description as such. *Blount v. State*, 76 Ga. 17.

Treasury Notes and Certificates. — An indictment charging the stealing of a "United States treasury note" is supported by proof of the theft of a "gold certificate" issued under an Act of Congress. *Randall v. State*, 53 N. J. L. 485.

Silver certificates, though in a technical sense not United States treasury notes, may be regarded as such under an indictment charging the larceny of the latter. *Keating v. People*, 160 Ill. 483.

required degree of certainty cannot be used in specifying the pieces or denomination of coins stolen, or the number and denomination of paper currency or bank bills.¹

bb. VALUE. — When an indictment alleges the stealing of so many dollars, it is held that the word "dollars" imports to the common understanding the meaning of a thing of value, and is sufficient when connected with the necessary allegation for the purpose of specific description, "in United States currency."²

Promissory Notes. — But under a charge of stealing "certain promissory notes for the payment of money," evidence of the theft of a "silver certificate" is not admissible. *Stewart v. State*, 62 Md. 412.

Greenback. — A description of paper currency as "greenback" of a specified value is sufficient. *Levy v. State*, 79 Ala. 259; wherein the court says: "We judicially know that the paper money commonly known as and called 'greenback' is a currency issued by or under the authority of the United States, and is so called from the back of the notes being of a green color. The term is more frequently applied to United States treasury notes issued by the government, but is also sometimes used to designate the national currency or banknotes issued under its authority." See also *Jones v. Com.*, 13 Bush (Ky.) 356; *Sallie v. State*, 39 Ala. 691; *State v. Hockenberry*, 30 Iowa 504, wherein the description, "\$180 in banknotes, usually known and described as greenbacks," was held sufficient, the court saying that while it was undoubtedly practicable to have described the property with more exactness, the language was such as to "enable a person of common understanding to know what is intended." And see *Roberts v. State*, 83 Ga. 369, wherein the description was, "one hundred dollars in greenback bills, of the value of one hundred dollars," and it was held that if the bills were not sufficiently described the indictment should have been demurred to, as the witnesses may give such description of them in the testimony as may be consistent with the truth and not inconsistent with what is stated in the indictment. *Contra*, *Lewis v. State*, 3 Heisk. (Tenn.) 333; *Territory v. Shipley*, 4 Mont. 472.

Proof. — "When, in this instance, the witness testified that 'greenbacks' had been taken from him, he no doubt intended the jury to understand that treasury notes were taken, and their

verdict shows that they did so understand him." *Hickey v. State*, 23 Ind. 21.

Evidence that the bill was a greenback and good money is sufficient proof of value under an allegation of the theft of "a ten-dollar bill of the currency of the country, commonly called paper money, of the value of ten dollars." *State v. Evans*, 15 Rich. L. (S. Car.) 31.

1. *Alabama.* — *Leonard v. State*, (Ala. 1897) 22 So. Rep. 564; *Chisolm v. State*, 45 Ala. 66; *Grant v. State*, 55 Ala. 201.

California. — *People v. Bogart*, 36 Cal. 245.

Dakota. — *Territory v. Anderson*, 6 Dakota 300.

Indiana. — *Hart v. State*, 55 Ind. 599.

Iowa. — *State v. Hoppe*, 39 Iowa 468; *Munson v. State*, 4 Greene (Iowa) 483.

Massachusetts. — *Com. v. Gallagher*, 126 Mass. 54; *Com. v. Sawtelle*, 11 Cush. (Mass.) 142.

Minnesota. — *State v. Beebe*, 17 Minn. 241; *State v. Hinckley*, 4 Minn. 345; *State v. Taunt*, 16 Minn. 109.

South Carolina. — *State v. Shirer*, 20 S. Car. 411.

See *supra*, III. 3. i. (4) *More Certain Description Unknown to Grand Jury.*

2. *Leonard v. State*, (Ala. 1897) 22 So. Rep. 564. See also, to the same effect, *Gady v. State*, 83 Ala. 51; *People v. Green*, 15 Cal. 512; *Porter v. State*, 26 Fla. 56; *State v. Anderson*, 25 Minn. 67; *Kelley v. State*, 34 Tex. Crim. Rep. 412; *Warren v. State*, 29 Tex. 369; *Adams v. Com.*, 23 Gratt. (Va.) 949.

But an information for larceny which describes the property simply as "one hundred and thirty-five dollars," "of the property, goods, and chattels of J. C.," without any allegation of its value, or of any excuse for the want of greater particularity, does not sufficiently show the subject of the larceny to be money for the purpose of taking the amount stated as the value thereof without an allegation of value. *Merwin v. People*, 26 Mich. 298.

And a statute dispensing with any description of money other than a simple designation as such puts this subject of larceny on a different footing from chattels or movables the names or designations of which do not of themselves import value.¹

cc. BANK NOTES AND BANK BILLS. — Bank notes and bank bills may be described *eo nomine* if their number, denomination, and value are stated, and this is the usual description held to be sufficient in the absence of statutes under which a less particular description may be given.² Often, as in the case of coin, as hereinbefore

Evidence of Value. — Treasury notes, national banknotes, and silver certificates are themselves sufficient evidence of their value when produced upon the trial. *Keating v. People*, 160 Ill. 483; *Merrill v. State*, 45 Miss. 651.

Foreign Coins. — In *Com. v. Smith*, 1 Mass. 245, it was held that an indictment for the larceny of French crowns must allege the value of such coins in legal-tender money, such coins not being legal tender.

1. *State v. King*, 37 La. Ann. 91; *State v. Ziord*, 30 La. Ann. 867; *State v. Faulkner*, 32 La. Ann. 725.

A charge of stealing three hundred dollars in United States notes and divers banknotes of the value of three hundred dollars charges the stealing of six hundred dollars. *People v. Evans*, 69 Hun (N. Y.) 226, 143 N. Y. 638.

2. *State v. Williams*, 19 Ala. 15; *Hart v. State*, 55 Ind. 599; *Crawford v. State*, 2 Ind. 132; *People v. Kent*, 1 Dougl. (Mich.) 42; *Territory v. Shipley*, 4 Mont. 472; *McKean v. Cutler*, 48 N. H. 370; *Hamblett v. State*, 18 N. H. 384; *Low v. People*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 37; *Pyland v. State*, 4 Sneed (Tenn.) 357.

Some description must be given of the bills or notes, or some legal excuse may be given for a failure to give the proper description. "Six thousand and twenty-seven dollars of the paper money of the United States," is not sufficient. *State v. Hoke*, 84 Ind. 137.

Amount and Value. — An indictment under the Penitentiary Act of the District of Columbia for stealing a banknote was required to state the amount as well as the value of the note. *U. S. v. Barry*, 4 Cranch (C. C.) 606.

For Payment of Money. — In *State v. Cassel*, 2 Har. & G. (Md.) 407, it was held that an indictment under the Act of 1809 for stealing a banknote sufficiently described the note as a "banknote for the payment of," etc., and "of the value of," etc., and that nothing

more was required than to charge the offense in the language of the act. See also *Salisbury v. State*, 6 Conn. 101.

But it is held to be unnecessary to charge that the note was for the payment of money. *Com. v. Richards*, 1 Mass. 338; *U. S. v. McDaniel*, 4 Cranch (C. C.) 721. *Contra*, *State v. Emery*, Brayt. (Vt.) 131; *State v. Thomas*, 2 McCord L. (S. Car.) 527, holding that an indictment for stealing bank bills, under the Act of 1737, must state a sum certain due on the notes and unsatisfied at the date of the theft.

Incorporation of Bank. — An indictment for stealing bank bills need not state that they were the bills of some incorporated bank, but it is sufficient if it describes the bills of a certain bank, naming it. *State v. Smart*, 4 Rich. L. (S. Car.) 356; *McDonald v. State*, 8 Mo. 283; *State v. Bond*, 8 Iowa 540. *Contra*, *Spangler v. Com.*, 3 Binn. (Pa.) 533.

"It is of no consequence whether the banks were organized within the bounds and under the laws of this state, or were banks of other states or countries, so far as the allegations in the indictment are concerned," the names of the banks being mentioned by way of description of the property stolen. *People v. Jackson*, 8 Barb. (N. Y.) 637.

Bank of Issuance. — On the other hand, it is held to be enough to describe banknotes by their denomination and value, without any designation of the bank which issued them. *Pyland v. State*, 4 Sneed (Tenn.) 357; *Foster v. State*, 71 Md. 553; *State v. Stevens*, 62 Me. 284. *Contra*, *Rhodus v. Com.*, 2 Duv. (Ky.) 159; *State v. Hinckley*, 4 Minn. 345. And an indictment upon the Maryland Act of 1793, c. 35, making it a felony to steal the notes of any bank established by a charter from the government of the United States or of some individual state of the United States, must state of what bank the notes were,

shown, a general description as bank bills or bank notes, with an allegation of value, without a more specific allegation as to the denomination or value of each bank note, is sufficient.¹

(f) **Written Instruments — Valuable Papers** — *aa. IN GENERAL.* — Written instruments and valuable papers may be described in the same manner as other things of intrinsic value, and it is said that there is no requirement that they should be more particularly described than any other stolen property.²

and whether incorporated by the United States or by an individual state. It is not sufficient to make the averment in the terms of the act. *U. S. v. Porte*, 1 Cranch (C. C.) 369.

1. *Berry v. State*, 10 Ga. 511; *Munson v. State*, 4 Greene (Iowa) 483; *Jones v. Com.*, 13 Bush (Ky.) 356; *Com. v. Grimes*, 10 Gray (Mass.) 470; *People v. Evans*, 69 Hun (N. Y.) 226, 143 N. Y. 638; *Adams v. Com.*, 23 Gratt. (Va.) 949.

Money. — Under general statutes, as hereinbefore noted, it is sufficient to allege a larceny of money, and the charge will be maintained by showing that any money, banknotes, promissory notes, or bills of exchange were stolen. *State v. Carter*, 113 N. Car. 640; *State v. Freeman*, 89 N. Car. 469; *Brown v. People*, 29 Mich. 233; *State v. King*, 37 La. Ann. 91; *Rains v. State*, 137 Ind. 83; *Lewis v. State*, 113 Ind. 59; *Hammond v. State*, 121 Ind. 512; *Randall v. State*, 132 Ind. 539. *Contra*, *Otero v. State*, 30 Tex. App. 450, holding that "twenty dollars in money" would be a sufficient description on demurrer, but that the proof must correspond with the allegation, and that the word "money" as used in statutes pertaining to theft means legal-tender coin or legal-tender currency of the United States, and evidence that the money was a twenty-dollar bill was not evidence of money as the term was understood under the statutes pertaining to the crime of theft; *Jackson v. State*, 34 Tex. Crim. Rep. 90, holding that a charge of the theft of "five ten-dollar bills, of the value of ten dollars each," is not an allegation that the bills are money.

Bank Bills Described as Promissory Notes.

— It is sufficient to describe a bank bill as "one promissory note, for the payment of money, commonly called a banknote," etc. *State v. Bond*, 8 Iowa 540. But it has been held that a description as a promissory note was not alone sufficient, but it should also be charged to be a promissory note for the

payment of money, purporting to be a banknote. *Damewood v. State*, 1 How. (Miss.) 262. *Contra*, *Com. v. Butts*, 124 Mass. 449; *Com. v. Collins*, 138 Mass. 483; *Com. v. Gallagher*, 126 Mass. 54.

2. *Whalen v. Com.*, 90 Va. 544; *State v. Pierson*, 59 Iowa 272.

Deed. — The term "deed" imports a complete instrument. This was held under an indictment which described the property to be affected by the instrument, but omitted to mention the grantee in the deed, the omission being held immaterial. *State v. Hall*, 85 Mo. 671, citing *State v. Fisher*, 65 Mo. 437.

Legal Process. — "A certain writ of *fi. fa.* belonging to the Superior Court," and "a certain process of and belonging to the said Superior Court," and "a certain record of and belonging to the said Superior Court," are too vague; but a description of a writ of execution as such, with the amount and the name of the judgment debtor, is sufficient. But if it is further charged that the *fi. fa.* issued from the Superior Court's office, the allegation is not sustained by proof that it was made out but retained by the clerk at the instance of the defendant until the amount was paid by him, as the writ is not issued under these facts, it being held that a writ of execution is not issued until it is handed to the sheriff. *State v. McLeod*, 5 Jones L. (N. Car.) 320.

Language of Statute. — An offense is sufficiently charged in the language of the statute when, in an indictment for grand larceny, the articles stolen, which are not technically banknotes, but are embraced under the term "writings and papers of value" found in the statute, are described by the name and designation by which they are usually understood and known in the country, and the value properly averred, so that the accused has full notice of the charges against which he is required to defend himself. *Fredrick v. State*, 3 W. Va. 695.

bb. CHECKS, NOTES, AND THE LIKE. — When promissory notes are the subject of larceny, they may be described as other property having commercial value, it being sufficient to describe them as promissory notes and to allege their value.¹ A check is sufficiently described as a paper purporting to be a check for a certain sum of money, alleging its value and to whom it belongs.²

cc. RECEIPTS. — It is sufficient to allege the larceny of a receipt

1. *M'Laughlin v. Com.*, 4 Rawle (Pa.) 464; *Robinson v. Com.*, 32 Gratt. (Va.) 870, distinguished in *Whalen v. Com.*, 90 Va. 544. See also *State v. Edson*, 10 La. Ann. 230.

Utmost Particularity Is Not Required. — An indictment describing a note as "one certain promissory note, dated November 6th, 1872, signed by the said F., for the payment of twenty-three hundred dollars for value received, to W. or order, on the first day of May, 1873, * * * a more particular description of which is to the attorney for the state unknown," was held sufficient, and the fact that the note provided for the payment of interest and taxes was held to be immaterial to the indictment. *State v. Fenn*, 41 Conn. 590.

So a description, "one promissory note of the value of three hundred dollars, and one piece of paper of the value of three hundred dollars, of the goods and chattels of A. B.," was held sufficient, although there was evidence before the grand jury which would have enabled it to give a fuller description. *Com. v. Brettun*, 100 Mass. 206.

But a description merely as "one promissory note" was held to be insufficient. *Com. v. Henry*, 2 Brews. (Pa.) 566. And, in *Wilson v. State*, 1 Port. (Ala.) 118, it was held that an allegation that a note is for a certain amount is not tantamount to an averment that it is of that value.

"One Duebill" is an insufficient description. *Com. v. Byerly*, 2 Brews. (Pa.) 568.

2. *State v. Pierson*, 59 Iowa 272, holding that a description of a bank check as such, for the payment of money, naming its date, owner, and place of payment, together with an allegation of its value, was sufficient.

So "one paper purporting to be a check for the payment of one hundred and twenty-five dollars, the goods and chattels of," etc., was held sufficient. *Whalen v. Com.*, 90 Va. 544.

In *Missouri*, it was held that an in-

dictment which described a stolen check as "one check for five thousand dollars on the Traders' Bank, of the value of five thousand dollars," was insufficient and should allege such additional matter of description as would notify the defendant what particular check was meant. *State v. Kroeger*, 47 Mo. 530.

Pension Check. — A description of a pension check as "one United States pension check, on the assistant treasurer of the United States, for twenty-four dollars," was held sufficient. *State v. Bishop*, 98 N. Car. 773.

Bill of Exchange or Draft. — In *Phelps v. People*, 6 Hun (N. Y.) 422, 72 N. Y. 334, under a statute providing that where the stolen property consists of a bill of exchange, draft, etc., the money due thereon or secured thereby and remaining unsatisfied, etc., shall be deemed the value of the article so stolen, it was held to be sufficient to charge the stealing of a bill of exchange or draft by charging the theft of the instrument by name and describing it as directing the payment of a certain sum of money, without an averment that any money was due upon it or secured by it or remaining unsatisfied on it. It was not intended that the averments in an indictment for stealing these instruments should be different from those charging the larceny of other property, save in the matter of description; and where the value is averred to be as of the face value of the instrument this is sufficient and leaves the case to rest on the proof.

Bank Check. — Where the indictment described the property alleged to have been stolen as a bill of exchange, to wit, an order for the payment of money (describing it), and of the value of twenty dollars and ninety-seven cents, it was sufficient; and it was held that in an indictment for the larceny of a written instrument the property need not be more particularly described than other stolen property. *State v. Pierson*, 59 Iowa 271.

issued by a certain person or company, without alleging authority to issue it.¹

dd. BONDS. — A bond for title is sufficiently described as a written instrument containing evidence of an existing contract for the conveyance of certain real estate, describing the real estate and stating to whom the instrument belonged when stolen.²

ee. RAILROAD TICKETS. — A railroad ticket is in general sufficiently described as such, though particular description may depend upon the statute under which the offense is punishable.³

1. Where the indictment charged the larceny of a warehouse receipt alleged to have been issued by a certain railroad company, it was held sufficient without alleging that the company had authority under its charter to issue such receipts. *State v. Loomis*, 27 Minn. 521.

Voucher — Averment as to Satisfaction. — "One voucher of the value of fifty dollars, the property of Robert Lake, in the words, letters, and figures following, viz." (setting out the voucher in full), was held sufficient without averring that the instrument was subsisting and remained unsatisfied. Such a description imposes on the prosecution all the consequences and gives the defendant all the advantages which may legally result if the instrument should appear to be spurious. *State v. Hickman*, 8 N. J. L. 299.

In *State v. Wade*, 7 Baxt. (Tenn.) 22, under an indictment for the larceny of coupons from state bonds, it was held that the particular charge, though a charge of stealing, not a subsisting valid obligation, but a coupon from a bond of the state, which was extinct as an obligation to pay because it had already been paid, could be maintained as an indictment for the theft of vouchers, such coupons properly belonging to the state as vouchers in settlement of the accounts of its officers.

In *Williams v. State*, 44 Ala. 396, a description as "a certain paper writing, commonly called a cotton receipt, issued by E. M. Byrne & Co., a firm composed of E. M. Byrne and Henry H. Bender, and dated December 4th, 1869, numbered 988, and issued to M. David McDonald, for the receipt of one bale of cotton marked [M. D.], and weighing (524) five hundred and twenty-four pounds, of the value of more than one hundred dollars, the personal property of said M. David McDonald," was held insufficient because it was uncertain whether the

value alleged belonged to the bale of cotton or the receipt. The court said: "The syntax of the sentence legitimately connects the statement of value with the cotton, or it leaves it doubtful whether this was not the purpose of the pleader. This is not sufficient."

2. An indictment described the thing stolen as a certain written instrument containing evidence of an existing contract for the conveyance of real estate, to wit, a town lot in the city of San Antonio, in the county aforesaid, of the value of one hundred and fifty dollars, of the property of, etc. This description was held sufficient. *Dignowitty v. State*, 17 Tex. 521.

Coupons. — In charging the larceny of coupons from state bonds, it need not be alleged that the bonds were issued by authority of the legislature. *State v. Wade*, 7 Baxt. (Tenn.) 22, holding that if the bonds were unlawful or forged, that would be a matter of defense, and that an averment that the coupons were taken from bonds of the state of Tennessee sufficiently imported that the bonds were lawful bonds of that state.

3. *General Description.* — In *Tennessee*, under a statute which provided against the stealing of "any instrument or writing whereby any demand, right, or obligation is created, ascertained, increased, extinguished, or diminished, or any other valuable writing," it was held that an indictment for the larceny of a railroad ticket which described it as "one railroad ticket from Knoxville, Tennessee, to Washington, D. C., of the value of seventeen dollars," and alleged ownership, sufficiently described the subject of the larceny, the court saying: "Such a ticket may be stolen at any point of the route, and the holder may not know, or may have forgotten, by what company it was issued, or the precise line it entitled him to take. The statute intended to punish the stealing of such a ticket,

j. VALUE — (1) *In General.* — As a question of law, value is of the essence of the offense of larceny,¹ and as affecting the question of jurisdiction or the penalty to be inflicted as depending upon the degree of the offense, the value of the property stolen must be alleged.²

(2) *Statutory Offense—Value Disregarded.* — In many cases, however, larceny is defined and the punishment therefor is fixed by statute without regard to and independently of the value of the property stolen, and under such statutes it is not necessary in charging the offense to allege or prove any value.³ So where the

and, in analogy to the settled rule as to bank bills and legal coin, as well as in virtue of the provisions of the code and the general principles of our decisions, a description of such a ticket in ordinary language, and in the words of the indictment before us, is sufficient." *Millner v. State*, 15 Lea (Tenn.) 179.

So in *Minnesota* it was held that "divers and sundry genuine railroad passenger tickets, prepared for sale to passengers and after the sale thereof, the personal property of and issued by the St. Paul, Minneapolis & Manitoba Railroad Company," etc., with an allegation that a more particular description was unknown, was held sufficient under a statute which provided that "whoever steals, takes, and carries away any railroad passenger ticket or tickets, prepared for sale to passengers, previous to or after the sale thereof, being the personal property of any railroad company or any other corporation or person, is guilty of larceny." *State v. Brin*, 30 Minn. 522. See also *State v. Hinckley*, 4 Minn. 345.

More Particular Description. — In *Washington* it is held that an indictment charging the larceny of a railroad ticket charges no offense if it fails to state that the ticket was stamped dated, and signed, as otherwise the ticket would be worthless and not the subject of larceny. *State v. Holmes*, 9 Wash. 528, 37 Pac. Rep. 283; *McCarty v. State*, 1 Wash. 377.

1. See the title *Larceny*, Am. and Eng. Encyc. of Law.

2. *Alabama.* — *Sheppard v. State*, 42 Ala. 532, *Wilson v. State*, 1 Port. (Ala.) 118; *State v. Garner*, 8 Port. (Ala.) 447; *Gregg v. State*, 55 Ala. 116.

Massachusetts. — *Hope v. Com.*, 9 Met. (Mass.) 134.

Michigan. — *People v. Beleher*, 58 Mich. 325; *Merwin v. People*, 26 Mich. 298.

Missouri. — *State v. Pedigo*, 71 Mo. 443; *State v. Sharp*, 106 Mo. 108; *State v. Daniels*, 32 Mo. 558.

New Hampshire. — *State v. Goodrich*, 46 N. H. 186.

Texas. — *Boyle v. State*, 37 Tex. 359; *Meyer v. State*, 4 Tex. App. 121; *Collins v. State*, 20 Tex. App. 197; *Melton v. State*, 20 Tex. App. 202; *Sheppard v. State*, 1 Tex. App. 522.

Wisconsin. — *Frazier v. Turner*, 76 Wis. 562.

3. *Alabama.* — *Adams v. State*, 60 Ala. 52; *Sheppard v. State*, 42 Ala. 531; *Gregg v. State*, 55 Ala. 116; *McDowell v. State*, 61 Ala. 172; *Maynard v. State*, 46 Ala. 85.

Arkansas. — *Shepherd v. State*, 44 Ark. 39; *Houston v. State*, 13 Ark. 66.

California. — *People v. Townsley*, 39 Cal. 405; *People v. Barnes*, 65 Cal. 16.

Florida. — *Mizell v. State*, 38 Fla. 22.

Illinois. — *McDaniels v. People*, 118 Ill. 301.

Louisiana. — *State v. Wells*, 25 La. Ann. 372.

Missouri. — *State v. Hall*, 85 Mo. 669; *State v. Pedigo*, 71 Mo. 443; *State v. Sharp*, 106 Mo. 108; *State v. Daniels*, 32 Mo. 558; *State v. Lawn*, 80 Mo. 241; *State v. Riley*, 100 Mo. 496.

Montana. — *Territory v. Pendry*, 9 Mont. 67.

Nebraska. — *Wells v. State*, 11 Neb. 409.

Texas. — *Lopez v. State*, 20 Tex. 780; *Johnson v. State*, 29 Tex. 492; *Davis v. State*, 40 Tex. 134; *Williams v. State*, 10 Tex. App. 8; *Watts v. State*, 6 Tex. App. 264.

Washington. — *State v. Kyle*, 14 Wash. 550; *State v. Young*, 13 Wash. 586.

But under such a statute making it a felony without regard to value to steal certain things, it was held that an indictment under the statute could not support a conviction for petit larceny

common-law distinction between grand and petit larceny is abolished, it is held to be unnecessary to allege or prove any specific value.¹

(3) *Sufficiency of Allegation* — (a) *Generally*. — Value is sufficiently expressed as of an amount of money designated, without characterizing it as "lawful money of the United States" or using equivalent expressions.²

where no value was alleged. *Gregg v. State*, 55 Ala. 116.

Construction of Statutory Expressions. — Under a statute providing for the punishment of the larceny of certain animals "of any value," it was held that the words "of any value" expressed the intention of the legislature to make the taking of such animals larceny "without reference to value." *State v. Young*, 13 Wash. 584, in which case the statute in *Washington* was said to mean practically the same thing as that in *Montana* which declared a theft of certain animals, "whatever their value," to be grand larceny, and under which statute the same rule was made. *Territory v. Pendry*, 9 Mont. 67.

Where a statute provided that a certain offense should be larceny "notwithstanding that the value of such animal or animals may be less than twenty dollars," these words, read in connection with the statute of larceny in force at the time the above was passed, do not mean that the thing taken must be of some value, to be stated in the information and proved on the trial. The stealing of the animals enumerated in this statute constitutes the offense, whatever may be their value, or regardless of value, and this value may be inferred by the jury from their description, even though there be no direct evidence on that point. *Chesnut v. People*, 21 Colo. 512 [*citing* *Territory v. Pendry*, 9 Mont. 67; *Houston v. State*, 13 Ark. 66; *Lopez v. State*, 20 Tex. 780].

Entering with Intent to Steal. — An indictment for entering with intent to steal need not aver the value of the goods which the accused intended to steal. *People v. Ah Ye*, 31 Cal. 451.

Larceny from Dwelling. — In *Missouri* larceny from a dwelling house is made grand larceny irrespective of the value of the property stolen, and the indictment need not allege value. *State v. Castor*, 93 Mo. 242; *State v. Patterson*, 98 Mo. 283; *State v. Riley*, 100 Mo. 493.

Surplusage. — Where a statute makes

it an offense to steal certain enumerated animals, without regard to their value, the allegation of value, being unnecessary, if made, should be rejected as surplusage. *State v. Kyle*, 14 Wash. 550; *Sanders v. State*, 55 Ark. 365; *Com. v. Burke*, 12 Allen (Mass.) 182; *Davis v. State*, 40 Tex. 134; *People v. Barnes*, 65 Cal. 16.

In *Michigan* it was held that where an indictment was drawn under a general statute against larceny laying the value of the property, the offense could not be proven as one under a statute creating the offense of larceny without regard to value. It is indicated in this case that in order to charge under the last statute the indictment must call attention to the fact that it is drawn thereunder and that the offense prosecuted is the one provided for in that statute. *People v. Martin*, 91 Mich. 650.

An Amendment by inserting value when by statute value is not necessary to be alleged adds nothing to the indictment. *State v. Wells*, 25 La. Ann. 372.

1. *State v. Watson*, 3 R. I. 114, recognizing that some value must exist, the court saying: "The jurisdiction of this court over this offense does not depend on the value of the stolen goods received. If they are of any value, the court has jurisdiction. * * * The common-law distinction between grand and petit larceny has been long abolished in this state. It was not necessary, therefore, to allege or prove any specific value, in order to define the offense committed." See also *Reg. v. Morris*, 9 C. & P. 347, 38 E. C. L. 148, holding that while the subject of larceny must be of some value, that value need not be stated as of the value of some coin known to the law.

2. *People v. Righetti*, 66 Cal. 184; *People v. Winkler*, 9 Cal. 234; *People v. Poggi*, 19 Cal. 600 [*citing* *People v. Green*, 15 Cal. 512, and saying that this last case *overrules* *People v. Cohen*, 8 Cal. 42, though from the lan-

(b) **Aggregate Value of Several Articles.**—Where the indictment charges the larceny of several distinct articles, an averment of their aggregate value is sufficient without separate averments as to the value of each article,¹ and where several groups of articles are described, the value of each group may be stated in the aggregate.²

Assignment of Separate Values Preferable.—But it is said to be the general and by far the better practice to assign a value to each article or separate piece of property, notwithstanding the stating of an aggregate value will be sufficient,³ in order to avoid the embarrassment which would result from a failure of proof as to any one of the articles, as it is held that under an allegation of collective value the defendant must be found guilty of the larceny

guage of the opinion it would seem to attempt to distinguish the last case mentioned rather than to overrule it].

"Current Money" used to characterize the allegation of value was held sufficient, the court holding that it was at most merely surplusage or should have been excepted to on demurrer, and was not such a defect as would be regarded as a ground of reversal on writ of error. *Gardner v. State*, 25 Md. 146.

"\$3" was held to be sufficiently plain and intelligible under a statute requiring the value to be expressed in "plain and intelligible words." *Earl v. State*, 33 Tex. Crim. Rep. 570.

Price Instead of Value.—An indictment charging the larceny of "one gelding horse of the price of one hundred dollars," instead of "one gelding horse of the value of one hundred dollars," according to the words of the statute, is sufficient. *State v. Sparks* 30 W. Va. 101.

1. *Alabama.*—*Grant v. State*, 55 Ala. 208.

California.—*People v. Robles*, 34 Cal. 591; *People v. Righetti*, 66 Cal. 184.

Indiana.—*Edson v. State*, 148 Ind. 283; *Clifton v. State*, 5 Blackf. (Ind.) 224; *State v. Murphy*, 8 Blackf. (Ind.) 498.

Iowa.—*State v. Hart*, 29 Iowa 268.

Maine.—*State v. Hood*, 51 Me. 364.

Massachusetts.—*Com. v. Butts*, 124 Mass. 449 [citing *Com. v. Sawtelle*, 11 Cush. (Mass.) 143; *Com. v. O'Connell*, 12 Allen (Mass.) 451; *Com. v. Hussey*, 111 Mass. 432; *Com. v. Green*, 122 Mass. 333].

Missouri.—*State v. Beatty*, 90 Mo. 143.

Tennessee.—*State v. Shelton*, 90 Tenn. 539.

Texas.—*Moore v. State*, (Tex. Crim. App. 1894) 24 S. W. Rep. 900; *Meyer v. State*, 4 Tex. App. 121; *Doyle v. State*, 4 Tex. App. 253; *Thompson v. State*, 43 Tex. 268.

Washington.—*State v. Brew*, 4 Wash. 97, distinguishing *McCarty v. State*, 1 Wash. 377, in that while the general proposition was stated in that case that the value of each of several railroad tickets alleged to have been stolen should have been set out, the main proposition decided was that the information should have shown that the tickets were genuine effective tickets, and that unstamped, undated, and unsigned railroad tickets were not the subject of larceny.

Articles Belonging to Different Owners.

—Where the larceny of several articles belonging to different owners is charged in one count, the value of each article must be specifically set forth. *Alexander v. Com.*, 90 Va. 810; *State v. Merrill*, 44 N. H. 624.

Alleging Value as to Part Only.—

Where a count of the indictment embraces several articles, and alleges value to only a part of them, the articles not valued may be rejected as surplusage, and conviction had as to the articles which are valued. *State v. Vanderlip*, 4 La. Ann. 444, citing *Com. v. Smith*, 1 Mass. 245. So also where a part are insufficiently valued. *Edson v. State*, 148 Ind. 283.

2. *Edson v. State*, 148 Ind. 283; *People v. Righetti*, 66 Cal. 184.

3. *State v. Beatty*, 90 Mo. 146; *Doyle v. State*, 4 Tex. App. 253; *State v. En*, 10 Nev. 277; *State v. Kelliher*, (Oregon 1897) 50 Pac. Rep. 532.

of the whole.¹

k. LARCENY FROM DWELLING HOUSE. — In charging larceny from a house or dwelling it is not necessary to allege an entry

1. *Com. v. Lavery*, 101 Mass. 209 [citing *O'Connell v. Com.*, 7 Met. (Mass.) 460; *Hope v. Com.*, 9 Met. (Mass.) 134]; *State v. Windman*, Cheves L. (S. Car.) 75; *Moore v. State*, (Tex. Crim. App. 1894) 24 S. W. Rep. 900; *Doyle v. State*, 4 Tex. App. 253; *Thompson v. State*, 43 Tex. 268; *Ware v. State*, 2 Tex. App. 547.

Special Verdict. — In *Maine* it was held that where an indictment alleged the stealing of two robes and laid the aggregate value, the jury might find the defendant guilty of stealing a part only of the property if they stated in their verdict the value of the articles found to have been stolen, and that a judgment could be rendered upon such a verdict. *State v. Buck*, 46 Me. 531. In a later case, on a motion in arrest of judgment, the court used this language: "It is only in cases where the verdict negatives the stealing of a part of the articles that an allegation of the collective value will be held insufficient." But the verdict in this case was a general one. *State v. Hood*, 51 Me. 363.

But these decisions do not comport with the reason for the rule laid down in *Com. v. Lavery*, 101 Mass. 207, *supra*, in which case, though the verdict in question was a general one, the court said: "To restate the case more particularly, the indictment and verdict do not exclude the conclusion that the grand jury were of opinion that the fractional currency, the bank bill, and some of the towels and handkerchiefs were valuable, but that the other towels and handkerchiefs, and the only ones which were proved at the trial to have been stolen, were of no value; and, on the other hand, that the traverse jury were of opinion that the only stolen articles of any value were the towels and handkerchiefs produced in court, which the grand jury, for aught that appears, may have thought to be of no value whatever. As the defendant may, therefore, have been convicted without being found guilty of stealing anything which the grand jury and the traverse jury concurred in finding to be of any value, she is entitled to a new trial." So in *Moore v. State*, (Tex. Crim. App. 1894) 24 S. W. Rep. 900, the court said that proof that

only some of the articles alleged to have been stolen were so taken will not sustain a conviction, because "otherwise you will have a person convicted of theft of an article of which the indictment shows no value." But *Thompson v. State*, 43 Tex. 268, which is cited in this last case to the proposition there stated, seems also by inference to support the holding in *State v. Buck*, 46 Me. 531, *supra*, it being said: "When the difference between grand and petit larceny is distinguishable merely by the value of the property stolen, not only must its value be stated, but where several articles are stolen, unless the value of each article stolen is alleged instead of the aggregate value of the whole, if there is a failure in the proof of the larceny of some of them, a general verdict would not be justified by the evidence or warrant a judgment, because in such case the indictment would not show the value of the articles proved to have been stolen or the grade of offense of which the defendant should be adjudged guilty."

The reasoning in *Com. v. Lavery*, 101 Mass. 207, *supra*, is also held not to apply where the prosecution is by information, in which case it is obvious that the concurrence of the grand and petit juries cannot be required, as the information is filed by the prosecuting attorney; and further, where the charge is of the theft of national currency or United States treasury notes, it is held that the reasoning in that case does not apply, because all men must know that these have some actual value, and it is impossible in legal contemplation to suppose that either should have no value. *State v. Henry*, 24 Kan. 461; *State v. McAnulty*, 26 Kan. 536. See also *McCorkle v. State*, 14 Ind. 39.

Exception — Property of Uniform Value. — While it is true that where the indictment charges various articles of obviously different values, and alleges the aggregate value of the whole, and not the separate value of each article, proof that only some of the articles alleged to have been taken were so taken will not sustain a conviction, this is not the rule where the property is of uniform value or is all of the same kind or character, as cotton in

with intent to steal,¹ and an allegation that the defendant stole property in a dwelling house described necessarily includes a statement that the act of stealing was done in the building.²

7. LARCENY FROM PERSON. — An indictment charging larceny from the person as a statutory offense should contain averments of the essential elements thereof under the statute defining it,³

bulk, and where it is a simple calculation to ascertain the value per pound. *Moore v. State*, (Tex. Crim. App. 1894) 24 S. W. Rep. 900. See also *Duren v. State*, 15 Tex. App. 624.

Proof of Aggregate Value is admissible under an allegation of aggregate value. *State v. Beatty*, 90 Mo. 147.

Separate Values Alleged — Conviction for Part. — Where separate values are alleged the state is not bound to prove the theft of all the articles in order to secure a conviction, as would be the case under an indictment alleging the aggregate value. *State v. Kelliher*, (Oregon 1897) 50 Pac. Rep. 532; *Edson v. State*, 148 Ind. 283. See *infra*, IV. 3. *Larceny of Several Articles*.

1. The crime may be committed although the original entry was not felonious. *Berry v. State*, 10 Ga. 511. See also *supra*, III. 3. *d. Place as Descriptive of Offense*.

2. *Com. v. Smith*, 111 Mass. 430.

"From" and "In." — In *Moore v. State*, 40 Ala. 49, it was held that whether the words "feloniously took and carried away from a dwelling" import a taking in a "dwelling house" or not, the indictment is not demurrable, because in the first case it would be good under section 3170 of the code and in the latter case it would be simple larceny. The words "from a dwelling" do not have the same import as "in a dwelling house." The words "from a dwelling" may perhaps be treated as surplusage, but if not it is only at most matter of description, which, if necessary to be proven, can only be taken advantage of on the trial and by asking an appropriate charge of the court.

Possession of Stolen Property. — In an indictment for stealing from the house of A an article belonging to B, it is not necessary to allege that the article stolen was under the control of or belonged to A. *Hill v. State*, 41 Tex. 157.

As to Breaking and Entering, see article BURGLARY, vol. 3, p. 753 *et seq.*

3. *Woodard v. State*, 9 Tex. App. 412; *McCollum v. State*, 29 Tex. App. 162.

In order to constitute "private stealing" from the person, under a statute providing for this particular offense, it must be averred that the theft was committed without the knowledge of the person from whom the property was taken, or that it was committed so suddenly as not to allow time to make resistance before the property was so taken. *Woodard v. State*, 9 Tex. App. 412; *Brown v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 24. But it is not necessary that the indictment should contain the word "privately" in charging the stealing. *Brown v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 24.

"With Force and Arms." — In an indictment for larceny from the person, the words "force and arms" do not imply violence or that the larceny was committed while the defendant was armed. *Schantz v. State*, 17 Wis. 251.

Where an indictment charged an assault with force, and a stealing from the person without force, it was held that if this be an incongruity it is unimportant. *Randall v. State*, 53 N. J. L. 488.

Surplusage. — The phrase "and on," in a charge of stealing "from and on the person," is surplusage. *State v. Lee Ping Bow*, 10 Oregon 27.

Time. — In an indictment for larceny from the person it need not be alleged that the offense was committed in the night-time, and the conviction will be sustained if the property was of any value. *Fallon v. People*, 2 Abb. App. Dec. (N. Y.) 83, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 256.

Description of Property. — It is not essential that bills stolen from the person should be accurately described and identified, but the jury must be satisfied that such bills were on the person of the loser, and that the defendant by himself or a confederate was the guilty party. *Wilson v. State*, 66 Ga. 591.

Felonious Stealing and Carrying Away. — In *New Jersey* it was held that while it might be necessary to charge a felonious stealing and carrying away if the indictment is designed to charge a

though where no distinctive features are provided by statute, no further particularity is required than in other cases of larceny.¹

m. LARCENY BY SERVANT. — An indictment for the statutory offense of larceny by a servant from his employer is sufficient if it charges the offense in the language of the statute.²

n. LARCENY BY BAILEE AND AFTER BREACH OF TRUST. — An indictment for larceny against a bailee is sufficient if it follows the language of the statute and is full enough to be understood by the defendant and the jury.³

o. PROPERTY STOLEN IN ANOTHER JURISDICTION. — Each asportation of stolen property from one county to another being a fresh theft, an indictment may lay the offense in the county where the property is found, though the proof shows the theft to have been committed in another county.⁴

common-law larceny, where the purpose is only to charge the statutory misdemeanor the indictment sufficiently characterizes the offense as an unlawful and malicious taking and stealing from the person, in the language of the statute. *Randall v. State*, 53 N. J. L. 488.

Attempt to Commit. — In an indictment for an attempt to commit a larceny from the person of an individual by picking a pocket, it is not necessary to allege that such party, at the time of the attempt, had anything in his pocket which could be the subject of larceny. *Com. v. McDonald*, 5 Cush. (Mass.) 365.

An indictment is sufficiently precise and unequivocal which charges that the defendant, with intent to steal the personal property of a certain woman, "being in her pocket and on her person," did "thrust, insert, put, and place his hand upon the dress, near and into the pocket of the said woman, without her knowledge, and against her will," etc. *Com. v. Bonner*, 97 Mass. 587.

1. *People v. Long*, 44 Mich. 296.

2. *People v. Garcia*, 25 Cal. 531.

Sufficiency of Averment of Relationship. — An indictment which charged that the accused, "being then and there servant to one J. H., * * * feloniously did steal," etc., was held sufficiently and fairly to import that the accused was the servant of J. H. at the time when the theft was committed. *Rex v. Somerton*, 7 B. & C. 463, 14 E. C. L. 84.

3. *Aiken v. State*, 73 Ga. 812.

Bailment. — See article EMBEZZLEMENT, vol. 7, p. 410; *Williams v. State*, 82 Ga. 286; *Cody v. State*, 100 Ga. 105;

State v. Chew Muck You, 20 Oregon 216.

Common-law Words — Surplusage. — If in charging larceny by a bailee, which is a statutory offense, formal words used in indictments for larceny at the common law are interjected, such words may be disregarded as surplusage and the indictment will be good for the statutory offense. *State v. Comings*, 54 Minn. 364.

General Indictment for Theft. — Under a general indictment for theft it is sufficient to charge a theft of pledged property. *Smith v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 785.

4. *California*. — *People v. Mellon*, 40 Cal. 648.

Iowa. — *State v. Lillard*, 59 Iowa 479.

Kansas. — *State v. Wade*, 55 Kan. 693.

Missouri. — *State v. Jackson*, 86 Mo. 18; *State v. Smith*, 66 Mo. 62; *State v. Ware*, 62 Mo. 597.

Nebraska. — *Hurlburt v. State*, (Neb. 1897) 72 N. W. Rep. 471.

Nevada. — *State v. Brown*, 8 Nev. 208.

New York. — *Haskins v. People*, 16 N. Y. 344.

Texas. — *Connell v. State*, 2 Tex. App. 422; *Hoffman v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 309; *Cameron v. State*, 9 Tex. App. 332.

In Either County. — Under the *Texas* statute the offense is held to be properly laid in either county. *Cox v. State*, 43 Tex. 101.

Charging Taking in One and Asportation into Another County. — In *State v. Brown*, 8 Nev. 208, an indictment was held to be bad because the offense was not laid in the county where the prose-

When the Property is Stolen in a Sister State or Foreign Country and is brought into one of the United States, the same general rule has been applied as where the property is stolen in one county and brought into another; that is, that the facts which occurred in the sister state or foreign country need not be set forth, but that the offense is properly laid in the state where the prosecution is had;¹ though the practice of setting forth the larceny in a foreign jurisdiction and the asportation into the state where the prosecution is had is followed,² while in some states this has been required.³

cution was had, though the court said that if it were proper to lay the offense in the county where the original offense was committed, the indictment was nevertheless defective because it did not state that the act of the defendant in bringing the goods into the county where he was prosecuted was done feloniously. See, to the same effect, *Johnson v. State*, 47 Miss. 671.

Where the indictment charged theft in one county and a conveyance of the property into the other where the parties were prosecuted, the court in *Texas* said: "We are of opinion that the allegation that the property was stolen in Austin county did not vitiate the indictment. Under the provisions of the code, theft may be prosecuted either in the county where committed or in any county where the taker may be found in possession of the property." *Connell v. State*, 2 Tex. App. 422. And in *Indiana* it was said of such a charge that while the court could not approve of the form of the indictment, which should have directly charged the larceny to have been committed in Wells county, yet it could not, under the code, hold the indictment bad; for each removal of the stolen property by the thief into another jurisdiction was at common law held to be a fresh taking and a new larceny. The averment of removal was an evidentiary fact, but it was conclusive, and if true would result in the defendant's guilt, and was necessarily the equivalent of a direct charge of larceny. *Hurt v. State*, 26 Ind. 106.

Surplusage.—An averment relating to the original stealing in a county other than that in which the prosecution is brought is immaterial and an unnecessary ingredient of the offense, which may be rejected as surplusage. *Hurlburt v. State*, (Neb. 1897) 72 N. W. Rep. 471.

1. *Rex v. Peas*, 1 Root (Conn.) 69;

McFarland v. State, 4 Kan. 68; *People v. Burke*, 11 Wend. (N. Y.) 129; *State v. Kief*, 12 Mont. 98 [*citing* *Hemmaker v. State*, 12 Mo. 453; *State v. Underwood*, 49 Me. 181; *State v. Newman*, 9 Nev. 48; *State v. Barnett*, 15 Oregon 77].

2. *People v. Staples*, 91 Cal. 26; *State v. Mathews*, 87 Tenn. 690.

Information and Complaint.—Where the complaint charged that the offense was committed in San Bernardino county, in the state of California, and the stolen goods brought into Los Angeles county, while the information for the same offense charged that the offense was committed in the territory of Arizona and the stolen goods brought into Los Angeles county, each charged in legal effect a larceny in Los Angeles county. *People v. Staples*, 91 Cal. 23.

3. *La Vaul v. State*, 40 Ala. 44, holding that such an indictment must be framed under the statute which created the offense, and that a conviction could not be had under an indictment in the form prescribed for larceny [*citing* *Williams v. State*, 15 Ala. 259; *Ham v. State*, 17 Ala. 188; *Murray v. State*, 18 Ala. 727]; *Norris v. State*, 33 Miss. 373, holding that "to constitute an offense against the statute there must be both a stealing of the property in another state or country and a bringing of it into this state; and these facts both being necessary to constitute the offense must be sufficiently set forth in the indictment in order not only to conform to a well-established rule of pleading, that the facts which constitute the crime or cause of action must be alleged with sufficient certainty, but that the accused may know what it is that he is called on to answer, so that he may prepare for his defense accordingly;" *Cummins v. State*, 12 Tex. App. 121; *State v. Morales*, 21 Tex. 298; *Carmisales v. State*, 11 Tex. App.

p. **FORMER CONVICTION OR SECOND OFFENSE.** — A second offense or former conviction, when made the basis of increased punishment, must be alleged in order to justify such increased punishment;¹ and this rule applies to the charging of larceny as a second offense. And where by statute petit larceny as a second offense is punishable as a felony, the information or indictment properly designates the offense as a felony.²

IV. DUPLICITY — JOINDER OF COUNTS AND OFFENSES — 1. **Conviction of Lesser Offense.** — Jurisdiction is determined by the charge made in the indictment, and when the court has acquired jurisdiction by reason of such charge it has under the law jurisdiction of all lesser offenses included therein.³

Conviction of Larceny under Charge of Kindred Offense. — Where the indictment or information charges a kindred offense which embraces the essential elements of larceny there may be a conviction of larceny thereunder,⁴ and a statute which provides that

474, the last three cases holding that under the Penal Code of *Texas* the law of the foreign state or country is an element of the offense and must be alleged.

1. See article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 489.

2. *People v. Gutierrez*, 74 Cal. 83.

It is proper to charge that the act was feloniously done. *State v. Loehr*, 93 Mo. 103. And such a charge is held to be necessary as in other cases of felony. *State v. Weldon*, 70 Mo. 572.

Charge Good for Principal Offense Without Increased Punishment. — Improper allegations of a former conviction will not vitiate the whole indictment or information, but the charge is good for the principal offense without increased punishment; and therefore a motion to quash under such circumstances should not be directed against the whole indictment, but only against that part which improperly charges the former offense. *Myers v. State*, 92 Ind. 394, citing *Good v. State*, 61 Ind. 69.

More than One Previous Conviction. — Any number of previous convictions may be alleged in the same indictment. *Reg. v. Clark*, 20 Eng. L. & Eq. 582.

3. *People v. Comyns*, 114 Cal. 107; *McLean v. State*, 23 Fla. 281; *Groves v. State*, 76 Ga. 808; *State v. Murphy*, 8 Blackf. (Ind.) 498; *State v. Thompson*, 137 Mo. 620; *State v. Arlin*, 27 N. H. 116; *Haskins v. People*, 16 N. Y. 348; *Nance v. State*, 21 Tex. App. 458 [citing *Harberger v. State*, 4 Tex. App. 26; *Montgomery v. State*, 4 Tex. App. 140]; *State v. McClung*, 35 W. Va. 285. For

the general rules as to joinder of counts and offenses and election, see article INDICTMENTS, INFORMATION, AND COMPLAINTS, vol. 10, p. 344.

Grand and Petit Larceny. — Thus, under a charge of grand larceny a conviction can be had for petit larceny. *Hoskins v. State*, 27 Ind. 470; *State v. Malloy*, 30 La. Ann. 61; *Swinney v. State*, 8 Smed. & M. (Miss.) 576; *State v. Spurgin*, 1 McCord L. (S. Car.) 252.

Where the offense is made punishable as grand larceny only, a conviction can be had for petit larceny. *Pinckard v. State*, 62 Ala. 167. See also *Allen v. State*, 86 Ga. 399.

And if the elements of the offense do not constitute it a compound offense, a conviction can be had only for the offense charged. *State v. Spurgin*, 1 McCord L. (S. Car.) 253.

4. **Under a Charge of Robbery**, larceny may be proved and a conviction had for it.

Alabama. — *Morris v. State*, 97 Ala. 82; *Allen v. State*, 58 Ala. 98.

Arkansas. — *Haley v. State*, 49 Ark. 147; *Clary v. State*, 33 Ark. 561.

California. — *People v. Jones*, 53 Cal. 58.

Illinois. — *Burke v. People*, 148 Ill. 70.

Indiana. — *Rains v. State*, 137 Ind. 83.

Kentucky. — *Com. v. Prewitt*, 82 Ky. 240.

Louisiana. — *State v. Will*, 49 La. Ann. 1337.

Missouri. — *State v. Keeland*, 90 Mo. 337.

any person indicted for a felony may be convicted for another

Nebraska. — *Stevens v. State*, 19 Neb. 647; *Brown v. State*, 33 Neb. 357.

New York. — *People v. Kennedy*, 57 Hun (N. Y.) 532.

Under Charge of Burglary. — That an indictment for burglary is not duplicious because it charges the completion of the larceny seems to be well settled. *Love v. People*, 160 Ill. 502; *Com. v. Tuck*, 20 Pick. (Mass.) 356; *Jennings v. Com.*, 105 Mass. 587; *Becker v. Com.*, (Pa. 1887) 9 Atl. Rep. 510; *Stoops v. Com.*, 7 S. & R. (Pa.) 499; *State v. McClung*, 35 W. Va. 284; *State v. Shaffer*, 59 Iowa 290; *Butler v. Com.*, 81 Va. 159; *State v. Moore*, 117 Mo. 395. And though not so uniformly held, it may be stated as a rule that under an indictment for burglary which also charges the consummation of the theft, a conviction can be had for larceny upon failure of the conviction for the burglary. *State v. McClung*, 35 W. Va. 284; *Lawhead v. State*, 46 Neb. 608; *Aiken v. State*, 41 Neb. 263; *Breese v. State*, 12 Ohio St. 146, reviewing the question as follows: "It is said, indeed, in *Stoops v. Com.*, 7 S. & R. (Pa.) 499, that only one offense is charged in such indictment, 'and that is burglary;' and in *Rex v. Withal*, 1 Leach C. C. 88, that the larceny is merged in the burglary. It is nevertheless clear that if acquitted of the burglary, the prisoner may be convicted and sentenced for the larceny. *Com. v. Tuck*, 20 Pick. (Mass.) 360; *State v. Cocker*, 3 Harr. (Del.) 554; *State v. Grisham*, 1 Hayw. (N. Car.) 12; *Roscoe's Crim. Ev.* 367. It is said, however, in *State v. Moore*, 12 N. H. 44, that conviction of the burglary works the merger, and with this qualification the cases in *Sergeant and Rawle* and in *Leach*, *supra*, harmonize with the cases above cited, which authorize a conviction for the larceny if acquitted of the burglary, and also with *Com. v. Hope*, 22 Pick. (Mass.) 10, *Joslyn v. Com.*, 6 Met. (Mass.) 240, and *State v. Moore*, 12 N. H. 44, which determine that where the two offenses are included in the same count, the prisoner, on a general verdict of guilty, can be sentenced for the burglary but not for the larceny." To the same point see *State v. Colter*, 6 R. I. 196, pointing out that the practice has become so well settled in this respect since the days of Lord Hale, that in *Rex v. Furnival*, R.

& R. C. C. 445, the doubt resolved against the prisoner was whether a conviction was good under an indictment which charged a burglarious entry and an actual theft without charging also an intent to steal, an actual theft having been proved. See also article *BURGLARY*, vol. 3, p. 790.

But in other cases the charge of larceny is construed literally as a mere substitute for the charge of an intent to steal, and a conviction for larceny cannot be had under such an indictment. *State v. Shaffer*, 59 Iowa 290; *State v. Hayden*, 45 Iowa 11; *State v. Ridley*, 48 Iowa 370; *Butler v. Com.*, 81 Va. 159. And in *Louisiana* it is held that burglary and larceny cannot be charged in the same count, *State v. Robertson*, 48 La. Ann. 1026; *State v. Ford*, 30 La. Ann. 311; though if not all the elements of burglary are charged, and those of larceny are charged, the indictment will be good for the latter offense, *State v. Richardson*, 45 La. Ann. 692. To this last point see also *State v. Hupp*, 31 W. Va. 355.

Double Conviction. — In *Missouri*, under a statute, contrary to the authorities last above cited, a conviction can be had both for breaking and entering and for the larceny. *State v. Henley*, 30 Mo. 509; *State v. Moore*, 117 Mo. 395; *State v. Owens*, 79 Mo. 619; *State v. Nagel*, 136 Mo. 45.

Election. — Under a charge of robbery the state may elect to prosecute for larceny, as it is an included offense. *Kidd v. State*, 83 Ala. 58.

Charge of Larceny from Building. — Under an insufficient charge of larceny from a building, a conviction for simple larceny may be had if the indictment is sufficient in other respects. *Com. v. Hathaway*, 14 Gray (Mass.) 392; *Shepard v. State*, 2 Tex. App. 295; *Brown v. State*, 90 Ga. 454; *Vaughan v. Com.*, 17 Gratt. (Va.) 576; *State v. Nordman*, 100 Iowa 446. *Contra*, *Allen v. State*, 86 Ga. 399, holding that larceny from the house of anything under the value of \$50 is a misdemeanor only, while by section 4406 of the code, simple larceny, where the property stolen is a note, due bill, bank bill, or any paper for the payment of money or other valuable thing, is a felony. It follows that a person indicted and tried for larceny from the house on a charge of stealing in a house "one five-dollar bill

felony included therein does not authorize a joinder of distinct offenses in the same count.¹

2. Variation of Charge in Separate Counts. — Where there is uncertainty as to what character of the offense the proof will establish, the charge may be varied in several counts in order to admit the different characters of proof.²

of the value of five dollars" cannot be convicted of simple larceny.

Larceny from the Person. — Larceny from the person includes simple larceny, and a conviction can be had for the latter under an indictment charging the former. *Fanning v. State*, 12 Lea (Tenn.) 651; *People v. Long*, 44 Mich. 296; *State v. Taylor*, 3 Oregon 10; *State v. Eno*, 8 Minn. 220. *Contra*, *Stone v. State*, (Ala. 1897) 22 So. Rep. 275, holding that without reference to the particular statute under which an indictment for larceny from the person was drawn, the offense of larceny would be grand or petit larceny, depending upon the value of the property; but when taken from the person the statute makes the larceny of a higher grade, owing to the place from which the thing was taken, and not on account of its value, and does not come within the principle that under an indictment charging grand larceny the conviction can be petit larceny; *Dalton v. State*, (Tex. Crim. App. 1894) 27 S. W. Rep. 259 [citing *Nichols v. State*, 28 Tex. App. 105; *Gage v. State*, 22 Tex. App. 123].

Larceny Must Be Properly Charged. — In an indictment for burglary, the charge of larceny must be laid in proper form in order to convict of that offense if the prisoner should be acquitted of the charge of burglary. *State v. McClung*, 35 W. Va. 283.

Allegation of Value. — Under a form given in the code for larceny in a dwelling house, which omits to state the value of the property stolen, a conviction of simple larceny cannot be sustained; but if the value of the property be alleged in the indictment for larceny in a dwelling house, then the indictment will constitute all the essential elements of the charge of simple larceny in addition to that of larceny in a dwelling house, and will sustain a conviction of the former offense. *State v. Hanlon*, (Oregon 1897) 48 Pac. Rep. 353; *State v. Taylor*, 3 Oregon 10.

Effect of Acquittal. — An acquittal, on an indictment for burglary and larceny, may be pleaded to a new indictment for

larceny of the same goods, for upon the former indictment the defendant might have been convicted of the larceny. *Davis v. State*, 3 Coldw. (Tenn.) 78. And the same is true of an acquittal on a charge of robbery. *Hickey v. State*, 23 Ind. 21; *People v. M'Gowan*, 17 Wend. (N. Y.) 386.

1. *Davis v. State*, 3 Coldw. (Tenn.) 77.

2. *People v. Bogart*, 36 Cal. 245; *State v. Hogan*, R. M. Charl. (Ga.) 474; *Langford v. People*, 134 Ill. 450; *Cooper v. State*, 79 Ind. 206; *Engleman v. State*, 2 Ind. 91; *State v. Elsham*, 70 Iowa 531; *Martin v. Territory*, 4 Okla. 105; *Greenwood v. State*, (Tex. Crim. App. 1898) 44 S. W. Rep. 177; *Vaden v. State*, (Tex. Crim. App. 1894) 25 S. W. Rep. 777, wherein it is said that "if district attorneys would always pursue this plan in framing their indictments, there would be more certainty in the administration of the law;" *Shuman v. State*, 34 Tex. Crim. Rep. 69.

Larceny as Bailee and from the Person. — Thus one count charging a person as bailee with fraudulently converting property in his possession without the consent of the owner may be joined with another charging the defendant with fraudulently and privately, and so suddenly as not to allow time to make resistance on the part of the owner, taking from the person of said owner certain property. This is the allegation of the same transaction, being different modes of committing the offense, and the court will not require the state to elect. *Greenwood v. State*, (Tex. Crim. App. 1898) 44 S. W. Rep. 177.

Larceny from Dwelling in Night and Day. — An indictment which in one count charges larceny from a dwelling in the night-time and in another count charges the same larceny in the day-time is not bad for duplicity. The crime in either case is larceny. *State v. Elsham*, 70 Iowa 531.

Different Owners Laid in Separate Counts. — Ownership may be laid in different persons in separate counts.

Alabama. — *Maynard v. State*, 46 Ala.

3. Larceny of Several Articles — Articles Belonging to the Same Owner.

— If several articles charged to have been stolen were taken at the same time and place and from the same owner, but one larceny is committed, and therefore all the articles should be inserted in one count and their taking charged as one offense.¹

85; *State v. Wisdom*, 8 Port. (Ala.) 512.

Arkansas.—*State v. Jourdan*, 32 Ark. 203.

California.—*People v. Connor*, 17 Cal. 354.

Florida.—*Kennedy v. State*, 31 Fla. 428.

Illinois.—*Langford v. People*, 134 Ill. 450.

Indiana.—*Cooper v. State*, 79 Ind. 206.

Maryland.—*State v. McNally*, 55 Md. 559.

Massachusetts.—*Bushman v. Com.*, 138 Mass. 507.

Texas.—*Pisano v. State*, 34 Tex. Crim. Rep. 63; *McLaughlin v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 280; *Irving v. State*, 8 Tex. App. 46; *Shuman v. State*, 34 Tex. Crim. Rep. 69.

Ownership — Charged in One Count and Unknown in Another.—An indictment may allege a certain ownership in one count and in a subsequent count charge the ownership to be unknown, where the evidence before the grand jury was such as to make it a *prima facie* case of unknown ownership distinct from that averred in the first count. *McLaughlin v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 280; *Irving v. State*, 8 Tex. App. 46.

In *Rex v. Robinson*, Holt 595, 3 E. C. L. 233, it was held that where the first count charged the ownership specifically, naming the parties, and the second count charged the ownership to be unknown, and the prosecutor could not prove the ownership as laid in the first count, by reason of a defect of evidence, he could not recur to the second count charging the ownership as unknown.

One Offense.—In *Arkansas*, where only one distinct offense could as a rule be charged in the same indictment, an indictment charged in one count the larceny of steers belonging to one person and in another the larceny of oxen belonging to another person, and upon demurrer to the indictment for misjoinder it was held that if the prosecuting attorney intended to charge but one

offense and inserted the second count to obviate uncertainty in the evidence as to the ownership of the animals, he should have stated the fact to the court and made it appear of record. *State v. Jourdan*, 32 Ark. 204.

1. *Alabama*.—*Reed v. State*, 88 Ala. 36.

Colorado.—*Kollenberger v. People*, 9 Colo. 236.

Illinois.—*Waters v. People*, 104 Ill. 544.

Louisiana.—*State v. Faulkner*, 32 La. Ann. 725.

Missouri.—*State v. Wagner*, 118 Mo. 626; *State v. Daniels*, 32 Mo. 558.

Nevada.—*State v. Ward*, 19 Nev. 297.

New Hampshire.—*State v. Snyder*, 50 N. H. 150.

North Carolina.—*State v. Martin*, 82 N. Car. 672.

Oregon.—*State v. McCormack*, 8 Oregon 236.

Pennsylvania.—*Com. v. Johnson*, 133 Pa. St. 293.

South Carolina.—*State v. Johnson*, 3 Hill L. (S. Car.) 1.

Tennessee.—*State v. Williams*, 10 Humph. (Tenn.) 101; *Taylor v. State*, 3 Heisk. (Tenn.) 460; *Baldwin v. State*, 1 Sneed (Tenn.) 411.

Vermont.—*State v. Cameron*, 40 Vt. 555.

Different Penalties for the Several Articles.—The rule stated in the text is held not to be altered by the fact that different penalties are prescribed for the larceny of the different articles. *Kelly v. State*, 7 Baxt. (Tenn.) 323; *State v. Augustine*, 29 La. Ann. 120; but to the contrary see *Heineman v. State*, 22 Tex. App. 44; *Hickman v. State*, 22 Tex. App. 441.

Prosecution or Conviction for One of Several Articles Charged.—It is held that the state may elect to prosecute, or that a conviction may be had for the larceny of any one of the articles stolen at the same time. *State v. Snyder*, 50 N. H. 150; *State v. Donnegan*, 34 Mo. 67; *State v. Martin*, 82 N. Car. 672. And if any one of the articles is not the subject of larceny, *Harvey v. Com.*, 23 Gratt. (Va.) 941, or is insufficiently de-

Articles Belonging to Different Owners. — The same rule applies though the articles belong to different owners. A charge that at the same time and place the defendant stole different articles belonging to different persons does not charge separate offenses, and if the taking was done as a single act it is properly charged as one offense in one count.¹

scribed, a conviction may be had for the larceny of the others, *Reed v. State*, 88 Ala. 36. See also *supra*, III. 3. j. (3) (b) *Aggregate Value of Several Articles.*

Effect as Bar. — And if the prosecution is for only a part, no prosecution can be instituted thereafter for the others. *State v. Snyder*, 50 N. H. 150; *Jackson v. State*, 14 Ind. 327; *State v. Ward*, 19 Nev. 300; *State v. McCormack*, 8 Oregon 236; *Fisher v. Com.*, 1 Bush (Ky.) 211; *State v. Cameron*, 40 Vt. 555; *State v. Augustine*, 29 La. Ann. 119, wherein it is said that if the rule were otherwise it would result in allowing an unlimited number of indictments predicated on one and the same act.

But it has been held otherwise without denying the propriety of joining the several articles in the same indictment. In *Reg. v. Brettell, C. & M.* 609, 41 E. C. L. 331, the right to prosecute for the theft of one of two articles, after a prosecution and conviction for the theft of the other, the two articles having been stolen at one and the same time, was upheld, though the second prosecution was stopped because, as it seems, it would have been unjust to impose a double penalty upon the prisoner under the circumstances of that case.

So in *State v. Johnson*, 3 Hill L. (S. Car.) 1, the court, in sustaining an indictment which charged the larceny of several articles in one count, said, *arguendo*, that it was to the advantage of the defendant, because if the state failed as to any one of the articles no other indictment should be brought therefor, while otherwise he might be exposed to several prosecutions.

1. *District of Columbia.* — *Hoiles v. U. S.*, 3 MacArthur (D. C.) 370.

Georgia. — *State v. Hogan, R. M. Charlt.* (Ga.) 474.

Indiana. — *Bell v. State*, 42 Ind. 335.

Iowa. — *State v. Larson*, 85 Iowa 659; *State v. Paul*, 81 Iowa 597.

Maine. — *State v. Nelson*, 29 Me. 329.

Massachusetts. — *Bushman v. Com.*, 138 Mass. 507.

Michigan. — *People v. Johnson*, 81 Mich. 573.

Missouri. — *Lorton v. State*, 7 Mo. 55; *State v. Morphin*, 37 Mo. 373.

New Hampshire. — *State v. Merrill*, 44 N. H. 624.

Ohio. — *State v. Hennessey*, 23 Ohio St. 339.

Pennsylvania. — *Fulmer v. Com.*, 97 Pa. St. 503.

Texas. — *Addison v. State*, 3 Tex. App. 41.

Vermont. — *State v. Newton*, 42 Vt. 537.

Virginia. — *Alexander v. Com.*, 90 Va. 809.

Washington. — *Territory v. Heywood*, 2 Wash. Ter. 180.

See *supra*, IV. 2. *Variation of Charge in Separate Counts.*

Contra. — *Morton v. State*, 1 Lea (Tenn.) 498. See also *Phillips v. State*, 85 Tenn. 560. Though different articles belonging to different owners may be joined in separate counts. *Cash v. State*, 10 Humph. (Tenn.) 111.

Bar to Future Prosecution. — In some cases it is held that where several articles belonging to different owners are stolen at the same time there can be but one prosecution, as there is but one offense, and that a prosecution for a part will bar a future prosecution for the other part, *Wilson v. State*, 45 Tex. 76; *Hudson v. State*, 9 Tex. App. 151; *Hoiles v. U. S.*, 3 MacArthur (D. C.) 370; while in others it is held that there may be a separate prosecution for the larceny of each article which belongs to a different owner, *Phillips v. State*, 85 Tenn. 551; *State v. Lambert*, 9 Nev. 321; *Com. v. Sullivan*, 104 Mass. 552; *State v. Thurston*, 2 McMull. L. (S. Car.) 382.

Presumption when Two Indictments are Found. — Where separate indictments are preferred as to the property of each owner, the court will not presume that several articles belonging to different owners which are alleged to have been stolen on the same date were stolen at the same time and place. *U. S. v. Goddard*, 4 Cranch (C. C.) 444.

Allegation of One Offense. — In *Joslyn*

Specific Designation of Owner. — Where the larceny of several articles belonging to different owners is charged in one count, the ownership of each article must be specifically set forth.¹

4. Joinder of Offenses in Separate Counts — a. GENERALLY. — While more than one distinct offense cannot as a general rule be joined in one count,² kindred offenses generic in kind growing out of the same transaction may be charged in the same indictment, provided they be incorporated in separate counts,³ and

v. State, 128 Ind. 160, it was held that an indictment charging the theft of articles belonging to different owners must allege that they were stolen at the same time and place and by the same act, or it will be objectionable as double. In *Addison v. State*, 3 Tex. App. 41, the indictment contained such a charge. In *State v. Wagner*, 118 Mo. 630, which treated of several articles belonging to the same owner, it was said that whether it is necessary in charging the theft of several articles at one time in one count to charge that the articles were stolen at the same time and place is a point which does not appear to have been determined, but that in two instances this was the method of procedure adopted; referring to *State v. Williams*, 10 Humph. (Tenn.) 101, which treats of articles belonging to the same owner, and *State v. Nelson*, 29 Me. 329, which treats of articles belonging to different owners.

1. *Alexander v. Com.*, 90 Va. 811; *State v. Merrill*, 44 N. H. 624; *State v. Ryan*, 4 McCord L. (S. Car.) 16.

2. See article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

3. *Alabama*. — *Barber v. State*, 34 Ala. 213.

Colorado. — *Roberts v. People*, 11 Colo. 213.

Illinois. — *Waters v. People*, 104 Ill. 544.

Indiana. — *McCullough v. State*, 132 Ind. 427.

Iowa. — *State v. Elsham*, 70 Iowa 531.

Louisiana. — *State v. Wren*, 48 La. Ann. 803; *State v. Moultrie*, 33 La. Ann. 1146; *State v. Prince*, 42 La. Ann. 817.

Maine. — *State v. Hood*, 51 Me. 363; *State v. McAllister*, 26 Me. 376.

Massachusetts. — *Com. v. Walker*, 163 Mass. 226; *Crowley v. Com.*, 11 Met. (Mass.) 575.

Ohio. — *Barton v. State*, 18 Ohio 221.

Texas. — *Irving v. State*, 8 Tex. App. 46; *Heineman v. State*, 22 Tex. App.

44; *Hickman v. State*, 22 Tex. App. 441. *Virginia*. — *Anthony v. Com.*, 88 Va. 847.

Larceny and Conspiracy to Commit Larceny may be joined in the same indictment. *Anthony v. Com.*, 88 Va. 847.

Larceny and Conspiracy to Defraud may be joined. *Henwood v. Com.*, 52 Pa. St. 424.

Severing from Soil and Stealing. — A count for severing certain property from the soil of another person and a count for stealing such property may be joined in the same indictment. *State v. Prince*, 42 La. Ann. 817.

Presumption from Separate Counts. — If various counts in an indictment are intended to charge but a single prosecution, namely, the larceny at the same time of the property of several different persons, only one count is necessary, but the court is not bound to assume that the offenses set up in the different counts are one and the same offense, although they are alleged to have been committed on the same day. *Bushman v. Com.*, 138 Mass. 507.

Surplusage. — An indictment which sufficiently charges larceny is good notwithstanding it is informal and poorly drawn and embraces the charge, or attempts to embrace the charge, of another offense, because under the statute all the words attempting to charge such other offense may be rejected as surplusage, and if when so rejected sufficient remains to charge the offense of larceny, the indictment is good. *State v. White*, 129 Ind. 153; *State v. Henn*, 39 Minn. 464.

An indictment for stealing the temporary use of a horse in violation of a particular statute is not defective because it also charges the stealing of the temporary use of a buggy, the latter being harmless surplusage. *State v. Darden*, 117 N. Car. 697.

"*Embessle*," in an indictment for larceny, may be rejected as surplusage. *Com. v. Simpson*, 9 Met. (Mass.) 138.

this is held to be permissible whether the offenses charged are of the same or different degrees.¹

b. APPLICATION OF RULE TO PARTICULAR CASES. — The foregoing rule is stated in its general application to the joinder of larceny with other offenses and may be more particularly stated in connection with special kindred offenses.

Larceny and Recovering Stolen Property. — Thus, separate counts for larceny and for receiving stolen goods may be joined in the same indictment.²

Burglary and Breaking and Entering. — In like manner a count for larceny may be added to one for burglary or breaking and entering with intent to steal, under statutes. The practice of joining these offenses is very common.³

1. *State v. Hood*, 51 Me. 364.

2. *Alabama*. — *Broughton v. State*, 105 Ala. 103; *Orr v. State*, 107 Ala. 35.

Indiana. — *Goodman v. State*, 141 Ind. 35; *Gandolpho v. State*, 33 Ind. 439.

Kansas. — *State v. Blakesley*, 43 Kan. 250.

Louisiana. — *State v. Crosby*, 4 La. Ann. 434; *State v. Moultrie*, 33 La. Ann. 1146.

Maine. — *State v. Stimpson*, 45 Me. 608.

Massachusetts. — *Com. v. Adams*, 7 Gray (Mass.) 43; *Com. v. O'Connell*, 12 Allen (Mass.) 451.

Michigan. — *Brown v. People*, 39 Mich. 37.

Missouri. — *State v. Daubert*, 42 Mo. 242.

New York. — *People v. Infield*, (Gen. Sess.) 1 N. Y. Crim. Rep. 146.

North Carolina. — *State v. Carter*, 113 N. Car. 640.

Ohio. — *Whiting v. State*, 48 Ohio St. 220.

South Carolina. — *State v. Posey*, 7 Rich. L. (S. Car.) 484.

Tennessee. — *Hampton v. State*, 8 Humph. (Tenn.) 69; *Cassels v. State*, 4 Yerg. (Tenn.) 149; *Cook v. State*, 16 Lea (Tenn.) 461.

United States. — *U. S. v. Prior*, 5 Cranch (C. C.) 37.

England. — *Rex v. Wheeler*, 7 C. & P. 170, 32 E. C. L. 483; *Rex v. Austin*, 7 C. & P. 796, 32 E. C. L. 740.

Same Offense Charged. — Where burglary, larceny, and receiving stolen goods are charged separately in separate counts, the indictment will be construed to refer to one and the same transaction, *People v. Rose*, (Buffalo Super. Ct.) 39 N. Y. St. Rep. 291; and an election will not be required for fail-

ure to aver that the goods are the same, if their description identifies them as the same and there was no motion to quash, *Whiting v. State*, 48 Ohio St. 220.

Counts Charging Different Persons as Thief and Receiver Respectively. — Different persons may be charged respectively, in separate counts of the same indictment, as thief and receiver of the stolen property. *Goodman v. State*, 141 Ind. 35; *Gandolpho v. State*, 33 Ind. 439; *Com. v. Adams* 7 Gray (Mass.) 43; *Rex v. Hartall*, 7 C. & P. 475, 32 E. C. L. 589; *Rex v. Wheeler*, 7 C. & P. 170, 32 E. C. L. 483. *Contra*, *People v. Hawkins*, 34 Cal. 181.

Effect of Acquittal on Charge of Larceny. — If in one count one person is charged with larceny and in another count another person is charged with receiving the stolen goods, knowing them to have been stolen, a conviction cannot be had on the latter count if there is an acquittal on the former. *State v. Antoine*, 42 La. Ann. 945.

Necessity for Separate Counts. — Larceny and receiving stolen goods cannot be charged in the same count. *State v. Moultrie*, 33 La. Ann. 1146; *Trimble v. State*, 18 Tex. App. 632; *Gaither v. State*, 21 Tex. App. 527. *Contra*, *State v. Halida*, 28 W. Va. 499. See further article RECEIVING STOLEN PROPERTY.

3. *Dodd v. State*, 33 Ark. 517; *State v. Hood*, 51 Me. 363; *People v. Rose*, (Buffalo Super. Ct.) 39 N. Y. St. Rep. 291. See article BURGLARY, vol. 3, p. 736.

In *Indiana* the joinder of counts for larceny and obtaining goods by burglary is expressly authorized by statute, and it is not necessary in joining counts for larceny and obtaining goods by burglary that it should affirmatively

Larceny and Robbery. — Larceny and robbery are offenses of such a nature that they may be joined in separate counts of the same indictment.¹

Larceny and Embezzlement. — As a general rule, larceny and embezzlement, when relating to the same transaction, may be joined in separate counts of the same indictment.²

c. ELECTION. — The foregoing principles are subject, however, to the rule that the court may in its discretion and for the purpose of protecting the accused from embarrassment in his defense require the prosecution to elect upon which count it will proceed.³

V. INSTRUCTIONS — 1. Generally. — As in other cases, the court should submit to the jury the issues involved in a prosecution for larceny, with proper instructions as to the law governing the subject.⁴ The defendant is entitled to have the law charged upon

appear in the indictment, or in either count thereof, that the goods obtained by burglary were the same as those made the subject of larceny, but it is sufficient that the contrary does not affirmatively appear. *McCullough v. State*, 132 Ind. 427.

Conviction for One Offense. — If the two offenses are charged in separate counts, there can be no conviction of both. *State v. McClung*, 35 W. Va. 284. *Contra*, *Dodd v. State*, 33 Ark. 517; *Speers v. Com.*, 17 Gratt. (Va.) 570. See also the notes in the last preceding subsection.

1. *Damewood v. State*, 1 How. (Miss.) 262; *Com. v. Shutte*, 130 Pa. St. 272; *Mathews v. State*, 10 Tex. App. 279.

Same Transaction. — There may be a joinder of counts for larceny and robbery where they refer to the same transaction. *People v. Callahan*, 29 Hun (N. Y.) 580; *Com. v. Shutte*, 130 Pa. St. 272.

Larceny as Bailee and Robbery. — The offense of larceny as bailee may be joined with the offense of robbery in separate counts, and there may be a conviction of the larceny and an acquittal of the robbery. *Com. v. Shutte*, 130 Pa. St. 272.

Larceny from the Person. — Larceny from the person and robbery, being offenses of different characters in *Georgia*, cannot be joined in the same indictment. *Doyle v. State*, 77 Ga. 513.

2. See article EMBEZZLEMENT, vol. 7, p. 449.

Where the Offenses Are of Different Natures, as in *California*, where it is held that larceny and embezzlement are

essentially different and depend upon altogether different facts, they cannot be joined in the same indictment or information. *People v. De Coursey*, 61 Cal. 134; *People v. Clement*, (Cal. 1894) 35 Pac. Rep. 1022.

3. See the general treatment of this subject in the article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344, in addition to the following cases pertaining particularly to the joinder of larceny and other offenses. *Roberts v. People*, 11 Colo. 213; *McCullough v. State*, 132 Ind. 427; *Lamphier v. State*, 70 Ind. 320 [*citing* *Bell v. State*, 42 Ind. 335; *Mershon v. State*, 51 Ind. 14; *Snyder v. State*, 59 Ind. 105]; *State v. Hood*, 51 Me. 364; *State v. Nelson*, 29 Me. 329; *Com. v. Sullivan*, 104 Mass. 552; *State v. Daubert*, 42 Mo. 242; *State v. Hazard*, 2 R. I. 474.

But the court will not usually require an election where counts are properly joined as indicated in the subsections last preceding; see *Orr v. State*, 107 Ala. 35; *State v. Daubert*, 42 Mo. 242; *Hurlburt v. State*, (Neb. 1897) 72 N. W. Rep. 471; *Whiting v. State*, 48 Ohio St. 220; *Womack v. State*, (Tex. Crim. App. 1894) 25 S. W. Rep. 772; and it is only where it may appear that the rights of a defendant may be jeopardized or prejudiced that the state will be required to elect on which count it will proceed to trial. *Shuman v. State*, 34 Tex. Crim. Rep. 69. See the cases generally in the preceding subsections.

4. See generally for this subject the article INSTRUCTIONS, vol. 11, p. 47.

Only Issues Involved. — A charge on any issue is only appropriate when

every defense presented by the evidence, and a refusal to give an instruction covering such a defense as a part of the law of the case is error.¹ The court should not give an instruction which will leave the jury free to convict the defendant of a charge not embraced in the indictment.² But where the charge conforms to the allegations in the indictment it will be presumed on appeal and in the absence of the testimony that the issues involved in

some evidence is introduced in support of such issue. *Dalton v. State*, (Tex. Crim. App. 1894) 27 S. W. Rep. 259; *Ellis v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 205; *Young v. State*, 34 Tex. Crim. Rep. 290.

Where the court sufficiently instructs upon the only defense relied on, it is proper to refuse any other charge not called for by the evidence. *Prewitt v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 792.

Prejudicial Though Abstractly Correct.—A charge, "Possession of the person unlawfully deprived of property is constituted in all cases where the person so deprived of possession is at the time of taking lawfully entitled to the possession thereof as against the true owner," was held to be abstractly correct, and proper if there was evidence in the case tending to show that the prosecutor was entitled to the possession as against the defendant, the owner, but there being no evidence to this effect the instruction was held prejudicial to the defendant. *McNair v. State*, 14 Tex. App. 82.

Theory of Prosecution under Indictment and Proof.—Where, under the indictment as presented and the proof as introduced, the only theory upon which the prosecution can be sustained is that at the time the defendant obtained the money he did so with the intent to appropriate it to his own use, it being admitted that he obtained it with the consent of the owner, the court should limit the consideration of the jury to this phase of the case only. *Sanders v. State*, (Tex. Crim. App. 1897) 42 S. W. Rep. 983.

Theft Generally and Larceny from Person.—Under an indictment charging theft generally, if the evidence shows theft or larceny from the person the court must charge as to that offense, where under a charge of the former there may be a conviction of the latter. *Dalton v. State*, (Tex. Crim. App. 1894) 27 S. W. Rep. 259.

Special Instruction on Matter Once

Charged.—It is not error to refuse a special instruction, however correct, if the law in that respect has been once correctly given. *Phillips v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 644; *Waidley v. State*, 34 Neb. 250.

1. *Wilson v. State*, 27 Tex. App. 577; *Long v. State*, 11 Tex. App. 381; *Graff v. People*, 134 Ill. 380.

Purchase.—Where the defendant sets up a purchase of the property and this issue as a defense is made by the evidence, the court must announce the principles of law governing such a defense, *Wright v. State*, 35 Tex. Crim. Rep. 470; *Clayton v. State*, 15 Tex. App. 348; *Ray v. State*, 13 Tex. App. 51; *Heath v. State*, 7 Tex. App. 464; *Vincent v. State*, 9 Tex. App. 303; *Henry v. State*, 9 Tex. App. 358; *McAfee v. State*, 14 Tex. App. 668; *Faulkner v. State*, 15 Tex. App. 115; and an instruction must be given embracing such a purchase, either in the affirmative or in the shape of an exception in connection with the possession, *Wright v. State*, 35 Tex. Crim. Rep. 470; but it is sufficient if the court charges on the purchase, if this was the defense, and the defendant's explanation when found in possession, though the court fails to instruct in regard to the defendant's explanation in connection with recent possession, *Thomason v. State*, (Tex. Crim. App. 1897) 41 S. W. Rep. 638.

2. Thus, an instruction that the unexplained possession of recently stolen property is presumptive evidence of guilt, and that if the jury is "satisfied from all the evidence * * * that the possession of the defendant was a guilty possession," then he should be convicted, was held to be erroneous, because under it the defendant could be found guilty of receiving stolen property knowing it to have been stolen, which was an offense materially different from that with which he was charged. *State v. Tucker*, 76 Iowa 232. See further article RECEIVING STOLEN PROPERTY.

the trial were fully submitted.¹

2. Definition of Offense. — It is incumbent on the judge to give to the jury an accurate definition of the crime, either in the language of the law or in his own language,² but it is sufficient if the charge viewed as a whole sustains the usual definition of larceny.³

3. Value. — Under a statute making the enormity of the offense and the punishment therefor dependent upon the value of the property stolen with respect to a fixed amount, the court cannot refuse an instruction that if the jury have a reasonable doubt upon all the evidence as to the value of the property being greater than the amount fixed by the statute, they should find the value to be of a less amount.⁴ But if the accused is charged with petit

1. *Morris v. State*, (Tex. Crim. App. 1893) 20 S. W. Rep. 979.

2. *Lindley v. State*, 8 Tex. App. 446; *State v. Moore*, 101 Mo. 316.

In Illinois, as defined by the statute, 1 Starr & Curt. Annot. Stat. (1896), p. 1316, "larceny is the felonious stealing, taking and carrying, leading, riding, or driving away the personal goods of another." Under this definition it was held that to charge a felony it must be alleged that the defendant feloniously stole, took, and carried away, etc., and that an instruction that "larceny is the felonious taking and carrying away the personal goods of another" is fatally defective. *Hix v. People*, 157 Ill. 385.

Consent of Owner. — It is necessary to charge that the taking must have been without the consent of the owner, *Lindley v. State*, 8 Tex. App. 445; *Bawcom v. State*, 41 Tex. 189; *Spruill v. State*, 10 Tex. App. 695; *Littlejohn v. State*, 59 Miss. 276; but it is unnecessary to charge in regard to the want of consent of a party who is not named as owner, *Otero v. State*, 30 Tex. App. 450.

Joint Ownership. — Where an indictment alleged joint ownership in two, and the jury were instructed that "if from the evidence adduced in this case you are satisfied beyond a reasonable doubt that * * * defendant unlawfully took one cow, * * * the property of Frank Paxton and C. C. McClure, without the consent of said Paxton and said McClure or of either of them," etc., it was held that the words "or of either of them" should have been omitted, and the charge as to consent have been "without the consent of Frank Paxton and without the consent

of C. C. McClure," etc. *Jones v. State*, 28 Tex. App. 42. To the same point, *Woods v. State*, 26 Tex. App. 490. See *supra*, III. 3. *h. Want of Owner's Consent.*

3. *State v. Garvin*, 48 S. Car. 258.

Inadvertent Misapplication of Terms. — Where by a mere inadvertence the court in charging the jury used the word "burglary" instead of "larceny," but the law as to larceny was given throughout the charge, the error was harmless. *Oxford v. State*, 32 Tex. Crim. Rep. 272.

4. *State v. Thompson*, 137 Mo. 620; *State v. McCarty*, 73 Iowa 51, *following* *State v. Wood*, 46 Iowa 116; but in *State v. Hessian*, 58 Iowa 68, where an instruction was complained of because the defendant might have stolen some of the property and not have been guilty of the offense charged, it was held that the instruction was sufficient, the court saying: "If the value of the stolen property did not exceed twenty dollars, the defendant might nevertheless be found guilty of larceny under the indictment. The value of the property merely fixes the punishment to be inflicted upon the offender. The court instructed the jury that they must find the value of the property which was stolen. This was done, and the value was found to be fifty dollars."

Sufficiency. — Where the court instructs the jury carefully, upon the question of value, that they are not bound by the valuation placed upon the articles by the state's witnesses, but can judge of the value for themselves, and at the same time calls attention to the importance of such determination by pointing out that the defendant cannot be convicted of

larceny, the court has no right to charge the statute defining grand larceny nor to instruct the jury that they should inflict a punishment as for grand larceny if the defendant is convicted.¹

4. Ownership and Possession. — Where the statutory definition of larceny requires that the property should be found by the jury to belong to a third person, the jury must be so instructed.²

Possession of Recently Stolen Property. — It is proper to submit the question of explanation of possession of recently stolen property if this is an issue presented by the evidence. The court is not authorized to order a conviction or to charge the jury that the defendant is guilty as a presumption from the evidence,³ but

any greater offense than that of petit larceny should the value of the articles be found to be less than a certain amount, if the jury find the value to be greater than that amount and render a verdict accordingly their verdict will not be disturbed. *People v. Alexander*, (Supreme Ct.) 33 N. Y. Supp. 830.

Value Not Contested — Weight of Evidence. — When the facts are admitted to be true or are placed beyond any doubt without contest, there is no reason why the court may not so assume the value proven without infringing the rule inhibiting the charge upon the weight of the evidence. *Nelson v. State*, 35 Tex. Crim. Rep. 205; *State v. Burton*, (Iowa 1897) 72 N. W. Rep. 413.

Misdemeanor Not in Issue. — Where the only testimony fixes the value at an amount above the misdemeanor limit, the court is not required to charge on the misdemeanor. *Young v. State*, 34 Tex. Crim. Rep. 290.

But where the indictment charges grand larceny, it is proper to instruct concerning petit larceny where the evidence on the trial shows the value of the property to be within the latter offense. *State v. Donovan*, 121 Mo. 496. And where under an indictment for the larceny of several articles proof makes out only the theft of a number sufficient in value to make the offense petit larceny, the court cannot withdraw from the jury the consideration of that offense, *People v. Comyns*, 114 Cal. 107; but under such circumstances an instruction on petit larceny must be given, *Lee v. State*, 14 Tex. App. 266.

1. *Livingston v. State*, 141 Ind. 134, holding that the error is not cured by reason of the fact that the punishment actually inflicted is one which could have been inflicted for petit larceny.

2. *State v. Crow*, 54 Mo. App. 212.

Evidence Tending to Show Defendant Owner. — It is improper to refuse a charge that if the jury believe from the evidence that the property belongs to any one other than the party in whom the ownership was alleged then they must find for the defendant, where there is evidence tending to show that such property did belong to another person, namely, to the defendant himself, as of course there could be no conviction if the jury found according to this tendency of the evidence. *Barnes v. State*, 103 Ala. 44.

Evidence Tending to Show Variance. — So where the exact ownership laid must be proved, the defendant is entitled to such an instruction, as proof of any other ownership would not justify a conviction, *Robinson v. State*, 5 Tex. App. 519; *Kay v. State*, 40 Tex. 29; and he is entitled to such an instruction whether it is requested or not, as in other felonies, *Robinson v. State*, 5 Tex. App. 519.

Ownership and Possession. — In *Texas*, if an indictment alleges ownership and possession to be in one person and the evidence establishes the ownership to be in that person, but the care and control of the property to be in another, this issue should be submitted to the jury with the proper instructions as to the necessity of proof sustaining the allegation of ownership and possession. *White v. State*, 33 Tex. Crim. Rep. 94.

3. *Pollard v. State*, 33 Tex. Crim. Rep. 197; *Blaker v. State*, 130 Ind. 203; *Hix v. People*, 157 Ill. 385; *Stover v. People*, 56 N. Y. 315; *State v. Smith*, 2 Ired. L. (N. Car.) 402; *State v. McRae*, 120 N. Car. 608. See article *Larceny*, Am. and Eng. Encyc. of Law.

The Corpus Delicti must be proven, and the charge of the court cannot dispense with this requirement. *Thomas*

where the court charges fully on circumstantial evidence, it is held that there is no occasion to give a special charge at the instance of the defendant on the possession of recently stolen property.¹

5. Intent. — The intent as an element in the definition of the offense is a question for the court to explain to the jury; but whether or not the intent is expressed at any particular time under the testimony is a question for the jury to determine,² and an

v. State, 109 Ala. 25; *Bailey v. State*, 52 Ind. 462. And the charge must not instruct the jury to convict upon unexplained possession alone, but must fairly leave to the jury the question of reasonable doubt and the necessity of proof of guilt beyond a reasonable doubt, as well as the *prima facie* presumption of guilt. *Graft v. People*, 134 Ill. 380; *Smith v. State*, 58 Ind. 340; *State v. Wilson*, 95 Iowa 341; *State v. Walker*, 41 Iowa 218; *Brooke v. People*, 23 Colo. 375; *Stokes v. State*, 58 Miss. 677; *Matthews v. State*, 61 Miss. 156; *State v. Hodge*, 50 N. H. 526; *Stover v. People*, 56 N. Y. 315; *Thomason v. State*, (Tex. Crim. App. 1897) 41 S. W. Rep. 638. See also *Wheeler v. State*, 34 Tex. Crim. Rep. 350, (Tex. Crim. App. 1897) 41 S. W. Rep. 615; *McCarty v. State*, 36 Tex. Crim. Rep. 135; *Ray v. State*, (Tex. Crim. App. 1897) 43 S. W. Rep. 78; *Bazan v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 100; *Teague v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 402; *Spillman v. State*, (Tex. Crim. App. 1898) 44 S. W. Rep. 149.

In *State v. Hodge*, 50 N. H. 526, it was said: "If the jury found the defendant had the property in his possession after it was stolen, that fact was evidence against him. If they found an absence of explanatory evidence on his side, under circumstances which tended to show he could furnish such evidence, that fact was additional evidence against him." *Rex v. Burdett*, 4 B. & Ald. 162, 6 E. C. L. 433; 1 Philipps Ev. 598, 599 (4th Am. ed.); J. F. Stephen Cr. L. 303. But if those facts were found, there was no presumption of law, nor was the burden of proof shifted. The state, in the indictment, made an affirmation of the defendant's guilt which the defendant traversed in his plea. The state had the affirmative and the burden of proof which belongs to the affirmative. The question from the beginning to the end of the trial, was

whether the affirmative allegation of guilt was proved by the testimony introduced on both sides, and by the evidence which consists of the nonproduction of testimony, not including the refusal of the defendant to testify if there was such a refusal." See also *Smith v. State*, 58 Ind. 340; *Stover v. People*, 56 N. Y. 315; *Young v. State*, 24 Fla. 147 [citing *State v. Raymond*, 46 Conn. 345]; *Stokes v. State*, 58 Miss. 677; *State v. Smith*, 2 Ired. L. (N. Car.) 402; *Bryant v. State*, 16 Tex. App. 144; *McCoy v. State*, 44 Tex. 616; *Hall v. State*, 8 Ind. 439].

But a charge which instructs that when the explanation given by the defendant is reasonable, etc., and the state fails to establish its falsity the accused must be acquitted, is not open to the criticism that it excludes from the jury the reasonableness of the explanation nor that it imposes upon the defendant the burden of proof. *Hyatt v. State*, 32 Tex. Crim. Rep. 580.

And an instruction that "the possession of stolen property soon after the commission of a theft is *prima facie* evidence of the guilt of the person in whose possession it is found, and is sufficient to warrant a conviction, unless other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt," was held fairly to leave to the jury the question as to whether or not there was stolen property, when read in connection with other instructions, which is permissible. *Keating v. People*, 160 Ill. 483; *Smith v. People*, 103 Ill. 82, where a charge in almost the same words was held good.

1. *Bonnors v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 650.

2. *Miller v. People*, 4 Colo. 182; *State v. Coy*, 119 N. Car. 901; *State v. Gaither*, 72 N. Car. 458; *State v. Hines*, (Idaho 1898) 51 Pac. Rep. 684, holding that an instruction that if the jury "believe from the evidence that the defendant had no felonious intent

instruction which excludes the necessity of such intent, without which the larceny could not be committed, is erroneous and will not support a conviction.¹

to steal the property described at the time he took it," they must acquit, sufficiently leaves the question of intent to the jury; *Green v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 120, holding that an instruction "If from the evidence you entertain a reasonable doubt whether defendant intended to appropriate the horse to his own use when he took it, if you find he took it, then find him not guilty," was held to be sufficient on the question of intent.

In *Indiana*, where larceny may be committed by wrongfully obtaining possession by a trick, as well as by securing the property by stealth, it was held that a charge upon the felonious intent, though not sufficiently expressed, if correct, will not be sufficient to set aside the verdict in the absence of request for additional or more definite instructions on the point. *Crum v. State*, 148 Ind. 401.

Distinction between Larceny and Forcible Trespass.—The distinction between larceny and forcible trespass is clear as a legal proposition, but sometimes it is difficult to draw the line on a given state of facts, and in cases where there is evidence from which the jury might infer that the taking was not fraudulent it is the right of the defendant to have them clearly instructed as to the distinction between trespass and theft; but whether or not the facts in the particular case constitute the one or the other must be left to the jury.

Colorado.—*Miller v. People*, 4 Colo. 182.

Mississippi.—*Littlejohn v. State*, 59 Miss. 276.

North Carolina.—*State v. Coy*, 119 N. Car. 901.

South Carolina.—*State v. Watson*, 7 S. Car. 63.

Texas.—*Bray v. State*, 41 Tex. 203; *Ainsworth v. State*, 11 Tex. App. 344; *Neely v. State*, 8 Tex. App. 64; *Riojas v. State*, 8 Tex. App. 49; *Spinks v. State*, 8 Tex. App. 125; *Landin v. State*, 10 Tex. App. 63; *Isaacs v. State*, 30 Tex. 451.

The accused is entitled to such an instruction where the testimony tends to show that the property alleged to have been stolen was taken openly and in the presence of the owner or other person, notwithstanding the only testi-

mony upon that point is that of the accused himself, and notwithstanding the testimony is contradicted by persons in whose presence he testified that he took or received the property. *Littlejohn v. State*, 59 Miss. 276.

Degree of Offense.—When intent is material upon the question of the degree of offense committed, the defendant is entitled to an instruction covering the law on the point. *Bawcom v. State*, 41 Tex. 192.

1. *People v. Cheong Foon Ark*, 61 Cal. 527; *People v. Hendrickson*, 18 N. Y. App. Div. 404; *State v. Lackland*, 136 Mo. 26; *State v. Moore*, 101 Mo. 316; *Barnes v. State*, 40 Neb. 546; *Waidley v. State*, 34 Neb. 250; *Mead v. State*, 25 Neb. 444; *Thompson v. People*, 4 Neb. 524. See also *supra*, III. 3. *f. The Intent*.

"Stealing" Without the Word "Felonious."—An instruction that the law is that "when by means of fraud or artifice, or any other kind of contrivance, the possession of property is fraudulently obtained * * * and the party obtaining this possession acquires it by means of this fraud and artifice with the intention of stealing it when he gets possession of it, then the crime is larceny," etc., is good without using the word "felonious" before the word "stealing." The word "steal," in common as well as legal use, imports a larceny, and when used in connection with property which is the subject of larceny it means a felonious taking. *People v. Tomlinson*, 102 Cal. 19 [*citing State v. Chambers*, 2 Greene (Iowa) 311; *People v. Raschke*, 73 Cal. 378; *People v. Robertson*, 3 Wheel. Cr. Cas. (N. Y. Gen. Sess.) 181]. See also *Barnes v. State*, 40 Neb. 546; *Ford v. State*, 46 Neb. 390, *distinguishing Mead v. State*, 25 Neb. 444, and *Barnes v. State*, 40 Neb. 545, in that those cases were prosecutions for simple larceny in which the felonious taking was an ingredient of the offense.

As Used in the Code, the term "steal" includes all the elements of larceny at common law, and in instructing the jury the court may charge the intent by using the word "steal;" but if the court undertakes to define larceny at common law, all the elements of that offense must be charged,

VI. VERDICT AND JUDGMENT — 1. In General. — The verdict, as in other cases, must be responsive to the issues,¹ and the jury must act within the limits of the law prescribing their duties in each particular case.²

2. General Verdict. — Where criminal trials are conducted "according to the course of the common law," a general verdict is sufficient, unless it is otherwise provided by statute,³ and such a verdict establishes all the material facts charged in the indictment.⁴ But it is sometimes necessary under express statutes to

and an instruction is erroneous if it omits to charge the element of felonious intent. *Barnes v. State*, 40 Neb. 545.

1. For general treatment of verdicts, see article VERDICT.

Effect of Rejected Verdict. — If the verdict is not responsive to the issue, and the court refuses to accept it, and directs the jury to further consider of their verdict, the rejected verdict will not have the effect of acquittal of the offense charged. *Alston v. State*, 41 Tex. 39.

2. General Verdict — Assessment of Punishment for Lower Grade of Offense. — Under an indictment which charged horse theft, the jury returned a verdict of 'guilty of theft as charged in the indictment,' and assessed the punishment as for theft of an inferior degree of the horse theft charged in the indictment. The verdict was held to be good over an objection that it found the defendant guilty of the offense charged in the indictment and assessed a punishment not provided for that specific offense. *Foster v. State*, 21 Tex. App. 80.

Where a prisoner indicted for grand larceny is found guilty by the jury in manner and form as charged in the indictment, and sentenced to two years' confinement in the penitentiary, whereas three years is the minimum term for that offense, it is held to be no ground for a new trial, as it sufficiently appears that the jury found for a lower degree. *Wattingham v. State*, 5 Sneed (Tenn.) 64.

Surplusage — Fixing Punishment. — Where the jury have no authority to fix the imprisonment, that part of a verdict which attempts to exercise this power may be rejected as surplusage. *Harvey v. Com.*, 23 Gratt. (Va.) 941.

Adding Words Not Necessary, as the value of goods found, will not vary the meaning or effect of the verdict. *Timmons v. State*, 56 Miss. 786.

3. Kollenberger v. People, 9 Colo. 233. See in general article VERDICT.

4. Du Bois v. State, 50 Ala. 139; *People v. Magallones*, 15 Cal. 426; *Mason v. People*, 2 Colo. 373; *State v. Gerish*, 78 Me. 20; *State v. Somerville*, 21 Me. 20; *Com. v. Lavery*, 101 Mass. 207; *Cook v. State*, 49 Miss. 8; *State v. Carter*, 113 N. Car. 640; *State v. Barber*, 113 N. Car. 712; *Wolverton v. Com.*, 75 Va. 909.

Where the jury find a defendant guilty of larceny in a particular case, the law construes the verdict as if the words 'in manner and form as charged in the indictment' were added to it. *State v. Barber*, 113 N. Car. 711.

Larceny and Burglary. — The effect of a general verdict where the defendant is charged with larceny and burglary in the same count is to find the defendant guilty of the burglary.

Georgia. — *Yarborough v. State*, 86 Ga. 396.

Illinois. — *Love v. People*, 160 Ill. 503.

Iowa. — *State v. Shaffer*, 59 Iowa 290.

Massachusetts. — *Com. v. Tuck*, 20 Pick. (Mass.) 358; *Com. v. Lowery*, 149 Mass. 67; *Com. v. Hope*, 22 Pick. (Mass.) 1; *Josslyn v. Com.*, 6 Met. (Mass.) 240; *Kite v. Com.*, 11 Met. (Mass.) 581.

New Hampshire. — *State v. Moore*, 12 N. H. 44.

Virginia. — *Butler v. Com.*, 81 Va. 159; *Speers v. Com.*, 17 Gratt. (Va.) 570.

West Virginia. — *State v. McClung*, 35 W. Va. 280.

England. — *Rex v. Withal*, 1 Leach C. C. 88.

See also *supra*, IV. 1. *Conviction of Lesser Offense.*

Defective Description. — Under a general verdict of guilty the court may strike out articles defectively described or enter a *nolle prosequi* as to them. *Com. v. Johnson*, 133 Pa. St. 293.

find the degree of the offense,¹ though such a statute has no application where a larceny is charged which is not susceptible of division into degrees.²

Upon Several Counts.—A general verdict of guilty on an indictment consisting of two or more counts charging but one offense is sufficient without specifying the count on which the verdict is founded,³ as it is also held where distinct offenses which may properly be joined are charged in several counts of the same indictment.⁴

Effect of Verdict on One Count.—Where there is a verdict of guilty of the offense charged in one count, without reference to the charge in another count of the same indictment, this is in effect an acquittal of the latter charge.⁵

3. Finding of Value.—In some states it is necessary that the

1. See article VERDICT.

2. *People v. Perez*, 87 Cal. 122; *People v. Price*, 67 Cal. 350; *People v. Manners*, 70 Cal. 428; *People v. Whitely*, 64 Cal. 211.

3. *Hurlburt v. State*, (Neb. 1897) 72 N. W. Rep. 471; *Langford v. People*, 134 Ill. 444. See article VERDICT.

4. **Larceny and Receiving Stolen Goods.**—Under an indictment charging larceny and receiving stolen goods, a general verdict is sufficient if there is evidence to sustain it on either count. *State v. Carter*, 113 N. Car. 640; *State v. Stroud*, 95 N. Car. 626; *State v. Baker*, 70 N. Car. 530; *State v. Speight*, 69 N. Car. 72; *State v. Jones*, 82 N. Car. 685; *Com. v. Stahl*, 1 Pa. Super. Ct. Rep. 496; *Taylor v. State*, 3 Heisk. (Tenn.) 460; *Rice v. State*, 3 Heisk. (Tenn.) 215. *Contra*, *State v. Major*, 14 Rich. L. (S. Car.) 76, holding that a general verdict is not sufficient in such a case, because the two offenses are of different degrees.

Under an indictment charging larceny in one count and receiving stolen goods in another count, a verdict of "guilty as charged in the second count of the indictment, to wit, of receiving stolen goods, knowing," etc., was held good as a general verdict on the second count. *Oxford v. State*, 33 Ala. 416.

Receiver and Thief Charged in Separate Counts.—When in one count of an indictment a defendant is charged with stealing and in another a co-defendant is charged with receiving stolen goods, a verdict that certain of the defendants are guilty of larceny and that the defendant B. is "guilty of

receiving, knowing the tobacco to have been stolen," the verdict as to the defendant B., taken in connection with the indictment, is sufficiently clear to show a conviction upon the second count. *State v. Barber*, 113 N. Car. 712.

Different Degrees of the Same Offense.—Where different degrees of the same offense are charged in separate counts of the same indictment, a general verdict will be referred to the highest grade. *State v. Hood*, 51 Me. 363.

Burglary and Larceny.—In *State v. Nicholls*, 37 La. Ann. 779, it was held that a verdict of "guilty of burglary and larceny" responded to an indictment which charged both burglary and larceny in one count, and was equivalent to a verdict of guilty as charged in the indictment, and sustained a sentence for burglary only. See also *State v. Crenshaw*, 45 La. Ann. 496, applying the same rule to a general verdict where the offenses were charged in separate counts.

Where the charges are contained in separate counts as a part of the same transaction, a judgment may be rendered on either count. *Lyons v. People*, 68 Ill. 271; *State v. Watson*, 31 Mo. 362.

One of Two Counts Bad.—Where one of two counts is bad a general verdict will be referred to the good count. *Com. v. Johnson*, 133 Pa. St. 293; *Rice v. State*, 3 Heisk. (Tenn.) 215; *State v. Watson*, 31 Mo. 362; *Murphy v. People*, 104 Ill. 528.

5. *Guenther v. People*, 24 N. Y. 100; *People v. Dowling*, 84 N. Y. 478. See in general article VERDICT.

verdict should find the value of the property stolen,¹ but in others this is not necessary, the general verdict being held to find the truth of all the allegations in the indictment, including that of value.²

4. Judgment. — The judgment must conform to the verdict, and the court has no power to enter a finding and judgment not authorized by the verdict.³

1. *Illinois*. — *Love v. People*, 160 Ill. 501; *Burke v. People*, 148 Ill. 70; *Sawyer v. People*, 8 Ill. 53; *Thompson v. People*, 125 Ill. 256; *Collins v. People*, 39 Ill. 233; *Highland v. People*, 2 Ill. 392; *Williams v. People*, 44 Ill. 478.

Iowa. — *Ray v. State*, 1 Greene (Iowa) 316.

Minnesota. — *State v. Coon*, 18 Minn. 518, wherein the ruling is restricted to the case where the defendant is not convicted of the offense charged.

Nebraska. — *McCormick v. State*, 42 Neb. 866.

New Hampshire. — *Locke v. State*, 32 N. H. 106.

See also *People v. Alexander*, (Supreme Ct.) 33 N. Y. Supp. 830.

Aggregate Value. — A finding of the aggregate value of several articles stolen is sufficient. *Clifton v. State*, 5 Blackf. (Ind.) 224; *State v. Murphy*, 8 Blackf. (Ind.) 498.

In *Jones v. State*, 13 Ala. 153, under an indictment charging petit larceny, it was held that a verdict which failed to find the value of the property was erroneous, but that the error was one of which the defendant could not complain, having no effect upon his guilt or innocence, but being important only as it related to the restitution of the stolen property. See also *Poindexter v. Com.*, 6 Rand. (Va.) 667.

Value of Bank Bills. — Where an indictment charged that the defendant stole twelve hundred and seventy dollars in current bank bills, of the value of \$1,270, and the verdict of the jury was that the defendant was "guilty of larceny of twelve hundred and seventy dollars, as charged in the indictment," it was held that, though the verdict did not in terms find the value of the property, it was sufficiently certain in that respect. *Hildreth v. People*, 32 Ill. 36.

Determination of Value. — In *Nebraska*, where an indictment charges larceny,

the jury on conviction shall ascertain and declare in either verdict the value of the property stolen. The jury are not to estimate, but must determine, the value of the property. *McCormick v. State*, 42 Neb. 866.

2. *Du Bois v. State*, 50 Ala. 139; *Mason v. People*, 2 Colo. 373; *Smith v. State*, 60 Ga. 431; *State v. Calwell*, 43 Minn. 378, harmonizing the rule with the decision in *State v. Coon*, 18 Minn. 518, cited in the last preceding note; *Timmons v. State*, 56 Miss. 786; *Cook v. State*, 49 Miss. 8 [*distinguishing* *Shines v. State*, 42 Miss. 333, and *Unger v. State*, 42 Miss. 642, in that in both cases, while the language of the court in general terms lays down the necessity of the verdict finding the value of the stolen property, the point was not at issue and was not decided in either case]; *Schoonover v. State*, 17 Ohio St. 294; *State v. Kelliher*, (Oregon 1897) 50 Pac. Rep. 532; *Howell v. State*, 1 Oregon 242; *Com. v. Butler*, 144 Pa. St. 568; *Taylor v. State*, 3 Heisk. (Tenn.) 460; *State v. White*, 25 Wis. 359; *Poindexter v. Com.*, 6 Rand. (Va.) 668, holding that a verdict of guilty of petit larceny under an indictment charging grand larceny would not be set aside as erroneous.

3. See in general article SENTENCE.

The court cannot enter a finding and judgment for grand larceny upon an indictment for petit larceny, and although the substitution of the word "grand" in the place of "petit" is in fact a clerical error, this fact cannot be assumed. *McCollough v. State*, 132 Ind. 427.

Verdict Authorizing No Judgment. — If the verdict is one which the law does not authorize, and a judgment is entered thereon and the jury is discharged without objection, the court of last resort will reverse and remand the prisoner for a new trial. *Murphy v. State*, 7 Coldw. (Tenn.) 516.

LASCIVIOUS COHABITATION.

See articles *ADULTERY*, vol. 1, p. 305; *FORNICATION*, vol. 9, p. 642; *LEWDNESS*.

LAW OF THE CASE.

See article *APPEALS*, vol. 2, p. 373.

LEADING QUESTIONS.

See article *EXAMINATION OF WITNESSES*, vol. 8, pp. 80, 121.

LEASE.

See article *LANDLORD AND TENANT*, *ante*, p. 842.

LEAVE OF COURT.

See the various titles in this work upon subjects concerning which Leave of Court may be required, and consult the General Index.

LEGACIES AND DEVISES.

As to *legacies*, see article *LEGATEES AND DISTRIBUTEES*.
devises, see article *HEIRS AND DEVISEES*, vol. 10, p. 20.

LEGAL CONCLUSIONS.

BY THOMAS J. MICHIE.

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I. GENERAL RULE. — To constitute good pleading the facts alone must be alleged. It is a general rule which applies to all pleadings, whether at common law, in equity, or under the codes, that legal conclusions should not be pleaded, and that a bill,

answer, complaint, declaration, or other pleading is bad if it contains nothing more than the bare averment of a legal conclusion.¹

1. *Alabama*. — *Frazier v. Thomas*, 6 Ala. 169; *Stewart v. Hargrove*, 23 Ala. 429; *Savage v. Walshe*, 26 Ala. 619; *Cameron v. Abbott*, 30 Ala. 416. *Compare* *Randolph v. Sharpe*, 42 Ala. 265.
- Arkansas*. — *Tatum v. Tatum*, 19 Ark. 194; *Moore v. Nichols*, 39 Ark. 145; *Jackson v. Reeve*, 44 Ark. 499.
- California*. — *Payne v. Treadwell*, 5 Cal. 310, 16 Cal. 246; *Curtis v. Richards*, 9 Cal. 39; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 535; *Kinney v. Osborne*, 14 Cal. 114; *Levinson v. Schwartz*, 22 Cal. 232; *Nelson v. Murray*, 23 Cal. 338; *Wells v. McPike*, 21 Cal. 219; *People v. San Francisco*, 27 Cal. 675; *Minturn v. Baylis*, 33 Cal. 129; *Stokes v. Geddes*, 46 Cal. 17; *Triscony v. Orr*, 49 Cal. 613; *Matter of Gharky*, 57 Cal. 279; *Aurrecoechea v. Sinclair*, 60 Cal. 548; *Wheeler v. West*, 71 Cal. 128; *Hedges v. Dam*, 72 Cal. 523; *Turner v. White*, 73 Cal. 299; *Going v. Dinwiddie*, 86 Cal. 639; *Drew v. Pedlar*, 87 Cal. 449; *Dyer v. Bradley*, 89 Cal. 560; *Bean v. Travelers' Ins. Co.*, 94 Cal. 583; *McConoughey v. Jackson*, 101 Cal. 263; *Shea v. Johnson*, 101 Cal. 455; *Hihn Co. v. Fleckner*, 106 Cal. 95.
- Colorado*. — *Winne v. Colorado Springs Co.*, 3 Colo. 158; *People v. Lothrop*, 3 Colo. 428.
- Connecticut*. — *Parmelee v. Baldwin*, 1 Conn. 317; *Atwood v. Welton*, 57 Conn. 524; *Hewison v. New Haven*, 34 Conn. 136; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 561; *McCune v. Norwich City Gas Co.*, 30 Conn. 523; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *Chesebro v. Babcock*, 59 Conn. 217; *Kellogg v. New Britain*, 62 Conn. 232.
- Florida*. — *Bucki v. Cone*, 25 Fla. 1; *Sammis v. Wightman*, 31 Fla. 11.
- Georgia*. — *Whaley v. Columbus*, 89 Ga. 781.
- Illinois*. — *Compber v. People*, 12 Ill. 290; *Parks v. Holmes*, 22 Ill. 522; *Newell v. Bureau County*, 37 Ill. 253; *Hopkins v. Woodward*, 75 Ill. 62; *Clay F. & M. Ins. Co. v. Wusterhausen*, 75 Ill. 288; *Kilgore v. Ferguson*, 77 Ill. 215; *People v. Crotty*, 93 Ill. 189; *Kedzie v. West Chicago Park Com'rs*, 114 Ill. 281; *Greig v. Russell*, 115 Ill. 488; *Fish v. Farwell*, 160 Ill. 236; *Schuchert v. Wabash, etc., R. Co.*, 10 Ill. App. 399; *Spahr v. Tartt*, 23 Ill. App. 420; *Clellan v. Perry*, 37 Ill. App. 159; *Wilkinson v. Gage*, 40 Ill. App. 603; *Gerrity v. Brady*, 44 Ill. App. 203; *Ockenholdt v. Frohman*, 60 Ill. App. 300.
- Indiana*. — *Harrington v. Witherow*, 2 Blackf. (Ind.) 37; *Divine v. State*, 4 Ind. 240; *Wilson v. Clark*, 11 Ind. 386; *Kern v. Hazlerigg*, 11 Ind. 443; *Indianapolis, etc., R. Co. v. Taffe*, 11 Ind. 458; *Sutherland v. Lagro, etc., Plank Road Co.*, 19 Ind. 194; *Indianapolis, etc., R. Co. v. Bishop*, 29 Ind. 203; *Armstrong v. Cook*, 30 Ind. 26; *Wills v. Wills*, 34 Ind. 106; *Clark v. Lineberger*, 44 Ind. 223; *Sim v. Hurst*, 44 Ind. 579; *Patterson v. Lord*, 47 Ind. 205; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 384; *State v. Record*, 56 Ind. 109; *Kellogg v. Tout*, 65 Ind. 152; *Jackson School Tp. v. Farlow*, 75 Ind. 121; *Caskey v. Greensburgh*, 78 Ind. 237; *Johnston Harvester Co. v. Bartley*, 81 Ind. 407; *Copenrath v. Kienby*, 83 Ind. 22; *Booth v. Cass County*, 84 Ind. 430; *Krugg v. Davis*, 85 Ind. 311; *Guerin v. Kraner*, 97 Ind. 536; *Logansport v. La Rose*, 99 Ind. 128; *Louisville, etc., R. Co. v. Payne*, 103 Ind. 187; *Harris v. Ross*, 112 Ind. 316; *Kleyla v. Haskett*, 112 Ind. 516.
- Iowa*. — *Cottle v. Cole*, 20 Iowa 484; *Thompson v. Cook*, 21 Iowa 474; *Lane v. Burlington, etc., R. Co.*, 52 Iowa 18; *Burt v. Decker*, 64 Iowa 107; *Koon v. Tramel*, 71 Iowa 133.
- Kansas*. — *Stratton v. McCandless*, 27 Kan. 305.
- Kentucky*. — *Roots v. Merriwether*, 8 Bush (Ky.) 401; *Com. v. Cook*, 8 Bush (Ky.) 224; *Wing v. Hayden*, 10 Bush (Ky.) 280; *Bentley v. Bustard*, 16 B. Mon. (Ky.) 685; *Ransdall v. Shropshire*, 4 Metc. (Ky.) 329; *Camplin v. Eads*, (Ky. 1894) 24 S. W. Rep. 1068; *Clark v. Hart*, (Ky. 1895) 32 S. W. Rep. 216.
- Maryland*. — *Gott v. State*, 44 Md. 337; *Lamm v. Burrell*, 69 Md. 275; *Chambers v. Chalmers*, 4 Gill & J. (Md.) 420.
- Massachusetts*. — *Hollis v. Richardson*, 13 Gray (Mass.) 394; *Flax Pond Water Co. v. Lynn*, (Mass. 1887) 9 N. E. Rep. 837.
- Michigan*. — *Dubois v. Hutchinson*, 40 Mich. 264.
- Minnesota*. — *Clark v. Chicago, etc., R. Co.*, 28 Minn. 71; *Pinney v. Fridley*, 9 Minn. 34; *Knudson v. Curley*, 30

The Code System of pleading is emphatically a fact system. Facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. The plaintiff is required to state truly and frankly the facts constituting his cause of action, and must not load his complaint with conclusions of law and narrations from the evidence.¹ But it is good pleading, under the code, to state

Minn. 434; Price v. Doyle, 34 Minn. 401.

Missouri. — Turley v. Edwards, 18 Mo. App. 689; Pier v. Heinrichoffen, 52 Mo. 336.

Montana. — Parks v. Barkley, 1 Mont. 517; Power v. Gum, 6 Mont. 8.

Nebraska. — Scroggin v. National Lumber Co., 41 Neb. 200.

Nevada. — California State Tel. Co. v. Patterson, 1 Nev. 158.

New York. — Dorr v. Mills, 3 Civ. Pro. Rep. (Brooklyn City Ct.) 7; Swart v. Boughton, 35 Hun (N. Y.) 290; Ralli v. Equitable Mut. F. Ins. Co., 16 Misc. Rep. (N. Y. Supreme Ct.) 358; Louis v. Belgard, (Supreme Ct.) 43 N. Y. St. Rep. 766; Chauvran v. Maillard, (Supreme Ct.) 4 N. Y. Supp. 127; White v. Drake, 3 Abb. N. Cas. (N. Y. Supreme Ct.) 134; Casey v. Mann, 5 Abb. Pr. (N. Y. Super. Ct.) 91; Carter v. Koezley, 14 Abb. Pr. (N. Y. Super. Ct.) 151; Thompson v. Gould, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 428; Litchfield v. Pelton, 6 Barb. (N. Y.) 188; Russell v. Clapp, 7 Barb. (N. Y.) 483; Smith v. Lockwood, 13 Barb. (N. Y.) 209; Van Schaick v. Winne, 16 Barb. (N. Y.) 95; Taylor v. Atlantic Mut. Ins. Co., 2 Bosw. (N. Y.) 116; Prickhardt v. Robertson, 4 Civ. Pro. Rep. (U. S. Cir. Ct.) 112; Phinney v. Phinney, 17 How. Pr. (N. Y. Supreme Ct.) 199; Pierson v. Cooley, 1 Code Rep. (N. Y. C. Pl.) 92; Sprague v. Parsons, 12 Daly (N. Y.) 393; Lipe v. Becker, 1 Den. (N. Y.) 571; Lienan v. Lincoln, 2 Duer (N. Y.) 672; Lawrence v. Wright, 2 Duer (N. Y.) 674; Bentley v. Jones, 4 How. Pr. (N. Y. Supreme Ct.) 204; McMurray v. Gifford, 5 How. Pr. (N. Y. Supreme Ct.) 14; Coffin v. Grand Rapids Hydraulic Co., 61 N. Y. Super Ct. 51; Scofield v. Whitelegge, 49 N. Y. 261; People v. Highway Com'rs, 54 N. Y. 279; Sheridan v. Jackson, 72 N. Y. 173; Adams v. Holley, 12 How. Pr. (N. Y. Supreme Ct.) 330.

North Carolina. — Moore v. Hobbs, 79 N. Car. 537; Lassiter v. Roper, 114 N. Car. 21.

Ohio. — Mitchell v. Franklin County, 25 Ohio St. 143; Peterson v. Roach, 32 Ohio St. 374; Pittsburgh, etc., R. Co. v. Moore, 33 Ohio St. 384; U. S. Rolling Stock Co. v. Atlantic, etc., R. Co., 34 Ohio St. 467; Pelton v. Bemis, 44 Ohio St. 58.

Oklahoma. — Smith v. Kaufman, 3 Okla. 571.

Oregon. — Balfour v. Davis, 14 Oregon 52.

Pennsylvania. — Sigua Iron Co. v. Vandervort, 164 Pa. St. 574; Com. v. Allegheny County, 37 Pa. St. 287.

Tennessee. — Stover v. Allen, 6 Heisk. (Tenn.) 614.

Texas. — Thompson v. Eanes, 32 Tex. 192; Wright v. McKenney, 34 Tex. 570; State v. Jefferson Iron Co., 60 Tex. 314; Glasscock v. Hamilton, 62 Tex. 149.

Vermont. — Stearns v. Stearns, 30 Vt. 213.

Wisconsin. — Holden v. Kirby, 21 Wis. 149; Paine v. Comstock, 57 Wis. 162; Williams v. Williams, 63 Wis. 72; Warren v. Putnam, 68 Wis. 481; Brown v. Phillips, 71 Wis. 254; Wakeley v. Nicholas, 16 Wis. 588; Arimond v. Green Bay, etc., Canal Co., 31 Wis. 342.

United States. — Gould v. Evansville, etc., R. Co., 91 U. S. 536; Alabama v. Burr, 115 U. S. 424.

England. — Phillips v. Phillips, 4 Q. B. Div. 130; Cane v. Chapman, 5 Ad. & El. 647, 31 E. C. L. 404.

1. California. — Green v. Palmer, 15 Cal. 411.

Dakota. — Clay County v. Simonson, 1 Dakota 387.

Indiana. — Wills v. Wills, 34 Ind. 108.

Iowa. — Sac County v. Hobbs, 72 Iowa 69; Lumbert v. Palmer, 29 Iowa 104; Piffner v. Krapfel, 28 Iowa 27.

Kansas. — Kansas Pac. R. Co. v. McCormick, 20 Kan. 107.

Kentucky. — Ransdall v. Shropshire, 4 Metc. (Ky.) 330; Quisenberry v. Artis, 1 Duv. (Ky.) 30; Preston v. Roberts, 12 Bush (Ky.) 570.

facts according to their legal effect. A material fact may be pleaded either by express averment or by the averment of other facts from which the material fact is necessarily inferred.¹

Missouri. — *Wiggins v. Graham*, 51 Mo. 17; *Pier v. Heinrichoffen*, 52 Mo. 333; *Curran v. Downs*, 3 Mo. App. 468; *Miles v. Jones*, 28 Mo. 87; *Gamage v. Bushell*, 1 Mo. App. 418; *Kerr v. Simmons*, 82 Mo. 269; *See v. Cox*, 16 Mo. 166.

Montana. — *Nichols v. Dobbins*, 2 Mont. 541; *Territory v. Hildebrand*, 2 Mont. 429; *Daniels v. Andes Ins. Co.*, 2 Mont. 78; *U. S. v. Williams*, 6 Mont. 386.

New York. — *People v. Highway Com'rs*, 54 N. Y. 278; *Fisher v. Charter Oak L. Ins. Co.*, 67 How. Pr. (N. Y. Super. Ct.) 191; *Mann v. Morewood*, 5 Sandf. (N. Y.) 557.

South Carolina. — *Wallace v. Columbia, etc., R. Co.*, 34 S. Car. 62.

Texas. — *Thompson v. Eanes*, 32 Tex. 190; *Milburn v. Walker*, 11 Tex. 329; *Moody v. Bengel*, 28 Tex. 545; *Jennings v. Moss*, 4 Tex. 452; *Malone v. Craig*, 22 Tex. 609; *Parr v. Nolen*, 28 Tex. 798; *New York, etc., R. Co. v. Gallaher*, 79 Tex. 685; *Gray v. Osborne*, 24 Tex. 157.

The allegations should be such, and so stated, as to permit a distinct traverse and evolve a definite issue. *Cook v. Warren*, 88 N. Y. 37.

Facts constituting a cause of action in the sense of the code are physical facts capable of being established by oral or documentary proof, not propositions which are true in law. *Lawrence v. Wright*, 2 Duer (N. Y.) 673.

In *Gamage v. Bushell*, 1 Mo. App. 418, the court said: "There can be no doubt that the intention of the Practice Act of 1849 was to make all pleadings special, to abolish general averments stating conclusions of law in a declaration or petition, as well as similar general averments in a plea or answer. It was meant that the pleadings should be a statement of the facts of a case on both sides; not of the evidence, but of the facts to which the law was applicable."

Alabama. — It was held, however, in *Randolph v. Sharpe*, 42 Ala. 265, that the system of pleading established by the Alabama Code is more a mere statement of legal conclusions than of the facts which constitute the cause of action. See *supra*, the Alabama cases cited in the preceding note.

Cause of Action. — In *Williams v. Knighton*, 1 Oregon 234, the court said: "Waiving all other questions, it does not appear that the note was due. This cannot be implied from the allegations that he [the plaintiff] has a cause of action against the defendant. That is a conclusion of law. The pleader should state the facts which he thinks give a right of action, and not keep back those facts and offer the court his opinion. If one fact necessary to a right of action be omitted, all others might as well, and the complaint might be reduced to this, 'that the plaintiff has a cause of action against the defendant for five hundred dollars, for which he asks judgment.' The complaint is insufficient, and the judgment must be reversed."

Judgment by Default. — It was held in *Williams v. Knighton*, 1 Oregon 234, that a complaint which only states a conclusion of law will not sustain a judgment by default.

Real Party in Interest. — In *Bentley v. Jones*, 4 How. Pr. (N. Y. Supreme Ct.) 204, the court said: "I have just had occasion to hold, in *Russell v. Clapp* [4 How. Pr. (N. Y. Supreme Ct.) 347], that an allegation in a pleading that a party to an action is not the real party in interest is bad upon demurrer. It is so for the reason that the allegation does not involve a traversable fact, but merely a conclusion of law. I think the question presented by this demurrer is within the principle of that decision. What is the issue which the plaintiff here tenders? It is whether or not Zebulon Jones has any interest in the mortgaged premises. To determine this, it must be ascertained whether the conveyance to him by Silas L. Jones is valid, and if it is, whether he has been legally divested of the interest thus acquired. The facts which are to be established in order to determine these questions are the proper subjects of pleading, and not the inferences which the court may derive from those facts when properly pleaded and proved."

1. *Wills v. Wills*, 34 Ind. 108; *Jones v. Louderman*, 39 Mo. 288; *Jaccard v. Anderson*, 32 Mo. 188; *Lindsay v. Parsons*, 34 Mo. 422; *Simmons v. Belt*, 35 Mo. 461; *Bateson v. Clark*, 37 Mo. 31;

II. EFFECT OF GENERAL RULE — 1. Conclusions of Law Need Not Be Pleaded. — As it is bad pleading to allege legal conclusions without the facts from which they arise, it follows that where the facts are given the legal consequences which flow from them need not be stated.¹

2. The Allegation of a Conclusion of Law Raises No Issue. — Neither the allegation of a conclusion of law nor its denial in a pleading raises an issue.² Therefore, the mere averment of a

Page v. Freeman, 19 Mo. 421; Homire v. Rodgers, 74 Iowa 395; Rochester R. Co. v. Robinson, 133 N. Y. 242; Boyce v. Brown, 7 Barb. (N. Y.) 80; Pattison v. Taylor, 8 Barb. (N. Y.) 250; Coggill v. American Exch. Bank, 1 N. Y. 113; Stewart v. Travis, 10 How. Pr. (N. Y. Supreme Ct.) 148; Bennett v. Judson, 21 N. Y. 238; Thayer v. Gile, 42 Hun (N. Y.) 268; Sullivan v. Iron Silver Min. Co., 109 U. S. 550.

1. Wills v. Wills, 34 Ind. 109; Wootten v. Burch, 2 Md. Ch. 198; Gibson v. McCormick, 10 Gill & J. (Md.) 65; M'Gee v. Barber, 14 Pick. (Mass.) 216; Buck v. Colbath, 7 Minn. 310; Farron v. Sherwood, 17 N. Y. 230; Whittlesey v. Delaney, 73 N. Y. 575; Malcom v. O'Reilly, 89 N. Y. 160; Oneida Bank v. Ontario Bank, 21 N. Y. 490; Hemmingway v. Poucher, 98 N. Y. 287; Kenney v. New York Cent., etc., R. Co., 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 354; Mason v. Carter, 8 S. Car. 104; Lowry v. Jackson, 27 S. Car. 323; Seymour v. Maddox, 5 Eng. L. & Eq. 268.

In Kelley v. McGuire, 15 Ark. 555, the court said: "There can be no question of the soundness of the rule that it is only necessary to state the facts in the bill in chancery, and it tends to prolixity, and is generally improper, to state matters of law, unless, perhaps, law and fact be so blended as to render it necessary."

Indorser. — An original writ was indorsed by one who was not the plaintiff in the writ, and the defendant, having recovered judgment against the plaintiff, sued out a writ of *scire facias* against the indorser; judgment was given against the indorser, and he moved in arrest of judgment, because it was not alleged that he, by reason of indorsing the writ, became liable to the plaintiff in *scire facias*. The court said: "It was not necessary, we think, to aver that by force of any law of this commonwealth the indorser became liable; the statute is a general law, to

be taken notice of without being specially pleaded. It is sufficient to aver the facts which bring the indorser within the operation of the statute, without stating in terms the liability, which is an inference of law." M'Gee v. Barber, 14 Pick. (Mass.) 216.

Proper Relief. — A party is under no obligation to state in his pleading the theory of law upon which his claim is based; he is required only to state the facts, and if sufficient to constitute a cause of action or defense, the pleading is not demurrable because the legal effect of the facts is not stated, or even because the proper form of relief is not demanded. Hemingway v. Poucher, 98 N. Y. 281. See the article PRAYER FOR RELIEF.

Wrongful Taking. — Where the facts stated in a complaint show a wrongful taking, it is not necessary for the pleader to use the word "wrongful" to characterize the act of the defendant. Buck v. Colbath, 7 Minn. 310.

2. Triscony v. Orr, 49 Cal. 617; Bean v. Travelers' Ins. Co., 94 Cal. 581; Turner v. White, 73 Cal. 301; Hayden v. Smithville Mfg. Co., 29 Conn. 560; Chesebro v. Babcock, 59 Conn. 217; Kellogg v. New Britain, 62 Conn. 241; People v. Crotty, 93 Ill. 190; Merrigan v. English, 9 Mont. 123; Strauss v. Trotter, 6 Misc. Rep. (N. Y. C. Pl.) 78; Lamb v. Hirschberg, 1 Misc. Rep. (N. Y. C. Pl.) 108; Humble v. Mebane, 89 N. Car. 415; Baltimore, etc., R. Co. v. Walker, 45 Ohio St. 583; Pennsylvania Co. v. Platt, 47 Ohio St. 380; State v. Kearns, 47 Ohio St. 568; Schaetzel v. Germantown Farmers' Mut. Ins. Co., 22 Wis. 413; Williams v. Williams, 63 Wis. 72; Ritchie v. McMullen, 159 U. S. 241; McKeoin v. Northern Pac. R. Co., 45 Fed. Rep. 466; Phinney v. Mutual L. Ins. Co., 67 Fed. Rep. 494.

Raises No Issue. — In McMurry v. Gifford, 5 How. Pr. (N. Y. Supreme Ct. 14, the court said: "The first answer is bad. It controverts no allegation of the complaint, and sets up no new mat-

legal conclusion does not warrant the introduction of evidence.¹

3. A Party Is Not Bound by the Allegation of a Conclusion of Law.

— It has been held that a pleader is not bound by his own statements of legal inferences if they are repugnant to his allegations of fact.²

4. A Conclusion of Law Need Not Be Denied. — A pleader is under no obligation to deny the legal conclusions set out in the pleadings of his adversary; indeed, it would be improper for him to do so. It cannot be presumed, therefore, that the truth of such

ter in bar. The complaint states facts from which the legal conclusion is that the defendant is indebted to the plaintiffs in the amount due on the note. The answer virtually admits all these facts, but denies the conclusion of law. It thus presents no issue of fact that can be tried. This form of answer has been repeatedly held to be bad."

In *Pennsylvania Co. v. Platt*, 47 Ohio St. 380, the court said: "The answer does not controvert the making of the contract between the two companies, as alleged in the petition, but denies that the Lake Shore company intended to or did thereby abandon any of its right of way, or that its easement or right of way ceased and determined by virtue of the contract. These denials, in the light of the former decision, raised no issue of fact. They are the pleader's construction of the contract, and his opinion of its legal effect."

Action of Foreclosure. — An answer, in an action of foreclosure, which admits the making of the mortgage as security for a debt admits the cause of action; and a denial of the remaining allegations is aimed at mere legal conclusions, and puts nothing in issue. *Kay v. Churchill*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 83, *affirmed* in 25 Hun (N. Y.) 193.

False Imprisonment. — In a complaint against a justice of the peace for false imprisonment, an allegation that such imprisonment is unlawful is a mere conclusion of law and tenders no issue, where no facts are averred to show the cause complained of to be wrongful or unlawful. *Going v. Dinwiddie*, 86 Cal. 638.

Forfeiture. — The defendant answered, averring that the plaintiff, by failure to comply with the rules, regulations, and customs of the mining district, had lost whatever right he had. The court held that the general allegation of forfeiture was a legal conclusion upon which no issue could be taken.

Dutch Flat Water Co. v. Mooney, 12 Cal. 534.

Denial That a Right of Action Has Accrued. — The denial that an action has accrued to the plaintiff is a denial of a mere legal conclusion, and tenders no material issue. *Schaetzel v. Germantown Farmers' Mut. Ins. Co.*, 22 Wis. 413.

Indebtedness. — In *Wells v. McPike*, 21 Cal. 219, the answer did not deny the sale of the cattle at the agreed price, which was the cause of action set forth in the complaint. It was held that a denial of the indebtedness, without a denial of the facts alleged to show the existence of the indebtedness, was but the denial of a conclusion of law and raised no issue. See also *Curtis v. Richards*, 9 Cal. 39.

1. *Koon v. Tramel*, 71 Iowa 133; *People's Mut. Assur. Fund v. Boesse*, 92 Ky. 296; *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 697; *Griggs v. St. Paul*, 9 Minn. 246; *Price v. Doyle*, 34 Minn. 401; *Wymore First Nat. Bank v. Myers*, 44 Neb. 309; *Hatch v. Peet*, 23 Barb. (N. Y.) 582; *Davis v. Hop-pock*, 6 Duer (N. Y.) 256; *Seeley v. Engell*, 17 Barb. (N. Y.) 530; *Thomas v. Desmond*, 12 How. Pr. (N. Y. Supreme Ct.) 321.

In an Action to Foreclose a Mortgage it was held that a general averment that the plaintiff's mortgage was superior to a mortgage held by one of the defendants was but a legal conclusion, and did not warrant the admission of evidence to show that the defendant, when he took the mortgage, had actual notice of the plaintiff's equity. Such notice should have been pleaded if the plaintiff intended to rely upon it. *Koon v. Tramel*, 71 Iowa 132.

2. In *Brown v. Newall*, 2 Myl. & C. 576, the Lord Chancellor said: "It is a rule of pleading that, although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those facts."

allegations is admitted because not denied.¹

5. Conclusions of Law Not Admitted by Demurrer. — As a corollary to the preceding rule, viz., that the truth of a legal conclusion is not admitted by the adversary's failure to deny it, it follows that such conclusions are not admitted by a general or special demurrer to the pleading which contains them.² Thus averments

1. *Parks v. Heman*, 7 Mo. App. 17; *Hoopes v. Meyer*, 1 Nev. 444; *Kay v. Churchill*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 85, *affirmed* in 25 Hun (N. Y.) 193; *Allen v. Malcolm*, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 337; *Stuart v. Binsse*, 10 Bosw. (N. Y.) 446; *Barton v. Sackett*, 3 How. Pr. (N. Y. Supreme Ct.) 358; *St. James Church v. Huntington*, 82 Hun (N. Y.) 138; *Rutter v. Henry*, 46 Ohio St. 274; *Lake v. Steinbach*, 5 Wash. 663.

Damage Feasant. — It has been held that where a plea to a declaration in replevin, setting up the defense that the animals in question were taken damage feasant and distrained under the statute, merely alleged that said animals were wrongfully upon the defendant's premises, it alleged a mere conclusion of law, and not a traversable averment of fact which a jury can determine. *Spahr v. Tartt*, 23 Ill. App. 421.

Petition for Roads. — A bill asking for an injunction against the occupation of a public street by a railroad company alleged that there was no such petition of the property owners as the *Illinois* statute requires. This was held to be an averment of a mere conclusion of law, and therefore not traversable. *Schuchert v. Wabash, etc., R. Co.*, 10 Ill. App. 399.

Running at Large. — In *Rutter v. Henry*, 46 Ohio St. 272, it was held that an allegation that a horse was unlawfully running at large was not a sufficient averment that it was running at large in violation of the provisions of Rev. Stat. Ohio, § 4202, which authorizes the impounding of estrays. The court said: "It is assumed by counsel for defendant that the plaintiff admitted, by not denying, that the horse was 'unlawfully running at large,' as it is alleged in the answer. This view magnifies the legal significance of this averment. It means no more than that the horse was running at large — whatever that is. The meaning is not enlarged by the epithet employed. It involves no issuable fact. Whether it was unlawfully running at large depends

upon the facts, and these are not stated."

Revocability of Power of Attorney. — In *Farrell v. Amberg*, 8 Misc. Rep. (N. Y. C. Pl.) 225, the court said: "Again, any allegation that the power of attorney was revocable and revoked by service of notice of revocation implies no more than the statement of legal conclusions, not of facts, and so for that reason also was not admitted because not denied. The allegation of a legal conclusion is an immaterial averment. *Scofield v. Whitelegge*, 49 N. Y. 259; *People v. Highway Com'rs*, 54 N. Y. 276. Only material matter not controverted by answer or reply shall be taken as admitted."

Denial Said Not to Be Improper. — The court said in *Hoopes v. Meyer*, 1 Nev. 444: "It is not necessary to deny mere conclusions of law. It is sometimes difficult to say whether an allegation in a complaint is a mere averment as to a conclusion of law, or whether it also contains some averment of a material fact. It is, therefore, not improper in a pleader, out of abundance of caution, to deny all the material allegations in a complaint which are untrue, although some of them may be rather conclusions of law than facts from which such conclusions of law are to be drawn."

Not Improper to Insert. — In *Contee v. Dawson*, 2 Bland (Md.) 268, the court said: "But, although parties may be indulged in a brief expression of their opinions as to the law arising out of the facts they set forth, and the doing so may in many cases be received as a useful indication of the objects they aim at, yet there is no absolute necessity, in any case, to make any statement or allegation as to the legal consequences of any facts, since it is the peculiar and exclusive duty of the court to pronounce what is the law arising out of any combination of facts which may be regularly brought before it."

2. See article DEMURRERS, vol. 6, p. 336, and see the following cases:

Illinois. — *Greig v. Russell*, 115 Ill.

in a complaint as to the meaning or contents of a paper set forth

489; *Newell v. Bureau County*, 37 Ill. 256; *Compher v. People*, 12 Ill. 293.

Maryland. — *Ulman v. Charles Street Avenue Co.*, 83 Md. 144.

Massachusetts. — *Tompson v. National Bank*, 106 Mass. 131; *Everett v. Drew*, 129 Mass. 151; *Jones v. Dow*, 137 Mass. 121; *Millard v. Baldwin*, 3 Gray (Mass.) 486; *Hollis v. Richardson*, 13 Gray (Mass.) 392; *Lynch v. Forbes*, 161 Mass. 310.

Michigan. — *Dubois v. Hutchinson*, 40 Mich. 262.

Minnesota. — *Griggs v. St. Paul*, 9 Minn. 246.

Mississippi. — *Perkins v. Guy*, 55 Miss. 178.

Montana. — *Boley v. Griswold*, 2 Mont. 450; *McCormick v. Riddle*, 10 Mont. 470.

Missouri. — *Bradley v. Franklin County*, 65 Mo. 638; *Kerr v. Simmons*, 82 Mo. 275; *Kleckamp v. Meyer*, 5 Mo. App. 444.

New York. — *Alamango v. Albany County*, 25 Hun (N. Y.) 551; *Angell v. Van Schaick*, 56 Hun (N. Y.) 256; *Douglas v. Phenix Ins. Co.*, 63 Hun (N. Y.) 398; *Farrell v. Amberg*, 8 Misc. Rep. (N. Y. C. Pl.) 225; *Buckley v. Harrison*, 10 Misc. Rep. (N. Y. C. Pl.) 693; *Kinnier v. Kinnier*, 45 N. Y. 539; *People v. Highway Com'rs*, 54 N. Y. 279; *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 256; *Walsh v. New York, etc., Bridge*, 96 N. Y. 438; *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 337; *Masterson v. Townshend*, 123 N. Y. 458; *White v. Brown*, 14 How. Pr. (N. Y. Supreme Ct.) 286; *Talcott v. Buffalo*, 125 N. Y. 284; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; *Rauh v. Public Parks*, 66 How. Pr. (N. Y. Supreme Ct.) 368.

Ohio. — *Pittsburgh, etc., R. Co. v. Moore*, 33 Ohio St. 392; *Peterson v. Roush*, 32 Ohio St. 378; *Finch v. Board of Education*, 30 Ohio St. 41; *Mitchell v. Franklin County*, 25 Ohio St. 153; *Baltimore, etc., R. Co. v. Wilson*, 31 Ohio St. 558.

Oregon. — *Longshore Printing Co. v. Howell*, 26 Oregon 527.

South Carolina. — *Tutt v. Port Royal, etc., R. Co.*, 28 S. Car. 397.

Texas. — *Holman v. Criswell*, 13 Tex. 43.

Wisconsin. — *Brown v. Phillips*, 71 Wis. 255; *State v. Collins*, 5 Wis. 347.

United States. — *Pullman Palace Car*

Co. v. Missouri Pac. R. Co., 11 Fed. Rep. 636, 115 U. S. 596; *Dillon v. Barnard*, 21 Wall. (U. S.) 437; *Chicot County v. Sherwood*, 148 U. S. 536; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 577; *Pennie v. Reis*, 132 U. S. 469; *Gould v. Evansville, etc., R. Co.*, 91 U. S. 536.

England. — *Cuthbert v. Creasy*, 6 Madd. 189; *Nesbitt v. Berridge*, 8 L. T. N. S. 76; *Glenville-Murray v. Clarendon, L. R.* 9 Eq. 11; *Ellis v. Colman*, 25 Beav. 662.

Not Admitted by Demurrer. — The court said in *Pennie v. Reis*, 132 U. S. 469: "The petitioner now contends that these several allegations are to be taken as literally true, from the fact that the treasurer demurred to the petition. But a demurrer admits only allegations of fact, and not conclusions of law. When, therefore, a plaintiff relies for recovery upon compliance with the provisions of a statute, and attempts to set forth conformity with them, the court will look to that statute and take the allegations as intended to meet its provisions, notwithstanding the inaccuracy of any statement respecting them. If the pleading misstates the effect and purpose of the statute upon which the party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges."

Mutual Accounts. — An allegation in a bill in equity that mutual accounts exist between the defendant and the plaintiff is not admitted upon demurrer by a failure to deny the existence of such mutual accounts. *Frietas v. Dos Santos*, 1 Y. & J. 574.

Domestic Corporation. — An averment in a complaint that the defendants are a domestic corporation was held to be the allegation of a conclusion of law, and therefore not admitted on demurrer. *Rauh v. Public Parks*, 66 How. Pr. (N. Y. Supreme Ct.) 368.

Foreign Laws. — In *Kinnier v. Kinnier*, 45 N. Y. 535, it was held that allegations in general terms that a judgment was void in the state of *Illinois*, and other matters as to the law of that state, were averments of legal conclusions, and not to be deemed admitted on demurrer.

Qualified Elector. — In an action

therein, or annexed to or made part thereof, are not admitted by demurrer.¹

6. Surplusage.— Every fact which the party must prove to sustain his pleading must be averred,² and mere legal conclusions, improperly inserted, are of no effect, and may be ignored by the court,³ or they may be treated as mere surplusage and stricken out on motion.⁴ Surplusage alone, however, will not vitiate a

against inspectors of election for refusing to receive the vote of a woman, allegations in the complaint, that the plaintiff "was a legally qualified elector," and "was entitled to vote" at such election, were held to be bare conclusions of law and not admitted by demurrer. *Brown v. Phillips*, 71 Wis. 254.

Entitled to Judgment.— In *Holman v. Criswell*, 13 Tex. 44, the court said: "It is true that the plaintiff has alleged that he is entitled to judgment. But this is a legal conclusion drawn by the pleader from the facts stated. It is not a fact, and consequently is not admitted by the demurrer, whose office is to admit facts only, and those which are well pleaded."

1. *Bonnell v. Griswold*, 68 N. Y. 204; *Com. v. Allegheny County*, 37 Pa. St. 287; *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 337; *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 256; *Kinnier v. Kinnier*, 45 N. Y. 535; *U. S. v. Ames*, 99 U. S. 35; *Gould v. Evansville*, etc., R. Co., 91 U. S. 536.

A demurrer does not admit the accuracy of the construction of an instrument, when the instrument is set forth in the record, if the construction is not supported by the terms of the instrument. *Ford v. Peering*, 1 Ves. Jr. 78; *Lea v. Robeson*, 12 Gray (Mass.) 280; *Redmond v. Dickerson*, 9 N. J. Eq. 507; *Green v. Dodge*, 6 Ohio 80.

In *Dillon v. Barnard*, 21 Wall. (U. S.) 437, it was held that a demurrer to a bill in equity did not admit the correctness of an averment as to the meaning of an instrument set forth or annexed to the bill.

2. *Wheeler v. Floral Mill*, etc., Co., 9 Nev. 254; *Cohn v. Beckhardt*, 63 Hun (N. Y.) 333; *Buffalo v. Holloway*, 7 N. Y. 408; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Boyce v. Brown*, 7 Barb. (N. Y.) 85; *Allen v. Patterson*, 7 N. Y. 478; *Hall v. Bartlett*, 9 Barb. (N. Y.) 301; *Schenck v. Naylor*, 2 Duer (N. Y.) 678; *Lawrence v. Wright*, 2 Duer (N. Y.) 675; *Lienan v. Lincoln*, 2 Duer (N. Y.) 672; *Smith v.*

Leland, 2 Duer (N. Y.) 509; *Mann v. Morewood*, 5 Sandf. (N. Y.) 564; *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665; *Woolley v. Newcombe*, 58 How. Pr. (N. Y. C. Pl.) 480, *affirmed* in 87 N. Y. 605; *Tompkins v. Augusta*, etc., R. Co., 33 S. Car. 216; *Wallace v. Columbia*, etc., R. Co., 34 S. Car. 62.

3. *Spargur v. Romine*, 38 Neb. 736; *Board of Education v. Shaw*, 15 Kan. 33; *Hall v. Spaulding*, 42 N. H. 262; *Buffalo v. Holloway*, 7 N. Y. 408; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Allen v. Patterson*, 7 N. Y. 478; *Boyce v. Brown*, 7 Barb. (N. Y.) 85; *Hall v. Bartlett*, 9 Barb. (N. Y.) 301; *Schenck v. Naylor*, 2 Duer (N. Y.) 675; *Lawrence v. Wright*, 2 Duer (N. Y.) 675; *Lienan v. Lincoln*, 2 Duer (N. Y.) 672; *Smith v. Leland*, 2 Duer (N. Y.) 509; *Mann v. Morewood*, 5 Sandf. (N. Y.) 564; *Garvey v. Fowler*, 4 Sandf. (N. Y.) 665.

A conclusion of law in a pleading, so far as it is correct, is useless, and when erroneous it is worse than useless; and in either case it will be treated as if not alleged, in considering objections to the pleadings raised by demurrer. *Ohm v. San Francisco*, 92 Cal. 437.

4. *Payne v. Treadwell*, 16 Cal. 246; *Dyer v. Bradley*, 89 Cal. 560; *People v. Lothrop*, 3 Colo. 452; *Sac County v. Hobbs*, 72 Iowa 73; *Cooper v. French*, 52 Iowa 532; *Fitzpatrick v. Mt. Sterling Public Graded School*, 87 Ky. 133; *Jones v. Dow*, 137 Mass. 121; *Williams v. Raper*, 67 Mich. 429; *Curran v. Downs*, 3 Mo. App. 469; *Power v. Gum*, 6 Mont. 9; *Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 36; *Knox County Bank v. Lloyd*, 18 Ohio St. 365; *Longshore Printing Co. v. Howell*, 26 Oregon 536; *Morrison v. Insurance Co. of North America*, 69 Tex. 359.

In *Longshore Printing Co. v. Howell*, 26 Oregon 535, the court said: "The questions presented for our consideration arise upon demurrer to the complaint, and hence all the allegations contained therein must be taken as true. This rule must be understood,

pleading; therefore, where sufficient facts are stated the pleading is good though it contains allegations of legal conclusions.¹

however to include only such allegations as contain statements of facts as distinguished from statements of conclusions of fact or of law. It is a well-settled rule of pleading that bare allegations of conclusions cannot avail the pleader, especially where a demurrer is interposed, without a statement of the probative facts upon which said conclusions are based. Even then the conclusions may often be stricken out upon motion as irrelevant and redundant matter."

Stricken Out—Consideration.—A paragraph in an answer pleading a want of consideration for the note sued on, without stating the facts, is properly stricken out as being a mere legal conclusion. *Sac County v. Hobbs*, 72 Iowa 69.

Restatement of Fact with Conclusion Thereon.—Where a fact appearing on the face of the petition is claimed to defeat the right to recover, the legal point should be raised by demurrer, and a restatement of such fact in the answer, with the pleader's legal conclusion therefrom, is properly stricken out; the restatement of the fact, because it is mere surplusage; and the legal conclusion, because it is a conclusion. *Sac County v. Hobbs*, 72 Iowa 69.

Release.—In *Glasscock v. Hamilton*, 62 Tex. 149, the court said: "The defense set up in the answer, of a release of defendant's ancestor by the obligee of the bond, states a mere conclusion of law without averring the acts or facts which constituted such release. This plea was wholly insufficient for vagueness and uncertainty, and was subject to exceptions. *Mims v. Mitchell*, 1 Tex. 446; *Caldwell v. Haley*, 3 Tex. 317; *Wright v. Wright*, 3 Tex. 180. An answer consisting of legal conclusions, deductions from facts not disclosed, and vague references to facts dimly portrayed is no defense."

Distinct Paragraph of Complaint.—In *Cooper v. French*, 52 Iowa 531, the court said: "The plaintiff averred in the seventh paragraph of his petition that 'there was no such sale of the property as the law provides, and that there was no compliance with the law after the property was offered for sale.' The defendant moved to strike out the paragraph on the ground that it averred only a conclusion of law. The

motion was sustained, and the plaintiff excepted. He insists that the paragraph should be taken with other paragraphs which he claims contain averments of facts showing in what the illegality of the sale consisted. Whatever is numbered as a distinct paragraph should contain something more than a mere conclusion of law based upon statements of facts contained in some other paragraph. We think the court did not err in sustaining the motion."

Election of Trustees.—In *Fitzpatrick v. Mt. Sterling Public Graded School*, 87 Ky. 136, the court said: "The allegation in the original petition, in substance that the persons mentioned as defendants were never properly elected trustees under either act, and had no authority to act as such, is not definite or specific enough to raise an issue of fact, being no more than the statement of a conclusion of law, and consequently it was not error for the court to strike it out."

When Not Stricken Out.—Where a legal deduction or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain his cause of action, the defendant may move to have the petition made definite and certain, but cannot strike out such matter as redundant and irrelevant. *Dorsey v. Hall*, 7 Neb. 460.

1. *Williams v. Raper*, 67 Mich. 429; *Downer v. Read*, 17 Minn. 493; *Dritt v. Snodgrass*, 66 Mo. 286; *Garner v. Hannibal, etc.*, R. Co., 34 Mo. 240; *Dorsey v. Hall*, 7 Neb. 460, *Hall v. Spaulding*, 42 N. H. 262, *Nance v. Georgia, etc.*, R. Co., 35 S. Car. 307; *Wallace v. Columbia, etc.*, R. Co. 34 S. Car. 62, *Tompkins v. Augusta, etc.*, R. Co., 33 S. Car. 217; *Tutt v. Port Royal, etc.*, R. Co., 28 S. Car. 396; *Texas, etc.*, R. Co. *v. Kirk*, 62 Tex. 227; *Connor v. Saunders*, 81 Tex. 633, *Morrison v. Insurance Co. of North America*, 69 Tex. 353; *International, etc.*, R. Co. *v. Hinzle*, 82 Tex. 623; *Thompson v. Eanes*, 32 Tex. 190; *Part v. Nolen*, 28 Tex. 798; *Malone v. Craig*, 22 Tex. 609; *Jennings v. Moss*, 4 Tex. 452; *Moody v. Bengel*, 28 Tex. 545; *Milburn v. Walker*, 11 Tex. 329; *National Bank v. Texas Invest. Co.*, 74 Tex. 421.

III. WHAT ARE CONCLUSIONS OF LAW — 1. In General — Examples

— It seems impossible to give a concise and at the same time comprehensive definition of what the term "legal conclusion" signifies as distinguished from an issuable fact. Upon the inspection of a pleading containing both, however, the difference can generally be seen; and the meaning of the term can be more perfectly illustrated by examples taken from reported decisions than by a general definition. The following statements have been held to be conclusions of law, and as such have been condemned by the courts: an allegation upon information and belief that the plaintiff is not the real party in interest,¹ an allegation as to the validity of an appraisalment,² an averment that an assignment is void in law,³ an allegation of conversion,⁴ a statement that due

1. Allegation of Belief. — The following allegation was held a legal conclusion: "Defendant, for a further and separate defense, alleges on his information and belief that the plaintiff is not the real party in interest, but that said Woodruff is the real party in interest." *White v. Drake*, 3 Abb. N. Cas. (N. Y. Supreme Ct.) 133.

Information and Belief. — An allegation "that by reason of the aforesaid facts the plaintiff alleges, upon information and belief, that the above-named defendants were at the times hereinafter named copartners, doing and carrying on the business of banking, under the name and style of the 'Home Savings Bank,'" is an allegation of a conclusion, and not an allegation of independent facts. *Seacord v. Pendleton*, 55 Hun (N. Y.) 579, affirmed in 129 N. Y. 662.

2. Appraisalment. — It was held, on a complaint to redeem land from judicial sale, that the averments that there was no valid appraisalment of the rents and profits of the land sold and no valid appraisalment of the fee simple of the lands were wholly insufficient. They imply that there was an appraisalment of the rents and profits, and also of the fee, yet aver no fact showing why they were invalid, and they are therefore simply conclusions of law and not statements of facts. *Kellogg v. Tout*, 65 Ind 152.

3. Assignment Void in Law — Insurable Interest. — In an action by an administrator upon a policy of insurance on the life of his decedent, where there was an answer by the insurance company showing that the assured assigned the policy to another person and that the company indorsed upon the transfer

its consent thereto, but alleging that said assignee "did not, when said assignment was executed, have, and has not now, and never has had, any insurable interest whatever in the life of" the assignor, and that therefore "said assignment was and is wholly void in law," it was held that the averment of the answer was bad as alleging a mere conclusion of law. *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 384.

Assignee. — In *Smith v. Kaufman*, 3 Okla. 571, an allegation was: "Plaintiff further alleges that said P. W. Smith is not now or never has been legally appointed assignee for J. A. Newkirk or the firm that said Newkirk represented." The court said: "This allegation is totally inadequate as a statement of a cause of action to revoke or annul an assignment."

Assignment of a Demand. — The plaintiff brought his action on a contract for the payment of money, made by the defendant with Martin Allen and wife, and alleged his title to the cause of action as follows: "That the said plaintiff is now the sole owner of the said demand against the said defendant." It was held that this was insufficient. It was merely an allegation of a conclusion of law. Some fact or facts should be stated, showing how the plaintiff became the owner of the demand. *Thomas v. Desmond*, 12 How. Pr. (N. Y. Supreme Ct.) 321.

4. It is not sufficient to allege that the defendant took the property unlawfully or fraudulently; the facts which constitute the unlawful taking or the fraud must be set out. *Triscony v. Orr*, 49 Cal. 617.

But in *Duggan v. Wright*, 157 Mass. 231, an allegation of conversion was

diligence has been used,¹ a statement that the pleader was an innocent purchaser,² a statement that a certain judgment was void,³ a statement that land was not fenced by a railroad as required by statute,⁴ a statement as to the illegality of a marriage,⁵ an allegation that there existed no proper officer for a cer-

held an allegation of fact and not a conclusion of law. The court said: "The allegation that the defendant has converted the plaintiff's property to his own use is not an allegation of a conclusion of law, but of a fact which may be described as composite, and it allows evidence to be introduced of all such unjustified dealing with the property named as may tend to show a wrongful taking and disposal of it to the prejudice of the plaintiff's rights." To the same effect see *Thayer v. Gile*, 42 Hun (N. Y.) 270, where the court said: "It is objected that the allegation of conversion is a conclusion of law and not of fact. Ordinarily, the narration of a transaction, whether by stating all the details of it or by stating these details according to their legal effect, is the narration of a fact. A statement of a conclusion of law is usually a statement of the right or liability flowing from certain facts. Thus, A lent B a dollar is the fact; B owes A a dollar is the law. A converted B's hay is a fact; B's liability to A, the law. But from a given state of facts the law will pronounce that A converted B's hay. Is the statement of the conversion, therefore, the statement of a conclusion of law? It is rather the statement of a fact ascertained by the rules of law. From the facts given, the law presumes the fact required, but the presumption is only a rule of evidence, and, by the application of that rule, the fact required is determined. The rule of evidence by which the fact sought is found is not the fact itself. The rule is the instrument or help through which the fact sought is discovered. If the rule is called a conclusion of law, then, by means of the conclusion of law, the conclusion of fact is established." And see the article *TROVER*.

1. Due Diligence. — The naked assertion in a pleading that due diligence was used is but the statement of a legal conclusion. *Leas v. White*, 15 Iowa 191.

Diligence in Prosecution of a Suit. — It has been held that due diligence in the prosecution of a suit is a matter of law

arising out of the facts of the case, which facts must be set out that the court may determine whether they showed due diligence or not. *Harrington v. Witherow*, 2 Blackf. (Ind.) 37.

2. Innocent Purchaser. — An allegation in an answer that a defendant is "an innocent purchaser" was held insufficient and a conclusion of law, not being equivalent to a statement that he purchased without notice of the appellee's homestead right. *Wing v. Hayden*, 10 Bush (Ky.) 280.

3. Ritchie v. McMullen, 159 U. S. 241.

Attacking a Judgment. — If the complaint contains averments of the rendition of a judgment against the defendant by a court of competent jurisdiction, and states the character of the judgment, an answer denying that the defendant became or was lawfully bound by the judgment is only a denial of a conclusion of law, and does not raise an issue of fact. If the judgment can be attacked collaterally, the answer must specify the points of its invalidity. *People v. San Francisco*, 27 Cal. 655.

An allegation that a judgment is absolutely void is an allegation of a mere conclusion of law. *Ontario v. Andes First Nat. Bank*, 59 Hun (N. Y.) 29.

4. Sufficiency of Fence. — In a complaint under the statute against a railroad company for negligence there was a general allegation that said railroad was not, at the time and place where said animals were killed, fenced in by said defendant in manner and form as the statute provided. It was held that such an allegation was insufficient as averring a legal conclusion and not a fact. The allegation was not that the road was not securely fenced, but that it was not fenced in in manner and form as the statute provided. *Indianapolis, etc., R. Co. v. Robinson*, 35 Ind. 380.

5. Legality of Marriage. — In *Williams v. Williams*, 63 Wis. 72, the court said: "The allegation in the complaint as to the lawfulness of the marriage was a mere conclusion of law from the fact of marriage therein alleged. The allegation of a mere conclusion of law cannot

tain purpose,¹ an averment that no summons had been directed or delivered as required by law,² an averment that the defendant is unlawfully in possession of lands of the plaintiff,³ an averment of the existence of a trust.⁴

be treated as an allegation of an issuable fact. *Pratt v. Lincoln County*, 61 Wis. 62. It follows that the finding of the court that each and every allegation of the complaint was true must be confined to the facts therein stated, and cannot be extended to the conclusions of law therein alleged."

1. Proper Officer. — The court said in *State v. Collins*, 5 Wis. 347: "Again, it is insisted that the statement of the respondent in his return, that there is no proper officer to whom the required order can be directed, is a statement of fact, admitted by the demurrer. We think this is a misapprehension of the legal effect of the pleadings in the case. Undoubtedly, a mere matter of fact, well pleaded, is admitted by the demurrer. But such is not the case where the pleader asserts a proposition of law. The existence or nonexistence of such officer, the repeal or non-repeal of the statute creating the office, its continuance or abolition by force of subsequent statutes, and the like questions, are indubitably matters of law and not of fact, and hence their assertion in the pleading is not an admission of their truth by demurrer, nor is the court bound so to regard them."

2. Illegality of Summons. — The allegation in a complaint that no summons had been issued under the seal of the court and directed and delivered to the sheriff as was required by law, and that no such summons was ever issued, etc., was held not good, because instead of alleging the facts it stated only a legal conclusion. *Krug v. Davis*, 85 Ind. 311. See also *Clark v. Lineberger*, 44 Ind. 223.

3. Trespass. — In *Tompkins v. Augusta*, etc., R. Co., 33 S. Car. 217, the court said: "The allegation in a complaint that the defendant has done an unlawful act, as, for example, has unlawfully entered upon the lands of plaintiffs, is a mere statement of a legal conclusion, unless it is accompanied with an allegation of facts going to make the act in question unlawful. Hence, so much of the statements in this complaint as declares that defendant 'unlawfully' took possession of the lands in question, and is now in the

'unlawful' possession of the same, and 'unlawfully' withholds the same from plaintiffs, goes for nothing, unless we can find in the complaint allegations of fact which show these acts to be unlawful."

See also *infra*, V. 3. *Title to Real Estate*.

Title. — It was held in *Cameron v. Abbott*, 30 Ala. 416, that an allegation that the defendants have no claim to the said land that in equity and good conscience can counteract the complainant's complete equity is but the statement of a conclusion of law, and not the averment of a fact.

4. Trust. — The court said in *Lienan v. Lincoln*, 2 Duer (N. Y.) 672: "Whether a defendant has received money or property to the use of another is usually a question of law, depending upon facts which are to be litigated and found by the court or a jury. Each of the material facts essential to raise and uphold such a conclusion of law is a fact which should be stated in the complaint; and the whole of such facts constitute the cause of action. If enough are not stated to raise and uphold such a legal conclusion, enough are not stated to constitute a cause of action, and the complaint is demurrable for that cause."

A general allegation that the defendant holds a trust will not protect a bill from demurrer. For that purpose the bill must allege facts showing that the relation of trustee and *cestui que trust* exists between the plaintiff and the defendant. *Grenville-Murray v. Clarendon*, L. R. 9 Eq. 11.

Allegation of a Trust. — In *Jackson v. North Wales R. Co.*, 18 L. J. N. S. Ch. 91, the Lord Chancellor said: "The bill alleges that the defendants are trustees for the plaintiff as to certain moneys which they have in their hands for the purpose of paying him, but he is bound to state how the trust arose. * * * The allegation of trust is a mere deduction of law. If the acts constitute a trust, the court will exercise jurisdiction in respect of it, but it is not merely because the party alleges a trust, without showing how it arose, that any such consequence follows."

Duly, Wrongful, Unlawful, Illegal, etc. — Averments that certain transactions were "unlawful," "illegal," or "wrongful" have been held to be mere conclusions of law, unless from the facts stated the unlawfulness, illegality, etc., appear.¹ And so an allegation that a certain thing has been "duly" given, executed, or performed, is generally held to be only a legal conclusion.²

See also *Evan v. Avon*, 29 Beav. 144; *Wilkinson v. Gage*, 40 Ill. App. 605.

1. *Triscony v. Orr*, 49 Cal. 617; *Spahr v. Tartt*, 23 Ill. App. 421; *Tompkins v. Augusta, etc.*, R. Co., 33 S. Car. 217; *Tutt v. Port Royal, etc.*, R. Co., 28 S. Car. 388.

Unlawful. — A statement that an act is unlawful is an averment of a conclusion of law. *Williams v. Raper*, 67 Mich. 429; *Cohn v. Beckhardt*, 63 Hun (N. Y.) 333; *Wallace v. Columbia, etc.*, R. Co., 34 S. Car. 67.

Wrongfully. — An allegation in a complaint that an act has been wrongfully done states merely a conclusion of law. *Spahr v. Tartt*, 23 Ill. App. 421; *Scofield v. Whitelegge*, 49 N. Y. 259; *Wallace v. Columbia, etc.*, R. Co., 34 S. Car. 67.

Illegal, Unauthorized, and Void Attachment. — An allegation in a complaint that an attachment was illegal, unauthorized, and void is a statement of a conclusion of law only, and will not admit proof that the attachment was void. *Sprague v. Parsons*, 12 Daly (N. Y.) 392.

Illegal Actions. — Where the complaint in an action to vacate a portion of a municipal assessment alleged that the expense of the improvement and the assessment had been increased to an amount stated "by reason of the illegal action, frauds, and irregularities of the officers," without specifying the illegal action, the frauds, or the irregularities complained of, it was held that the complaint was defective as averring simply legal conclusions, not facts, and that a demurrer thereto was properly sustained. *Knapp v. Brooklyn*, 97 N. Y. 520.

Surplusage. — It was held in *Miles v. McDermott*, 31 Cal. 273, that words "duly," "wrongfully," and "unlawfully," when used in connection with issuable facts, while they did not vitiate a pleading, were surplusage, and should be omitted.

2. **Duly.** — *Farmers', etc., Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 287; *Myers v. Machado*, 6 Abb.

Pr. (N. Y. Super. Ct.) 198; *Harbison v. State Bank*, 28 Ind. 133.

Location on Public Lands. — Allegations in a petition that the plaintiffs had "located" their certificate on the land in controversy, and that the field notes of their survey had been "duly authenticated according to law," are statements of mere legal conclusions, and are not sufficient averments of the facts requisite to constitute a valid appropriation of land. *Thompson v. Eames*, 32 Tex. 192.

New York Code. — Section 161 of the code was expressly intended to alter the former rule (and it is abrogated in terms), that in pleading a judgment or determination of a court of inferior and limited jurisdiction the facts conferring the jurisdiction must be specially pleaded. In pleading any determination of a court of limited jurisdiction it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may simply be alleged to have been duly given or made. If that may be denied, jurisdiction, and all jurisdictional facts, must be proved. *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 537.

In an action against a sheriff for breach of duty in the execution of process which he received, it is not necessary that the complaint should show the several steps in the action on which the mere regularity of the process depends. It is enough, after showing jurisdiction to issue the process, to allege that it was duly issued. *French v. Willet*, 10 Abb. Pr. (N. Y. Super. Ct.) 99.

In *Graham v. Machado*, 6 Duer (N. Y.) 515, it was held that the allegations that a presentment was "duly made" and payment "duly demanded" are not warranted by the provisions in section 162 of the code, which declares that in pleading the performance of certain acts as conditions precedent, a general averment in the complaint, that all these acts were duly performed on the part of the person so pleading, shall be deemed sufficient. In the

Bills and Notes. — In the note will be found several averments concerning the execution, ownership, negotiability, etc., of bills of exchange and promissory notes, which have been held to be mere conclusions of law.¹

opinion of the court, section 162 has no application to averments in a complaint necessary to charge the drawer of a bill of exchange; but it is applicable only to conditions precedent expressed in a contract, and which, by its terms, are to be performed by a party to the contract, who is also a party to the action, and the performance of each of which conditions by himself, but for this section, he would have been required to state in his complaint or answer.

Assignment of Insurance Policy. — The allegation in the complaint that a policy of insurance was duly assigned to the plaintiff indicates that it was assigned by means of a sealed instrument, and a consideration will be inferred. *Fowler v. New York Indemnity Ins. Co.*, 23 Barb. (N. Y.) 143.

1. Denial of Execution of Note. — It was held in *Morton v. Coffin*, 29 Iowa 238, that the denial of the execution of a note must be specific, not general.

Presentment of a Bill of Exchange. — In a suit against a drawer of a bill of exchange it was claimed by the appellee that the words "duly presented for payment at the place where payable" referred not only to the place, but to the time, of demand; and that if it was "duly presented" it must have been presented not only at the proper place but at the proper time. It was held that this was but a conclusion of law, and not an averment of the fact from which such a conclusion must result. *Harbison v. State Bank*, 28 Ind. 133.

Release. — It was held, in a suit on a promissory note, that the bare allegation in the answer that the payee of the note did release the defendant was a mere conclusion of law. *Kelso v. Fleming*, 104 Ind. 180.

Protest. — In *Ducros v. Jacobs*, 10 Rob. (La.) 453, it was held that an allegation in a note that it was duly protested was a sufficient averment of a demand for payment.

Validity of Note. — In *Haggard v. Hay*, 13 B. Mon. (Ky.) 175, it was held that an answer admitting the execution of the note, but alleging that the defendant did not owe the note, was bad

on demurrer, as it stated only a legal conclusion.

In *Burrall v. Bowen*, 21 How. Pr. (N. Y. Supreme Ct.) 380, the court said: "Nor is the answer improved by the subsequent allegation that the note never had any validity as against the defendants. That allegation is a conclusion of law. It was necessary to aver the facts which would show that the note had no validity. A statement that a note is invalid in no manner apprises the opposite party what facts he must be prepared to meet at the trial."

Negotiability. — An allegation that a note is negotiable is the allegation of a conclusion of law. *Jaccard v. Anderson*, 32 Mo. 188.

Failure to State That Note Is Due. — A complaint upon a promissory note which omits to state that the note was due is insufficient. *Williams v. Knighton*, 1 Oregon 234, in which case the court said: "Waiving all other questions, it does not appear that the note was due. This cannot be implied from the allegations that he has a cause of action against the defendant. That is a conclusion of law."

Ownership. — It has been held that an answer that a plaintiff is not the legal owner and holder of a note sued upon is insufficient to warrant evidence under it, and is of course bad on demurrer, as stating a mere legal conclusion. *Hatch v. Peet*, 23 Barb. (N. Y.) 582. See also *Seeley v. Engell*, 17 Barb. (N. Y.) 530, *reversed* on another point in 13 N. Y. 542.

In *White v. Brown*, 14 How. Pr. (N. Y. Supreme Ct.) 286, the court said: "The plaintiff says that he is now the *bona fide* owner and holder of the said note; this is his conclusion of law. But who is to try whether he is the *bona fide* owner and holder of the note? All questions of fact must be triable by a jury; but the question whether the plaintiff is a *bona fide* owner and holder is a question of law."

In *Downer v. Read*, 17 Minn. 493, the court said: "The complaint alleges the execution and delivery of the note to said trustee, and that before maturity he duly indorsed and transferred it to plaintiff. This sufficiently alleges title

Lien. — It has been held that the existence of a lien is a conclusion of law from certain facts, and that, therefore, it is necessary that such facts should be stated in order that a judgment may be formed with respect to the existence of the lien.¹

Consideration. — In an action founded upon a mortgage, a plea that the consideration of the mortgage was void has been held defective, and subject to demurrer for not setting forth the facts relied on to show want of consideration.²

Corporation. — An averment that a corporation has or has not certain powers is a conclusion of law,³ and so is an allegation that

to [in] him. The allegation which follows, that he 'thereupon became and now is the actual, legal, and *bona fide* owner and holder thereof, is but a conclusion of law therefrom.' See also *Lowville Bank v. Edwards*, 11 How. Pr. (N. Y. Supreme Ct.) 216; *Frasier v. Williams*, 15 Minn. 288.

The court said in *Holden v. Kirby*, 21 Wis. 152: "The denial that the plaintiff was the owner and holder was the denial of a conclusion of law; and the allegation that Tucker, at the time of the payment to him of the hundred dollars, was the legal owner and holder, we can regard only as a conclusion the pleader drew from the transfer of the note to the plaintiff being fraudulent as to creditors and without consideration. At least the allegation does not amount to a defense, so long as the answer does not show that the plaintiff ever transferred the note, or parted with the possession of it, after it was transferred and delivered to him."

But in *Burns v. Haynes*, 13 La. 13, it was held that an allegation that the plaintiff was not the real and *bona fide* owner of a note was sufficient.

Where a note is payable to bearer, an averment that it is the property of the plaintiff, and that the amount claimed is due him, has been held equivalent to a direct allegation of title, and there need be no statement of whether it passed by delivery or assignment. *Dabney v. Reed*, 12 Iowa 316. See also *Prindle v. Caruthers*, 15 N. Y. 425.

Bills and Notes — Transfer. — In *Hoag v. Mendenhall*, 19 Minn. 335, it was held that an allegation that the plaintiff duly assigned a promissory note to the defendant was a sufficient allegation of its transfer. The court said: "His first objection to the complaint is that its averment that plaintiff 'duly assigned' the note to defendant is a mere conclusion of law, unsupported

by any allegation that the note was delivered to or came into the possession of defendant. To assign is 'to make over a right to another,' and an assignment is a transfer of property. *Bouv. L. Dict.*; *Worcester Dict.*; *Hight v. Sackett*, 34 N. Y. 447; *Bump v. Van Orsdale*, 11 Barb. (N. Y.) 634. To say, then, that Ann I. Hoag duly assigned a promissory note to defendant, is in effect to say that she did whatever was necessary to make over her right in the note and to transfer the property of the same to defendant; in other words (the note being personal property), that she delivered the note to defendant, either actually or constructively. This is upon the same principle upon which, as applied to commercial paper, the words 'indorsed to' and the word 'made' are held to import delivery. *Prindle v. Caruthers*, 15 N. Y. 426; *Peets v. Bratt*, 6 Barb. (N. Y.) 663, and cases cited; *Edw. Bills & Notes*, 664, 671; and see also 1 *Chitty's Pl.* 364, 365. The allegation 'duly assigned' is not a pure legal conclusion, as defendant contends, but an allegation compounded of fact and law, such as in many instances is very properly permitted for the avoidance of prolixity." See also *Webb v. Bidwell*, 15 Minn. 484.

1. See article LIENS.

2. *Powell v. Crawford*, 110 Ala. 294. See also *Hammond v. Earle*, 58 How. Pr. (N. Y. Supreme Ct.) 437; *Sac County v. Hobbs*, 72 Iowa 69.

3. **Corporate Powers.** — An averment in a complaint that a corporation had full power and lawful authority to do a particular act is an averment of a conclusion of law and does not tender an issue of fact; a demurrer thereto does not admit its truth. *Branham v. San Jose*, 24 Cal. 587.

Where it is claimed in a pleading that a charter does not confer certain

the company was legally organized.¹

Usury. — It is the general rule that one who has made a usurious payment on a debt cannot obtain credit therefor, unless he dis-

powers, the fact must be shown by setting forth the charter itself, otherwise the pleading will be defective for containing only a conclusion of law. *Jones v. Tennessee Bank*, 8 B. Mon. (Ky.) 124.

In *Lynch v. Forbes*, 161 Mass. 302, it was held that an averment in a bill in equity, brought to restrain a town from taking the land of the plaintiff for the purpose of increasing its water supply, that the town had previously taken all the land that it was authorized to take, is a conclusion of law, and not such an allegation of fact as would be admitted by the defendant's demurrer.

In an action upon the guaranty of a corporation, an averment in the complaint that it was made by the defendant, who had authority so to do, for value received, under the direction of its board of directors, is not the statement of a mere conclusion of law. *Bryce v. Louisville, etc., R. Co.*, 73 Hun (N. Y.) 233.

A mere statement in a pleading that the president of a bank had authority to make an assignment of a judgment belonging to the bank is admitted unless denied under oath. *Barnum v. Kennedy*, 21 Kan. 181.

Corporations — Subscriptions. — An averment that certain parties became subscribers to the capital stock of a corporation by signing and delivering an agreement among themselves is not a statement of any fact, but of a mere conclusion of law. *Wheeler v. Floral Mill, etc., Co.*, 9 Nev. 254.

1. Legal Organization of Corporation. — In an action to recover money subscribed by the appellant for stock in a company the complaint alleged that subsequent to the subscription the company was legally organized, into which organization the defendant entered. It was held that the averment that the company was legally organized was a conclusion of law rather than an averment of fact. *Hain v. North-Western Gravel Road Co.*, 41 Ind. 197.

The plaintiff's complaint alleged, in substance, the following facts: The plaintiff and the defendant's firm, W. P. C. & Co., were competitors as car-

Philadelphia, each owning vessels employed in the business. To consolidate the business, they entered into an agreement to form a corporation, the capital to be represented by vessels furnished by the parties respectively, at a valuation fixed, each to contribute one-half of the stock; W. P. C. & Co. to have the management of the corporation and business, to manage the same in good faith and with economy, and to receive the usual commissions, which were specified, on the freight carried, in consideration whereof said firm guaranteed to the plaintiff an annual dividend of seven per cent. for seven years. In pursuance of said agreement, the corporation was "duly organized under the laws of this state," the vessels transferred to it, stock issued, and the contract fully performed on the part of the plaintiff. Said firm had had the exclusive management of the corporation and business, but no dividends had been declared or paid. The plaintiff claimed to recover on the guaranty. The defendants demurred, claiming the agreement to be illegal, because the parties thereto were but five in number, while the statute contemplated that at least seven persons should unite in forming a corporation. This was held untenable, as the complaint alleged the due organization of the corporation, which imported the requisite number of corporators; and it was not necessary to aver the precise steps taken to accomplish the result. *Lorillard v. Clyde*, 86 N. Y. 384.

Power to Guarantee. — An averment that an indorsement of guaranty was made by the defendant, having authority to do so, for value received, and that the same was made and executed and delivered under the direction of its board of directors, was objected to as the allegation of a mere conclusion of law. The court said: "But in this, we think, the learned counsel for the appellant is mistaken. It is the allegation of a conclusion of fact; and facts, not evidence, are to be alleged in a complaint. The question of authority is one of fact, although the existence of such fact may depend upon questions of law. As, for example, whether A is the agent of B is a

tinctly and correctly sets forth in the pleadings the terms and nature of the usurious agreement. A general allegation of usury is not sufficient.¹

Various Illustrations. — In succeeding sections of this article many other examples of legal conclusions are given. In addition to these and those given above in this section, the reader is referred to the notes, setting forth a number of cases in which the courts have had to pass upon the question whether or not certain averments were allegations of fact or conclusions of law.²

question of fact. But whether certain facts constitute A such agent may be a question of law. The existence of the agency, however, is nevertheless a question of fact." *Bryce v. Louisville, etc., R. Co.*, 73 Hun (N. Y.) 235.

1. *Munter v. Linn*, 61 Ala. 492; *Powell v. Crawford*, 110 Ala. 294.

See also article USURY.

In pleading usury, it is well settled that the facts must be set forth with certainty, so that the court can see that they amount to usury. *Newman v. Kershaw*, 10 Wis. 333.

Denials of Usury. — Thus denials of usury in an answer will not be effectual where the facts admitted lead to the conclusion of usury. *Manice v. New York Dry Dock Co.*, 3 Edw. Ch. (N. Y.) 143.

2. **Denial of Obligation.** — In *Lowry v. Jackson*, 27 S. Car. 323, the court said: "As to the absence of any allegation of any 'obligation or liability' on the part of the Redfearns to pay the debt, it is obvious that such an allegation would be a mere legal conclusion from the facts stated, and therefore not only unnecessary but improper, as the well-settled rule is that facts, and not legal conclusions, must be stated in pleadings under the code." See *infra*, III. 7. *Indebtedness*.

Right of Action. — A bare allegation or denial that plaintiff has a right of action is not sufficient. *Williams v. Knighton*, 1 Oregon 234; *Schaetzel v. Germantown Farmers' Mut. Ins. Co.*, 22 Wis. 413.

Release. — An allegation that a release of all actions had been executed, without stating whether it was by an instrument under seal, or in what manner, so as to enable the court to judge whether it was a valid release, is insufficient. *Hatch v. Peet*, 23 Barb. (N. Y.) 575. See also *Kelso v. Fleming*, 104 Ind. 180; *Glasscock v. Hamilton*, 62 Tex. 149.

Not Authorized by Law. — An allega-

tion that the contract was illegally entered into by county commissioners, and that the commissioners were not authorized by law to contract for certain services, is a mere averment of a legal conclusion. *Hamilton County v. Noyes*, 35 Ohio St. 207.

Public Lands. — A statement that the plaintiff filed in the surveyor's office "his affidavit and application in due form" was held insufficient, being the statement of a mere conclusion of law. *McEntee v. Cook*, 76 Cal. 187.

Adjournment Sine Die. — The plaintiff alleged that a justice court was adjourned *sine die*. The court said: "It is not true that the justice court was adjourned *sine die* on that day. On the contrary, it was not adjourned at all on that day, but was intentionally kept open. It is argued on the part of the plaintiff that such a keeping open of a justice court without an adjournment to a day certain is in legal effect an adjournment *sine die*. If this be granted, it does not aid the plaintiff. He has alleged it as a fact that the justice court was adjourned *sine die* on the day named. As a fact it is not true. The statement of a conclusion of law is not the statement of a fact; it is not pleading. Bliss on Pleading, § 210. Matter of law is never matter to be alleged in pleading. No issue can be framed upon an allegation as to the law. Facts only are pleadable, and upon them without allegation the court pronounces and applies the law." *Chesebro v. Babcock*, 59 Conn. 217.

Official Bonds. — An averment that an official bond is in conformity with the statute which requires it is not sufficient, as it presents no issue of the fact and is the allegation of a mere conclusion of law. *People v. Crotty*, 93 Ill. 180.

Custodia Legis. — A plea in abatement to a suit in replevin asserted that the defendant had seized and held the goods as deputy sheriff. It was held

2. Construction of Contracts and Written Instruments. — An opinion volunteered by the pleader as to the proper construction or effect of a contract, deed, or other written instrument, or that

that the plea should have stated facts and not merely matters of conclusion, so that the court could have determined whether the defendant's seizure and custody were lawful, and what became of the property after it was seized on the writ of replevin, in default of which the demurrer should have been sustained and judgment given that defendant answer over. *Dubois v. Hutchinson*, 40 Mich. 262.

Taxation. — An averment that a local assessment was illegal is a legal conclusion and does not present an issue of fact. *Pelton v. Bemis*, 44 Ohio St. 58.

Exemption from Taxation. — In *Quincy v. Stockbridge*, 33 Wis. 508, it was held that an allegation that the land was "by the laws of the state of Wisconsin exempt from taxation" was the statement of a mere conclusion, which, being unsupported by the proper averments of fact, went for nothing.

Violation of Defendant's Covenant. — In an action to recover damages for the breach of a covenant, if the complaint does not show, either by express words or by necessary implication, that the covenant was broken by the defendant, it is bad upon demurrer, and the defect is not cured by a general allegation that the facts set forth were in violation of the defendant's covenant. *Schenck v. Naylor*, 2 Duer (N. Y.) 678; *Woolley v. Newcombe*, 58 How. Pr. (N. Y. C. Pl.) 480, *affirmed* in 87 N. Y. 605.

Validity of a Tax Deed. — In an action under a *Wisconsin* statute, to bar the rights of a former owner of lands sold and deeded for the nonpayment of taxes, an answer which merely denies the validity of the taxes for which the land was sold, or that anything was due thereon for taxes at the time of the sale, and denies the title of the plaintiff, is not sufficient, but facts should be alleged showing specifically the particular grounds upon which the defendant relies to avoid the tax deed. *Wakeley v. Nicholas*, 16 Wis. 588.

Levy of Execution. — In *Botsford v. Beers*, 11 Conn. 369, it was held sufficient to aver that execution was levied upon certain lands in due form of law, without detailing the facts requisite in the officer's return to constitute a valid levy.

Execution — Appeal Bond. — In *Liye v. Becker*, 1 Den. (N. Y.) 568, it was held that in declaring on an appeal bond, the plaintiff must state positively that execution was issued against the principal within thirty days after the term at which judgment was rendered. It is not sufficient to aver that such execution was issued according to the statute in such case made and provided. The court said: "The declaration alleges that according to the statute in such case made and provided, and pursuant to the course and practice of said court, an execution was duly issued upon the judgment, etc. Instead of an averment of a fact which, if true, shows that the requirement of the statute was complied with, the declaration states a conclusion of law upon a fact not stated or set forth. If the defendant had taken issue upon this averment in the declaration, the verdict would not necessarily have affirmed the fact that execution had been issued in thirty days. At best it presented a question of law, and not one of fact for the determination of the jury. The declaration is clearly bad."

Execution — Exemption. — An averment that property is exempt from execution, where no facts are stated from which it can be inferred that it really is so exempt, is bad as an averment of a mere conclusion of law. *Bell v. Sherer*, 12 Neb. 410.

Execution of Deed — Statement of Fact. — An allegation that a husband and wife executed a deed, and that it conveyed to the defendant their rights in the land, has been held sufficient to show that the deed was delivered. *Keenan v. Keenan*, (Supreme Ct.) 12 N. Y. Supp. 747.

Statement of Fact — Delivery of Agreement. — The complaint averred that "the defendant made and entered into an agreement with the plaintiff." Counsel argued that, if this averment covered a delivery of the agreement, it was still insufficient, because it was not an allegation of fact, but of a conclusion of law, which is not pleadable. The court held that this proposition was too refined, and that the same objection would apply to an allegation that the agreement was delivered, because the delivery may have been

a contract has not been performed according to law, without setting forth the facts relied on to support his opinion, is but an allegation of a conclusion of law.⁴ Thus an allegation by a party

actual, or it may have been constructive merely, and what amounts to a delivery is a question of law. The court, *per Beck, J.*, said: "Either averment, however, is that of an ultimate fact, which, although a conclusion of law from the evidence, is pleadable." *Hanna v. Barker*, 6 Colo. 313.

Not Conclusion of Law — Judgment. — In an action on a judgment by the judgment creditor, an answer alleging that the judgment is not owned by the plaintiff, but by another person, naming him, presents a good defense though the particulars of the assignment be not stated. *Holcombe v. Tracy*, 2 Minn. 241.

Fraudulent Conveyances. — An allegation that an insolvent has made a fraudulent conveyance of his property, without stating the person to whom such assignment was made, is demurrable as an averment of a conclusion of law. *Stewart v. Hargrove*, 23 Ala. 429.

Bankruptcy. — An allegation in general terms that a bankrupt had failed to file a full schedule of his notes and accounts, without specifying those which were omitted, was held to be but the statement of a legal conclusion. *Stewart v. Hargrove*, 23 Ala. 429.

Attachment. — An allegation in a complaint that an attachment was "illegal, unauthorized, and void," is a statement of a conclusion of law only, and will not admit proof that the attachment was void; but an averment that the attachment was vacated for irregularity is sufficient to sustain the action, although the rule of damages in such a case may be different from the rule in case of an absolutely void attachment. *Sprague v. Parsons*, 12 Daly (N. Y.) 392.

Custom Duties — Statement of Fact. — A complaint in an action to recover back duties paid under protest, and claimed to have been illegally exacted, alleged that "by law the true duty" on the goods imported was a certain sum, and that the collector of customs had exacted a larger sum. It was held that the statement "by law the true duty" was such a sum, was not the statement of a conclusion of law merely, but was a statement of one of the ultimate facts in the case. The

court said: "The statement of the amount exacted and paid is certainly a statement of pure fact; the only question that can be made is whether the statement that 'by law the true duty on said goods was \$2482.25' is a statement of a conclusion of law merely, or a statement of fact. In my opinion it should be considered as a statement of one of the ultimate facts in the case, as distinguished from the mere evidence of such fact. What the true duty is, depends on a great variety of circumstances. There is no dispute about the letter of the law, but upon the application of different sections of the law; and this may depend upon many circumstances to be given in evidence, such as the kind of goods, their quality, fineness, weight, mode of manufacture, component material, the relative proportions or value of different component materials, their commercial designation, and numerous other circumstances which may be involved in the determination of the true duty. If the 'true amount of duty' is not an ultimate fact to be ascertained, then every circumstance about the goods which may affect the rate of duty, and upon which the determination of the duty depends, must be deemed the ultimate facts necessary to be pleaded; and the result would be a requirement to plead a minute description of the goods in all particulars which might affect the rate of duty." *Prickhardt v. Robertson*, 4 Civ. Pro. Rep. (U. S. Cir. Ct.) 118.

1. Construction of Contract. — Allegations in a pleading denying the legal import of a written contract, a copy of which contract is given in the pleadings, and admitted to be correct by both parties, will not be considered by the court. *Board of Education v. Shaw*, 15 Kan. 33.

Waiver of Contract. — It was held in *Phinney v. Mutual L. Ins. Co.*, 67 Fed. Rep. 493, that a mere naked averment that a contract was waived, there being no statement of facts to show its abandonment, was not good pleading, but was demurrable.

Contract Not Binding. — An allegation that a contract set up in a pleading is not binding upon the defendant is but

to an action, that he has fully carried out an agreement, is insufficient, and but the assertion of a conclusion, where the circumstances of the case call for the setting forth of acts alleged to have been performed by him.¹

Demurrer.—And the construction of an instrument set forth in the pleading or annexed thereto is not admitted on demurrer.²

3. Allegations of Duty.—A bare allegation of duty alone is insufficient without an allegation of facts sufficient to create the duty, the obligation being but an inference of law, arising from the facts.³

the statement of a legal conclusion. *Knox County Bank v. Lloyd*, 18 Ohio St. 353; *Larimore v. Wells*, 29 Ohio St. 13; *Baltimore, etc., R. Co. v. Wilson*, 31 Ohio St. 555; *U. S. Rolling Stock Co. v. Atlantic, etc., R. Co.*, 34 Ohio St. 467.

Consideration.—In *Hammond v. Earle*, 58 How. Pr. (N. Y. Supreme Ct.) 437, the court said: "The defense to which this demurrer has been interposed does not refer to any other defense in the answer, nor to any of the allegations of fact contained in other defenses. If it is not complete in and of itself, it is, therefore, insufficient in law, and cannot be sustained by reference to the other defenses contained in the answer. Tested by this rule, the fourth defense is clearly bad, because no facts are averred, simply the conclusion of law that the contract alleged in the complaint is inoperative and void for want of a sufficient and adequate consideration." See also *Powell v. Crawford*, 110 Ala. 294; *Sac County v. Hobbs*, 72 Iowa 69.

Effect of a Deed.—In *Flax Pond Water Co. v. Lynn*, (Mass. 1887) 9 N. E. Rep. 837, the bill alleged that the complainant by a certain deed acquired all the right, title, and interest in and to the waters of a certain pond, and all the dams, etc., connected therewith. The court said: "What the plaintiff took by this deed depends upon its construction, and not upon the further allegation of the plaintiff that it did not acquire 'the title to any real estate,' which is an allegation merely of a conclusion of law."

1. *D'Arles v. Freedman*, 53 N. Y. Super. Ct. 518; *Knapp v. Brooklyn*, 97 N. Y. 523; *Van Schaick v. Winne*, 16 Barb. (N. Y.) 89; *Butler v. Viele*, 44 Barb. (N. Y.) 169; *Chauvrand v. Mailard*, (Supreme Ct.) 4 N. Y. Supp. 126; *Jennings v. Grand Trunk R. Co.*, 52

Hun (N. Y.) 227, affirmed in 127 N. Y. 438.

It has been held that the allegation in a complaint that S. "failed to fulfil his obligations by virtue of said instrument" was insufficient, being only the statement of a legal conclusion. *Van Schaick v. Winne*, 16 Barb. (N. Y.) 94.

Nonfulfilment of Contract.—In *Coffin v. Grand Rapids Hydraulic Co.*, 61 N. Y. Super Ct. 51, the court said: "And the further allegation 'that the defendant fully carried out and performed all the portions and parts of the agreement thereto annexed, binding or obligatory upon the defendant, up to the date of the commencement of this action, but that plaintiffs herein failed to perform and carry out the parts and portions of the said agreement binding and obligatory upon them, to the damage of this defendant,' all were conclusions of law, no facts having been pleaded tending to show a breach of the agreement by the plaintiffs."

2. See *supra*, II. 5. *Conclusions of Law Not Admitted by Demurrer.*

3. Allegation of Duty.—*Bailey v. Bussing*, 29 Conn. 1; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 27; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *McCune v. Norwich City Gas Co.*, 30 Conn. 521; *Hewison v. New Haven*, 34 Conn. 138.

An averment in a complaint that by reason of a contract it became the duty of the defendant to do certain acts is insufficient. The facts must be stated from which the duty arose. *Buffalo v. Holloway*, 7 N. Y. 494.

In *Cane v. Chapman*, 5 Ad. & El. 647, 31 E. C. L. 404, the defendant pleaded that it was not the duty of the commissioners to pay, etc. This was held to be bad on demurrer, as a traverse of an inference of law.

Duty to Pay a Note.—In an action for money paid out on a promissory note

4. Foreign Laws.—As courts will not take judicial notice of laws of a foreign state, it is necessary, when they are relied upon, that they should be set out in the pleading. The mere statement of the existence and effect of a foreign law will be no more regarded by the court than any other allegation of a legal conclusion by the pleader.¹

5. Fraud.—As fraud is an inference of law arising from the facts in pleading, it is not sufficient to charge fraud in general terms. The facts and circumstances relied on to prove a fraudulent transaction must be set out in order to let in evidence bearing on the question.²

by the plaintiff, the defendant's answer merely alleged a duty on the part of the plaintiff to pay the note. It was held that an allegation of duty without averring the facts on which the duty rested was insufficient, and a finding of a duty without facts was of no value. *Atwood v. Welton*, 57 Conn. 515.

1. See article FOREIGN LAWS, vol. 9, p. 542; *Hempstead v. Reed*, 6 Conn. 480; *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 697; *Walker v. Maxwell*, 1 Mass. 112; *Perkins v. Guy*, 55 Miss. 178; *Bank of Commerce v. Fuqua*, 11 Mont. 295; *Garrett v. Conklin*, 52 Mo. App. 654; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 55; *Throop v. Hatch*, 3 Abb. Pr. (N. Y. Supreme Ct.) 25; *Myers v. Machado*, 6 Abb. Pr. (N. Y. Super. Ct.) 201; *Rothschild v. Rio Grande Western R. Co.*, 59 Hun (N. Y.) 455; *Fagan v. Strong*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 438; *Riendeau v. Vieu*, (Supreme Ct.) 21 N. Y. Supp. 502; *Curtis v. Masten*, 11 Paige (N. Y.) 17; *Kinnier v. Kinnier*, 45 N. Y. 539; *Phinney v. Phinney*, 17 How. Pr. (N. Y. Supreme Ct.) 199; *Balfour v. Davis*, 14 Oregon 52; *Peck v. Hibbard*, 26 Vt. 705; *McLeod v. Connecticut, etc., R. Co.*, 58 Vt. 727; *Collett v. Keith*, 2 East 260. Compare *Schluter v. Bowery Sav. Bank*, 117 N. Y. 130.

The court said in *Rothschild v. Rio Grande Western R. Co.*, 59 Hun (N. Y.) 454: "The allegation is not a statement of fact, but of a legal conclusion from undisclosed facts. It is, in effect, saying that under foreign laws, of which we know nothing, one person has become liable for another person's debts, and it differs in no substantial particular from an allegation, which has always been treated as a mere conclusion, that the defendant is indebted to the plaintiff. It is clear that the

foreign law should have been pleaded. The law of a foreign state is a fact to be alleged and proved like any other fact."

Similar Laws.—An allegation that the laws of the state of New York are similar to those of New Jersey upon a certain question was held to be only an averment of the plaintiff's conclusion that the statutes of the two states were similar, and therefore it was held that the complaint did not state sufficient facts to constitute a cause of action. *Fagan v. Strong*, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 438.

In an Action upon a Note, executed in another state, it was alleged that "the legal rate of interest at that time in said state, according to the law of said state, was ten per centum per annum on all such obligations, and that the contract to pay interest on said sum at the rate of ten per centum per annum, as stipulated in said note, was lawful in said state, and enforceable under the laws thereof." It was held that this was a mere averment of a legal conclusion, and though not objected to, did not authorize the introduction of evidence as to such law. *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 696.

2. See article FRAUD, vol. 9, p. 675.

Fraud.—*Phoenix Ins. Co. v. Moog*, 78 Ala. 301; *Hale v. Walker*, 31 Iowa 354; *Kerr v. Steman*, 72 Iowa 242; *Grove v. Rentch*, 26 Md. 377; *Cummings v. Thompson*, 18 Minn. 246; *Nichols v. Stevens*, 123 Mo. 117; *Loehr v. Murphy*, 45 Mo. App. 522; *Tepoel v. Saunders County Nat. Bank*, 24 Neb. 817; *McMurray v. Gifford*, 5 How. Pr. (N. Y. Supreme Ct.) 15; *Wood v. Amory*, 105 N. Y. 282; *Mobile Sav. Bank v. Oktibbeha County*, 22 Fed. Rep. 581; *Ritchie v. McMullen*, 159 U. S. 241.

It has been held that when the

6. Heirship. — It has been held that when title is claimed by inheritance a bare assertion in pleading that the claimant is the heir of the decedent is inadmissible. Heirship is a question of law, and the facts relied on to establish its existence must be set out.¹

7. Indebtedness. — A general allegation of indebtedness is but the statement of a legal conclusion and insufficient. All the material facts from which the indebtedness arose, and of which proof will be necessary, must be set out for the guidance of the other side.²

grounds of contest embrace duress, menace, and fraud, or the like, such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded, not only in the language of the statute, but the facts relied on must be stated and issues relating thereto submitted to the jury. *Matter of Gharky*, 57 Cal. 279.

In *Alabama v. Burr*, 115 U. S. 426, the court said: "Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad."

Fraudulent Transfer. — Allegations averring that a transfer was not made in good faith, but for the purposes of defrauding creditors, were held to be conclusions of law and insufficient when challenged by special demurrer. *Scholze v. Steiner*, 100 Ala. 153.

1. *Larue v. Hays*, 7 Bush (Ky.) 53; *Kerlee v. Corpening*, 97 N. Car. 334; *Fite v. Orr*, (Ky. 1886) 1 S. W. Rep. 583; *Reiner v. Brandhorst*, 59 How. Pr. (N. Y. Supreme Ct.) 93; *Gillett v. Robbins*, 12 Wis. 319.

See also article HEIRS AND DEVISEES, vol. 10, pp. 53, 54.

In *Fite v. Orr*, (Ky. 1886) 1 S. W. Rep. 582, it was held that a pleading which stated that two parties were "the only heirs" of a deceased person was bad, as pleading a conclusion of law, and the adverse party admitted nothing by failure to answer it.

An averment that one is the only heir at law of the deceased person is the averment of a conclusion of law. *Reiners v. Brandhorst*, 59 How. Pr. (N. Y. Supreme Ct.) 91, wherein the court said: "An averment that one is the sole heir at law, under the laws of New

York, of a deceased person, is a conclusion of law and not a fact. The facts out of which such claim arises should be stated in a pleading, and the heir at law cannot claim unless there was no valid testamentary disposition made by the deceased, in which case the fact of intestacy should be pleaded."

2. *Indiana.* — *Jaqua v. Shewalter*, 10 Ind. App. 234.

Kentucky. — *Camplin v. Eads*, (Ky. 1894) 24 S. W. Rep. 1068.

Nevada. — *California State Tel. Co. v. Patterson*, 1 Nev. 150.

New York. — *Hall v. Southmayd*, 15 Barb. (N. Y.) 33; *Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 36; *Lamb v. Hirschberg*, 1 Misc. Rep. (N. Y. C. Pl.) 108; *McKyring v. Bull*, 16 N. Y. 303; *Bailey v. Richmond*, 49 N. Y. Super. Ct. 519.

Ohio. — *Knox County Bank v. Lloyd*, 18 Ohio St. 365; *Larimore v. Wells*, 29 Ohio St. 16.

Wisconsin. — *Robbins v. Lincoln*, 12 Wis. 10.

An averment that the defendant is indebted to the plaintiff will not support a recovery. *Pelton v. Bemis*, 44 Ohio St. 58.

In *California State Tel. Co. v. Patterson*, 1 Nev. 150, the court held the following allegation to be but the statement of a legal conclusion: "On the 17th day of October, A. D. 1864, at Carson City, in said county of Ormsby, the said defendant became indebted to the said plaintiff in the sum of four hundred dollars, for so much money, at or before that time, had and received, and in consideration thereof then and there promised to pay the said sum when thereunto requested."

In an indictment against the clerk of a Circuit Court it was contended by the state that an averment in the indictment that the money realized from fines, jury fees, etc., was due and owing to the state of Indiana on a certain date

So a General Denial of Indebtedness by a pleader, where the allegations of his opponent called for a specific and detailed denial, is but the averment of a conclusion of law.¹

was sufficient allegation of the indebtedness. The court said: "We regard that averment * * * as a conclusion of law merely, and not as equivalent to a statement of the facts from which such a conclusion might be drawn. It is not sufficient to charge in an indictment that the defendant has committed a certain specified crime. It must be stated how he committed the crime, by reciting the facts and circumstances constituting the offense." *State v. Record*, 56 Ind. 109.

Consideration. — A complaint which simply alleges that the defendant is indebted to the plaintiff and that the debt has not been paid, is subject to demurrer as not stating a sufficient cause of action. If a declaration or complaint in debt be upon simple contract, the consideration must be set forth with the other facts. If it be upon a specialty, the specialty must be set forth, and that imports a consideration. *Moore v. Hobbs*, 79 N. Car. 535.

In a Justice's Court. — A statement filed in a justice's court, to be sufficient, must advise the defendant of the nature of the claim, and be sufficiently specific to be a bar to another action. It must state facts, and not merely conclusions of law. Hence, a statement in these words: "Plaintiff states that defendant is indebted to him in the sum of \$50 lawful currency, for which he asks judgment," is insufficient. *Butts v. Phelps*, 79 Mo. 302.

Appeal from Justice of the Peace. — The declaration or statement, in case of appeal from a justice of the peace, is not subject to the technical rules of pleading; and it is sufficient if it shows in general terms a debt due. *Smith v. Dick*, 95 Ala. 311; *Western Union Tel. Co. v. Meyer*, 61 Ala. 158. Compare the Alabama doctrine as set out under 1. *General Rule*.

1. *Arkansas.* — *Fain v. Goodwin*, 35 Ark. 109.

California. — *Curtis v. Richards*, 9 Cal. 39; *Higgins v. Wortell*, 18 Cal. 330; *Wells v. McPike*, 21 Cal. 219.

Colorado. — *Gale v. James*, 11 Colo. 540.

Idaho. — *Swanholm v. Reeser*, 2 Idaho 1167.

Iowa. — *Cottle v. Cole*, 20 Iowa 485.

Kentucky. — *Francis v. Francis*, 18

B. Mon. (Ky.) 61; *Arnold v. Stephens*, (Ky. 1891) 17 S. W. Rep. 859; *Camplin v. Eads*, (Ky. 1894) 24 S. W. Rep. 1068.

Minnesota. — *Biron v. Board of Water Com'rs*, 41 Minn. 519; *Scanlan v. Murphy*, 51 Minn. 536.

Montana. — *Higgins v. Germaine*, 1 Mont. 230; *Power v. Gum*, 6 Mont. 5; *Stewart v. Budd*, 7 Mont. 579; *Merrigan v. English*, 9 Mont. 123.

Nevada. — *Skinker v. Clute*, 9 Nev. 342.

New York. — *Fosdick v. Groff*, 22 How. Pr. (N. Y. Supreme Ct.) 158; *Edson v. Dillaye*, 8 How. Pr. (N. Y. Supreme Ct.) 273; *Drake v. Cockroft*, 10 How. Pr. (N. Y. C. Pl.) 377; *People v. New York*, 28 Barb. (N. Y.) 250; *Horner v. Wood*, 15 Barb. (N. Y.) 373; *McCorkle v. Hermann*, (Supreme Ct.) 5 N. Y. Supp. 881; *French v. Willet*, 4 Bosw. (N. Y.) 649; *Manley v. Rassiga*, 13 Hun (N. Y.) 290; *Springsteene v. Gillett*, 30 Hun (N. Y.) 260, *Platt v. Stout*, 14 Abb. Pr. (N. Y. Supreme Ct.) 178; *People v. Walker*, 23 Barb. (N. Y.) 305; *Wheeler v. Dakin*, 12 How. Pr. (N. Y. Supreme Ct.) 542; *New York v. Dimick*, 49 Hun (N. Y.) 241; *Kennagh v. McColgan*, (Supreme Ct.) 4 N. Y. Supp. 231; *Lorillard v. Clyde*, 86 N. Y. 386; *People v. Ryder*, 12 N. Y. 437; *Lent v. New York, etc., R. Co.*, 130 N. Y. 509.

Ohio. — *Knox County Bank v. Lloyd*, 18 Ohio St. 353; *Larimore v. Wells*, 29 Ohio St. 13; *Baltimore, etc., R. Co. v. Wilson*, 31 Ohio St. 555.

Washington. — *Lake v. Steinbach*, 5 Wash. 663.

United States. — *Mills v. Duryee*, 7 Cranch (U. S.) 480.

Thus in *Wells v. McPike*, 21 Cal. 216, it was held that in an answer to a verified complaint in assumpsit, a mere denial of the indebtedness without a denial of the facts which show the existence of the indebtedness was but a denial of the conclusions of law, and raised no issue.

A pleading, in answer to a statement of facts constituting a cause of action, which merely denies that anything is due the adverse party is the statement of a mere legal conclusion embodying no matter of fact, and as a pleading it has no legal effect. *Knox County Bank v. Lloyd*, 18 Ohio St. 353.

8. Statute of Limitations. — It has been held that the statute of limitations must be specially pleaded, and the dates and other facts relied on to give effect to the statute must be set out in the answer, unless such dates and facts are supplied by the pleadings of the other side. An allegation that a demand is barred by the statute is but the averment of a conclusion of law, if the statute be not specially pleaded.¹

IV. ALLEGATIONS CONSISTING OF BOTH LAW AND FACT. — As has been seen, if a pleading contains sufficient facts to show a cause of action or a defense, it is not vitiated because it contains inferences of law as well.² It is difficult, however, at times, to determine whether the allegations of law and of fact are separable, or whether the latter are sufficient in themselves without resorting to the former.³

The court said in *Fain v. Goodwin*, 35 Ark. 110: "The defendant pleaded in his first paragraph that he did not owe said sum or any sum whatever. This was properly held bad on demurrer. An answer should deny the 'material allegations' of the complaint, or else set up some new matter by way of defense, counterclaim, or set-off. *Nil debet* is a mere conclusion of law, to be drawn from facts, and is not good, under the code, if objection be made in proper time."

In *Lamb v. Hirschberg*, 1 Misc. Rep. (N. Y. C. Pl.) 108, the court said: "The answer denied that defendants 'are indebted in any sum whatever upon the alleged cause of action set forth in the complaint,' and did not otherwise deny the allegations of sale and delivery of the merchandise at an agreed price stated. The denial was, therefore, of a legal conclusion merely, insufficient to raise an issue (*Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 34; *Emery v. Baltz*, 94 N. Y. 411), and the sale and delivery to defendants, as well as their promise to pay, were admitted. Code Civ. Pro., § 522."

It has been held that a general allegation that the defendants did not owe or were not indebted as charged in the complaint was a conclusion of law upon facts not stated. *Pierson v. Cooley*, 1 Code Rep. (N. Y. C. Pl.) 92.

Promissory Note. — Where a copy of a note was annexed to the complaint, the defendant answered, but did not deny the execution of the note, simply stating that he was not indebted to the plaintiff. This was held to be insufficient. *Kinney v. Osborne*, 14 Cal. 113.

1. See article LIMITATIONS.

2. See *supra*, II. 6. *Surplusage*.

3. **Mixed Law and Fact.** — In *Griade v. Milwaukee, etc., R. Co.*, 42 Iowa 377, it is said: "It is not allowable to plead mere abstract conclusions of law, having no element of fact; they form no part of the allegations constituting a cause of action; but if they contain the elements also of a fact, construing the language in its ordinary meaning, then force and effect must be given to them as allegations of fact, as when necessities are furnished to an infant, or when a deed or mortgage is alleged as having been made, or the ownership of property is asserted; the general allegation is sufficient, being the ultimate fact to be established by evidence. To allege more would be to plead the evidence, which is not allowable."

Where the issue made by an answer involves a deduction or conclusion of law, it is not bad on error if the language of the allegation, according to its ordinary meaning, contains a fact constituting an offense. *School Section 16 v. Odlin*, 8 Ohio St. 298.

In *Clark v. Chicago, etc., R. Co.*, 28 Minn. 71, it is said: "It has become a rule of pleading that, while it is not allowable to allege a mere conclusion of law containing no element of fact, yet it is proper not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which, according to the common and ordinary use of language, amounts to a mixed statement of fact and of a legal conclusion."

Where a legal deduction or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain

V. APPARENT CONCLUSIONS OF LAW — 1. In General. — There are some allegations which, though apparently only statements of legal conclusions, the decisions are almost unanimous in pronouncing to be statements of issuable facts; a few examples of these are here given, though belonging more properly to other articles in this work.

2. Negligence. — It has been generally held that negligence is an ultimate fact to be shown by the evidence, and not a legal conclusion requiring a specific statement of the facts and details which constitute it.¹

3. Title to Personal Property. — A general allegation of ownership of personal property would seem to be that of a conclusion of law, and not a statement of fact, but the courts have generally held it to be sufficient in pleading.²

4. Title to Real Estate. — In pleading a title in fee simple, which may depend upon a long succession of deeds, a general allegation of such ownership is sufficient; and it is never required of the pleader to set out in the pleadings the deed by virtue of which he claims title.³

VI. WHETHER THE DEFECT MAY BE REMEDIED. — It follows from what has been said in the preceding sections of this article

his cause of action, the defendant may move to have the petition made definite and certain, but cannot strike out such matter as redundant and irrelevant. *Dorsey v. Hall*, 7 Neb. 460.

Example — Not a Conclusion of Law. — In *Allen v. O'Donald*, 23 Fed. Rep. 576, an answer alleged that certain lands were not worth more than a certain amount, and that the premises, considering the same, ought to be released and discharged from the operation and effect of the mortgages. It was held that this was not open to the objection that it was the bare assertion of a conclusion of law. The court said: "The further point made in support of the third exception, that the matter excepted to is a mere conclusion of law, is not well taken. It is sometimes proper and convenient in equity pleading, as a means of indicating the relief to which the party considers himself entitled, or the defense sought to be made, to make deductions from the facts stated that are more or less conclusions of law; and this seems to be the character of this allegation."

In a suit upon an insurance policy containing a condition that the same should be avoided if any change took place in the title to the property by voluntary conveyance without the assent

of the company, the company pleaded that before the loss, to wit, on, etc., at, etc., a change took place in the title of the property insured by voluntary transfer, and without the consent of the defendant, whereby the policy became void. It was held that the plea was open to a demurrer, as it presented an issue involving questions of both fact and law which could not be submitted to a jury. *Clay F. & M. Ins. Co. v. Wusterhausen*, 75 Ill. 285.

1. See article NEGLIGENCE.

2. See article TITLE, OWNERSHIP, AND POSSESSION.

3. *California*. — *Payne v. Treadwell*, 16 Cal. 243; *Rough v. Simmons*, 65 Cal. 227; *Johnson v. Vance*, 86 Cal. 120.

Kansas. — *Leavenworth, etc., R. Co. v. Leahy*, 12 Kan. 124; *Saline County v. Young*, 18 Kan. 445.

New York. — *Ensign v. Sherman*, 14 How. Pr. (N. Y. Supreme Ct.) 439.

South Dakota. — *Grace v. Ballou*, 4 S. Dak. 333.

Wisconsin. — *Iowa County v. Mineral Point R. Co.*, 24 Wis. 93.

United States. — *Gage v. Kaufman*, 133 U. S. 471.

See in general upon this subject article TITLE, OWNERSHIP, AND POSSESSION.

that a pleading embracing nothing but the bare statement of a legal conclusion is fatally defective. But a pleading entirely destitute of allegations of fact is of rare occurrence; and most of the pleadings demurred to because of this defect — the averment of an inference of law — contain some allegations of fact, or mixed allegations of law and fact, and are subject to amendment. See article AMENDMENTS, vol. I, p. 620.

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